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State Report Citation of Cases in the SOUTHWESTERN REPORTER, VOL. 222.

The left-hand column shows the page of this volume on which a case begins and opposite at the right is shown where same case is to be found in the State Report.

Illustration: The case of *State v. Covington*, is in S. W. Rep., vol. 222, p. 1. This table shows that the same case is reported in "143 Tenn. 659."

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John W Shartel



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THE
SOUTHWESTERN REPORTER
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STATE v. COVINGTON.

(Supreme Court of Tennessee. May 31, 1920.)

Criminal law §200(4)—Acquittal bar to prosecution for offense arising out of same transaction.

Defendant having been acquitted on a charge of violating the Act of 1917, c. 12, which in sections 1, 2, and 3 denounces the offenses of receiving, possessing, and transporting liquors, cannot, though only one of the three separate offenses was charged, be prosecuted for others denounced arising out of the same transaction, for section 6 limits the fine in such cases to \$500 and imprisonment to six months, and to allow the state to split the same transaction into three indictments might result in the imposition of triple penalty.

Error to Circuit Court, Haywood County; Thos. E. Harwood, Judge.

Shane, alias Shang, Covington, was indicted for violating the liquor laws, and, plea of former acquittal having been sustained, the State brings error. Affirmed.

W. H. Swiggart, Jr., Asst. Atty. Gen., for the State.

Bond & Bond, of Nashville, for defendant in error.

MCKINNEY, J. The defendant in error was indicted at the January term, 1919, of the circuit court of Haywood county for violating the liquor laws. The indictment contained two counts, the first charging the defendant in error with unlawfully receiving intoxicating liquors, and the second with unlawfully being in the possession of intoxicating liquors.

At the next term of the court the defendant in error interposed a plea of former acquittal, which was sustained by the court, and the defendant in error was discharged.

In said plea of former acquittal the defendant in error set out that he had been tried and had been given a verdict of not guilty upon an indictment returned at the May term, 1918, charging that in April, 1918, he "did transport into this state and from one place to another in this state and within the county aforesaid, intoxicating liquors, including wine, ale and beer, for another person, firm and corporation."

After setting out said former indictment and trial, and the result thereof, and averring that the judgment rendered on said verdict of not guilty was final, the plea concluded with the following averments:

"The defendant says that the offense for which he was acquitted and upon which said judgment of not guilty was pronounced is the identical offense as the one charged the defendant in this case, and that the court had jurisdiction to hear and determine said case and to pronounce said judgment.

"The defendant further says that the facts upon which the presentment above set out was predicated and based are the identical facts upon which the presentment is predicated and based in the present case."

The Attorney General moved the court to strike out said plea of a former acquittal because it did not charge the same offense. The court overruled said motion, and, the state having declined to take issue, the court thereupon dismissed the case. From this action of the court the state prayed and was granted an appeal to this court.

The first three sections of chapter 12 of the Acts of 1917 are as follows:

"Section 1. Be it enacted by the General Assembly of the state of Tennessee, that it shall be unlawful for any person, firm or corporation to receive, directly or indirectly, intoxicating liquors including wine, ale and beer, from a common, or other carrier, in this state, whether intended for personal use, or otherwise, and whether interstate or intrastate shipments or transportation.

"Sec. 2. Be it further enacted, that it shall be unlawful for any person, firm or corporation to possess intoxicating liquors, including wine, ale and beer, hereafter received, directly or indirectly, from a common or other carrier in this state, whether intended for personal use or otherwise, and whether interstate or intrastate shipments or transportation.

"Sec. 3. Be it further enacted, that it shall be unlawful for any express company, railroad company, or any common carrier or person to ship or transport into this state or from one place to another within this state, intoxicating liquors including wine, ale and beer, for any person, firm or corporation, whether in original packages or otherwise and whether intended for personal use or otherwise."

The punishment prescribed for violating the provisions of said act is contained in section 6 thereof, which is as follows:

"Sec. 6. Be it further enacted, that any person, firm or corporation violating any of the provisions of this act, shall, upon conviction, be fined not less than fifty dollars nor more than five hundred dollars, and in the discretion of the court may be imprisoned in the county jail or workhouse for a period of time not exceeding six months."

Had the original indictment contained three counts charging, respectively, (a) receiving, (b) possessing, and (c) transporting liquors, and had the jury found the defendant guilty on all three counts, under the provisions of the act, the maximum punishment which could have been imposed would have been a fine of \$500 and an imprisonment of six months.

The plea, which must be taken as true, says that this was one transaction, so that if the state were permitted to split this one transaction into three parts and charge the defendant with receiving in one indictment—possessing in the second, and transporting in the third—and the defendant should be found guilty in each case, then the court could impose a fine of \$500, and an imprisonment of six months in each case. While the statute only contemplated a maximum fine of \$500, and an imprisonment of six months for the entire transaction.

The principle involved is thus stated in 16 Corpus Juris, 272, to wit:

"There is also another rule which declares that, if the prosecution under the second indictment involves the same transaction which was referred to in the former indictment, and it was or properly might have been, the subject of investigation under that indictment, an acquittal or a conviction under the former indictment would be a bar to a prosecution under the last indictment. This rule is sometimes called the 'same transaction test.'"

This text is supported by a great many authorities.

It is well illustrated in our case of *Fiddler v. State*, 7 Humph. 508, in which the defendant was presented for betting on a horse race. To this indictment the defendant pleaded that he had been indicted for running a horse race along a public road, and had been convicted thereof on his own confession, and punished therefor; and that said horse race for running which he had been so convicted and punished, and the horse race for betting on which he is presented, is one and the same horse race. To this plea the Attorney General demurred. The court sustained the demurrer, and fined the defendant. The statute involved was section 2 of chapter 10 of the Acts of 1833, which provides that—

"Be it enacted, that all and every person betting or running, aiding and abetting in running any horse race in or along any public road in this state, shall be liable to be indicted under the same rules and provisions as are now

in force and use in this state against unlawful gaming."

It will be noticed that this act prohibits (a) betting on a horse race, and (b) running a horse race.

This court reversed the trial court, holding the plea of former conviction to be good. The court held that there was but one transaction, and hence the matter of gaming, by betting on a horse race, was a proper subject of investigation under the first indictment. In the first indictment the state could have included a count for betting, but the state has no right to split up one transaction of this nature into parts, and find an indictment on each part.

In *Hite v. State*, 9 Yerg. 379, an entirely different principle was considered, and the question there involved has no bearing upon the present case.

We are of the opinion that the trial judge was correct in dismissing the case, and his judgment is affirmed.

LANDSEN v. CITY OF JACKSON.

(Supreme Court of Tennessee. May 31, 1920.)

1. Municipal corporations ~~§~~812(5) — One city commissioner cannot waive requirement of notice of injury.

Even if the statutory requirement of notice to a city of claim for personal injuries can be waived by the governing body of the city, one of the city commissioners has no authority to waive such requirement.

2. Municipal corporations ~~§~~812(5)—Ratification of commissioner's promise to pay hospital expenses does not waive notice of injury.

Ratification by the governing body of the city of the promise of one of the commissioners that the city would pay the hospital expenses of plaintiff for an examination of her injuries is not a waiver of the requirement that notice of claim for injuries be given the city.

3. Municipal corporations ~~§~~812(5)—Officer's waiver of right to notice can be ratified only by formal action.

A municipality can, in the absence of fraud or imposition, ratify an act of its officer in waiving the statutory requirement of notice of claim for injuries only by formal action taken by the proper officials.

Appeal from Circuit Court, Madison County; R. B. Baptist, Judge.

Action by Mrs. Maggie Lansden against the City of Jackson. Judgment dismissing the suit and sustaining demurrer to the declaration was reversed by the Court of Civil Appeals and the case remanded for hearing, and defendant appeals. Case dismissed.

W. N. Kay, of Jackson, for appellant.

R. F. Spragins and F. W. Pope, both of Jackson, for appellee.

BACHMAN, J. This suit was instituted by Mrs. Maggie Lansden against the city of Jackson to recover for injuries alleged to have been suffered by her on or about the 6th of August, 1917, by reason of the defective condition of one of the sidewalks in said city. A demurrer was filed on behalf of the city on the grounds that no notice of the plaintiff's claim had been served upon the mayor of the city, as required by chapter 55 of the Acts of 1913, and that no facts or circumstances were alleged to show a waiver by the city of the notice provided for. The authority of the city or its officers to waive the provisions of the statute was also challenged. The demurrer was sustained by the trial judge and the suit dismissed. Upon appeal to the Court of Civil Appeals a majority of that court were of opinion that, although notice had not been given, as required by the act referred to, the allegations of the declaration were sufficient to show a waiver on the part of the city, and the judgment of the circuit court was reversed and the case remanded for hearing.

The allegations of the declaration upon which the action of the Court of Civil Appeals is predicated are as follows:

"Plaintiff further avers that, while no written notice was served upon the mayor of said city of said accident and injury within the time prescribed by the state statute upon this subject, yet she avers that the said city did receive and have notice of the accident and injury and the circumstances connected with same, on the next day after the said accident and injury, and that written notice as prescribed by statute was made unnecessary and a useless formality, and was waived by the city, by reason of the following facts, to wit:

"On the next day after said accident plaintiff sent for Mr. Z. K. Griffin, who was at that time one of the commissioners of the city of Jackson, and informed him of all the facts connected with said accident and injury and as to the manner in which the plaintiff was injured, and thereupon the said commissioner directed the plaintiff to go to a hospital and to have an X-ray examination of her injured parts, and he promised that the defendant city would bear the expense of same; that at the next meeting of the board of commissioners of said city, to wit, on the following day, the said Z. K. Griffin, commissioner, reported the facts in regard to the plaintiff's said injury and his action relative thereto, and of the direction which he had given to the plaintiff, whereupon the other two commissioners, constituting said board, one of which was mayor of said city, approved and ratified the action of said Z. K. Griffin; that on or about December 2 or 3, 1917, plaintiff had another conference with the said commissioner, Z. K. Griffin, in which plaintiff advised the commissioner that she had or was going to leave the hospital where she was being treated; that she had not recovered from

said injury, and was looking to the city 'to do the right thing by her,' and the said commissioner thereupon stated that the city would consider her claim and treat her right in the matter; that again prior to March 4, 1918, plaintiff had another conversation with the said commissioner, in which the latter directed the plaintiff to present her claim to the board of commissioners of the city of Jackson, which she did on March 4, 1918, at which time she discussed her claim at length with the board of commissioners, but they failed to reach an agreement; that the mayor of the defendant city thereupon suggested that plaintiff meet the commissioners in conjunction with their attorney, to which plaintiff agreed, and did again appear before said board on April 24, 1918, and her case was again brought up and discussed, and at which meeting the plaintiff was finally informed by the mayor and city attorney that the city would not pay the sum demanded by the plaintiff on account of her said injuries.

"Plaintiff therefore avers that because of the foregoing facts, and by leading the plaintiff to believe that her claim would be adjusted by the city without suit, she was thereby misled, and therefore did not seek legal advice as she would have done, but for the negotiation which she had been drawn into through the representation of said mayor and commissioners, and her rights would have been protected by the giving of the required notice after being so advised by counsel of the necessity of said notice, and so the defendant city waived the written notice as prescribed by statute and is estopped to rely upon the failure to give such written notice as a defense in this case."

Upon these facts it is insisted that the city of Jackson has waived the compliance with the provisions of the act of 1913, and is now estopped to set up as a defense such non-compliance on the part of the plaintiff.

It will be seen that the failure to give the prescribed notice is sought to be excused upon the ground that the city had actual notice through the commissioner Griffin, with whom the plaintiff advised immediately following the injury, that the commissioner directed the plaintiff to go to a hospital and have an examination of her injuries made, and that the city would bear the expense thereof, and that upon report of his action to the other commissioners the same was ratified and approved. Whether municipalities, when acting through their governing bodies, are authorized to waive the provisions of protective statutes, is a question upon which there is a conflict of authority; the weight of authority seems to be that they cannot do so. *McQuillin, Municipal Corporations*, § 2714; *Dillon, Municipal Corporations* (5th Ed.) § 1613; *Gay v. Cambridge*, 128 Mass. 387; *Walters v. Ottawa*, 240 Ill. 259, 88 N. E. 651; *Lucas v. Pontiac*, 142 Ill. App. 470; *Starling v. Bedford*, 94 Iowa, 194, 62 N. W. 674; *Huntington v. Calais*, 105 Me. 144, 73 Atl. 829; *Blumrich v. Highland Park*, 131 Mich. 209, 91 N. W. 129; *Blair v. Ft. Wayne*, 51 Ind. App. 652, 98 N. E. 736.

[1] However, we do not think it necessary to here determine this question, for the reason that in our opinion the facts disclosed do not constitute a waiver by the city of the benefit of the statute. The purpose of the act of 1913, as pointed out in *White v. Nashville*, 134 Tenn. 688-695, 185 S. W. 721, Ann. Cas. 1917D, 960, was not to benefit municipal officials, but is for the protection of municipal bodies corporate, and it is also held therein that it is not within the power of individual officers or agents of the municipality to waive the required notice.

Assuming that the governing body of the city of Jackson had authority to waive notice to the city, it has not done so in the instant case; for, in the absence of a proper showing of authority, the acts or declarations of the commissioner Griffin could in no wise be binding upon the municipality.

In *Nashville v. Toney*, 10 Lea, 643, in passing upon the question of the authority of the mayor of a municipality to revive an indebtedness of the city, barred by the statute of limitations, it was said:

"We have not been referred to any authority, either in the charter, ordinances or resolutions of the city, and can find none, which authorizes or empowers the mayor, by his individual or sole promise, to bind the city for any purpose, and hence we presume there is none. And as will be seen by the provisions of the above-cited ordinances, he is prohibited from doing so, unless authorized by existing laws, or by order of the city council. It is scarcely deemed necessary to cite authorities to show that without such authority he has no power to do so. In the case of *Mayor and City Council of Nashville v. J. G. Fisher et al.*, decided at Nashville, 1875, unreported, this court, Judge Freeman delivering the opinion, says: 'We hold the principle to be sound, as stated by the Supreme Court of New Jersey, *Sachem v. Seymour*, 24 N. J. R. 153, that the powers of a municipal corporation can only be exercised by the governing, legislative body of such corporation, * * * in pursuance of authority given from such governing body, in the form of an ordinance, or legislative enactment of such body, or in pursuance of powers granted or conferred in the charter by the Legislature.' See, also, *Mayor, etc., v. Hagan*, 9 Baxt. 495; *Belote v. Wynne*, 7 Yerg. 341; *Muse v. Donelson*, 2 Humph. 166. While we have no doubt but that these promises had the effect to lull the plaintiff into security, and may cause a loss which to her may be serious, yet it is clear that these promises of the mayor were unauthorized and not binding on the defendant, and hence inoperative to prevent the bar of the statute. And for this error in the charge of the court and in the admission of testimony as above indicated, we are compelled to reverse the judgment and grant a new trial."

The principle there announced was reaffirmed in *Taylor v. Railroad*, 86 Tenn. 249, 6 S. W. 400; the court saying:

"The doctrine of this case we regard as conclusive upon the question of the want of authority of" its officers "to bind the city by their declarations or representations. If they could not do so by express agreement, it must logically follow that they could not do so by indirection, such as an estoppel would be."

So, in *Cole v. Seattle*, 64 Wash. 1, 116 Pac. 257, 34 L. R. A. (N. S.) 1166, Ann. Cas. 1913A, 344, it is said:

"The city council is the only authority which, under the organic law of the city, can take cognizance of such claims, and it necessarily follows that it is the only authority which can waive compliance with the charter. * * * We therefore hold that a compliance with the reasonable terms of the charter provision cannot be waived by statements or acts of any officer or employé or any other than the city council, and that to establish a waiver by the council some affirmative cognizance of the claim, other than the rejection by the council, must be pleaded and proved."

But it is contended that the city ratified and approved the acts of the commissioner and is therefore bound. In answer to this insistence it is to be seen that, according to the allegations of the plaintiff, legal notice of her claim was not presented to the mayor or board of commissioners until about five months after the happening of the accident and nearly two months after the expiration of the ninety days provided by the statute, and action by the city was not taken thereon until a later date.

[2, 3] If it could be held that the allegations are sufficient to constitute a ratification by the city of the acts of the single commissioner, such could extend no further than to the statements made by him to the plaintiff, which in the most liberal view, cannot be construed as a waiver of the city's right under the statute. However this may be, we think that the stability and certainty of the acts of a municipal corporation, particularly in dealing with protective rights granted the corporate body by statute, demand far more than informal action by corporate officials; there must be definite legal action by the proper officials before the municipality can be bound. There may be, of course, cases where fraud or circumstances of imposition would lead to a different conclusion; but the allegations here make no such showing.

The case will be dismissed.

FAIRBANKS, MORSE & CO. et al. v. GAMBILL.

(Supreme Court of Tennessee. May 18, 1920.)

1. Pleading ⚡110—Plea in abatement waived by disregard of it by all parties.

Where no replication was filed to plea in abatement and no action thereon invoked after it was filed, but it was entirely ignored by the parties and the court, and the case proceeded with on the merits, the plea in abatement was waived.

2. Appeal and error ⚡930(1)—Evidence of party recovering verdict must be accepted.

The Supreme Court must, after verdict for plaintiff, accept as the established facts in the case the version of the plaintiff as to controverted questions of fact.

3. Negligence ⚡136(25)—Proximate cause for jury, unless undisputed facts are susceptible of but one inference.

Where the facts are controverted and of such a character that different minds might reasonably draw different conclusions therefrom, the question of proximate cause is for the jury, but when the facts are undisputed and are susceptible of but one inference, the question is one of law for the court, and the same rule applies where an independent intervening cause is relied on by defendant.

4. Negligence ⚡59—"Proximate cause" defined.

"Proximate cause" is one of which the injury is a natural and probable consequence, such a consequence as, under the circumstances might and ought to have been foreseen by the wrongdoer.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Proximate Cause.]

5. Explosives ⚡7—Proximate cause of injury held for jury.

Where defendant left with plaintiff a can containing gasoline which he stated did not contain any dangerous or explosive substance, and plaintiff, mistaking the can for an oil can of his own, poured it on kindling to light a fire, from which an explosion resulted, the question whether defendant's wrongful act was a proximate cause of the injury was properly submitted to the jury.

6. Explosives ⚡7 — Not contributory negligence in law to use kerosene to kindle fire.

It was not contributory negligence as a matter of law for plaintiff to use kerosene to kindle a fire, or to pick up a can of gasoline, left by defendant with the statement that it contained nothing explosive which had been placed where plaintiff ordinarily kept his kerosene can of similar appearance.

7. Negligence ⚡100—Contributory negligence no defense to wanton misconduct.

Statement by defendant that a can containing gasoline contained no dangerous or explosive substance constituted willfulness, wantonness, and recklessness on his part, so that he

cannot rely on plaintiff's contributory negligence as a defense to liability for injuries caused thereby.

8. Damages ⚡131(1)—\$5,000 for burns on arm and face held excessive by \$2,500.

A verdict awarding \$5,000 damages for second degree burns on the arms and first degree burns on the face, which caused considerable pain, but which had entirely healed without permanent injury, leaving only small scars, held excessive, and reduced to \$2,500.

Certiorari to Court of Civil Appeals.

Action by Charles H. Gambill against Fairbanks, Morse & Co. and another. Judgment for the plaintiff in the circuit court was reversed by the Court of Civil Appeals, and plaintiff brings certiorari. Judgment of Court of Civil Appeals modified, and that of circuit court affirmed on condition that plaintiff accepts a remittitur of part of the amount awarded.

E. T. Seay, Jno. B. Keeble, and F. M. Bass, all of Nashville, for plaintiff in error.

W. H. Washington, B. D. Shriver, and J. E. Travis, all of Nashville, for defendants in error.

HALL, J. An action of damages instituted in the circuit court of Davidson county by the plaintiff, Charles H. Gambill, against the defendants, Fairbanks, Morse & Co. and D. K. Lee, to recover for personal injuries alleged to have been sustained by the plaintiff as a result of the negligence of the defendants. The trial of the case in the circuit court resulted in verdict and judgment for the plaintiff for \$5,000.

Defendants' motion for a new trial having been overruled, an appeal in the nature of a writ of error was taken by the defendants to the Court of Civil Appeals. That court reversed the judgment of the circuit court, and dismissed the suit upon the ground that there was no evidence to support the verdict and judgment, and that the defendants' motion for a directed verdict, made at the conclusion of all the evidence, should have been sustained by the trial judge. The Court of Civil Appeals also sustained the defendants' assignment of error going to the excessiveness of the verdict, being of the opinion that the verdict of \$5,000 was excessive in view of the nature of the plaintiff's injuries. The plaintiff filed his petition in this court for a writ of certiorari, which was granted, and the case is now before this court for review.

The plaintiff's declaration contains one count, and avers that the plaintiff was working as a laborer for the Tennessee Central Railroad Company at the time of sustaining his injuries, and used in his work a certain office in the railroad yards of said company in Nashville, Tenn.; that the defendant D. K. Lee was demonstrating a motor hand car be-

longing to the defendant Fairbanks, Morse & Co., which hand car was propelled by gasoline; that said Lee, being the agent of the defendant Fairbanks, Morse & Co., and while acting within the general scope of his authority as such agent, brought into the office of the plaintiff a can, such as is commonly used to contain coal oil, without any mark upon it indicating its explosive qualities and asked permission of the plaintiff to store the can in his (plaintiff's) office, assuring plaintiff at the time that it did not contain anything dangerous or explosive, and "negligently impressed plaintiff with the belief that it was coal oil, entirely harmless, and only had the properties of coal oil, and thereby threw plaintiff off his guard, whereas in truth and in fact it was pure gasoline, a highly volatile and dangerous explosive"; that on the day of the accident, to wit, 28th day of December, 1916, plaintiff, mistaking said can for his own can, which contained coal oil, and which was similar to the can left in the office by the defendant Lee, use it to pour some coal oil on the kindling to start the fire in the office stove, a use entirely harmless and without danger for coal oil or any other oil of similar properties, and while doing so plaintiff was in the exercise of ordinary care, but that by reason of the negligence of the defendants, and as a proximate result of being deceived and misled as to the identity, nature, and dangerous and explosive qualities of the contents of said can, it took fire and exploded with terrific force and violence, covering plaintiff with sheets of flames, whereby his body, head, face, nose, hands, arms, and legs were severely burned.

Both defendants filed pleas of not guilty. The defendant Fairbanks, Morse & Co., however, first filed a plea in abatement to the jurisdiction of the court upon the ground that it was not in court by proper service of process by reason of the fact that the defendant D. K. Lee, upon whom process was served, was not at the time of the service an officer of the company, but was merely an employé or traveling salesman or solicitor for said defendant company, and was not therefore, such agent or representative as that service of process issued against said defendant could be properly and lawfully executed upon said Lee.

[1] There was no replication filed, or issue joined on said plea in abatement, and no action of the court was in any manner invoked by the defendants upon it after it was filed. So far as the record shows, it was entirely ignored by the parties to the suit and the court, and the case was proceeded with on the merits. This amounted to a waiver of the plea in abatement.

Upon the trial in the circuit court plaintiff testified that during the year 1916 he was in the service of the Tennessee Central Railroad Company as a car inspector in its yards

at Nashville; that he had an office in the east end of what was called the old freighthouse; that the defendant D. K. Lee was engaged in the business of demonstrating motor hand cars for the defendant Fairbanks, Morse & Co., that is, hand cars operated by gasoline power; that in the summer of 1916, the defendant Lee was down in the yards of the Tennessee Central Railroad Company, demonstrating a hand car which he had for sale, and which he desired to sell to the Tennessee Central Railroad Company, and that about noon Lee walked into his (plaintiff's) office with a can of oil of some kind in his hand, and asked him if he would allow him (Lee) to leave it there. Plaintiff says that he asked Lee if there were any gasoline about it, and that Lee replied, "No;" that he asked Lee if there were anything dangerous or explosive about it, and that Lee replied, "No;" that thereupon he (Gambill) told Lee that the company (Tennessee Central Railroad Company) had an oil house up there near the shop, and he could go and leave the oil there, and that Lee replied that it was so far up there he did not care to go. The plaintiff says he then stated to Lee that the track walker had an old shanty at the spur track, and that possibly the track walker would let him leave his oil there; that Lee replied, "No, I will just leave it here," and set it down in one corner of the office. Plaintiff further testified that as Lee started out of the office he (Lee) said if anything happened he would be responsible for it. Plaintiff says that he got the impression from the statements made by Lee that the contents of the can were entirely harmless and not explosive. He says the can was an ordinary coal oil can, and was just like the can he (plaintiff) kept in the office, which contained coal oil. The plaintiff testified that he kept coal oil in the office for the purpose of filling his lanterns, and was also in the habit of kindling fires in the office stove with coal oil; that he would usually put kindling in the office stove and pour a little coal oil on it and stick a lighted match to it, and in this way start the fire; that he had been doing this for a long time, and did not regard it as dangerous to do so. Plaintiff further testified that the can remained in his office until the 28th day of December, 1916, when he went into the office early in the morning between 6 and 6:30 o'clock and put some coal and kindling in the stove, and picked up a can which he thought was his own can containing coal oil, which he had been in the habit of using to start the fire, but by mistake got hold of the can which had been left in the office by the defendant Lee, which contained gasoline, and poured it on the kindling in the stove, and it happened that there were some life coals in the stove, which fact was not known to him, as there had been no fire in the stove since the day before the accident, and the can immediately exploded

with terrific force, throwing the burning gasoline and fire on his body, seriously burning him about the hands, arms, and face. He testified that other railroad employes had access to his office, and some one had moved his can from the place where he usually kept it, and placed the can containing the gasoline in its stead the night before the explosion without his knowledge.

Plaintiff's testimony as to the representations made to him by Lee as to the contents of the can at the time he left it in the plaintiff's office is substantially corroborated by the testimony of the witness Monroe Bostick, who testified on behalf of the plaintiff. Bostick says that he was in the office of the plaintiff when Lee brought the can in and asked the plaintiff if he could leave it in the office. Bostick says the plaintiff asked Lee what was in the can, stating to Lee that the company did not allow him to keep any explosives in the office. Bostick says that Lee told plaintiff that the can did not contain any explosive; that it wouldn't explode.

The defendant Lee testified on behalf of the defendants, and admitted leaving the can of gasoline in the plaintiff's office; testified that the plaintiff was familiar with the contents of the can, and denied that he told the plaintiff that the can did not contain anything explosive. He testified that the plaintiff did not ask him as to the contents of the can at the time he left it in his (plaintiff's) office, and that he made no representation whatever to plaintiff as to the contents of said can.

[2] The jury, however, settled this controverted question of fact in favor of the contention of the plaintiff, and this court must therefore accept the version of the plaintiff as to the circumstances under which the can of gasoline was left in his office by Lee, and the statements made by Lee as to its contents, as the established facts of the case, and must determine the question of the defendants' liability upon them.

It is insisted by the plaintiff that the Court of Civil Appeals erred in sustaining defendants' assignment of error to the effect that the trial court erred in not directing a verdict in favor of defendants upon their motion made at the conclusion of all the evidence, and in dismissing plaintiff's suit.

Upon the other hand, it is insisted by the defendants that the action of the Court of Civil Appeals was correct, because the proof failed to show that the negligence of Lee, if any, in not advising plaintiff of the contents of the can, which was left in his office, was the direct and proximate cause of the plaintiff's injuries, but that his injuries were the direct result of the act of the plaintiff in attempting to kindle a fire in the office stove with the contents of said can.

It is further insisted by the defendants that, even if the defendant Lee were negligent in not advising the plaintiff of the con-

tents of said can, and that such negligence directly and proximately contributed to the plaintiff's injuries, still the plaintiff was also guilty of negligence which directly and proximately contributed to his injuries in attempting to use the contents of said can in building a fire in the office stove in which there were live coals, which contributory negligence, it must be held, barred his right to recover.

[3] The general rule is that what is the proximate cause of an injury is a question for the jury; the court instructing them as to what the law requires to constitute it, and the jury applying the law to the facts. But whether the question is one to be determined by the jury depends on the facts of each case. Thus where the facts of the particular case are controverted, and are of such a character that different minds might reasonably draw different conclusions therefrom, a question of fact is presented properly determinable by the jury. See opinion in the cases of *J. S. Moody and J. M. Horn v. Gulf Refining Co.*, 218 S. W. 817, decided at the present term of the court; *R. C. L. vol. 22, § 31*; *Tels v. Smuggler Min. Co.*, 158 Fed. 260, 85 C. C. A. 478, 15 L. R. A. (N. S.) 893; *Pilmer v. Boise Traction Co.*, 14 Idaho, 327, 94 Pac. 432, 15 L. R. A. (N. S.) 254, 125 Am. St. Rep. 161; *Stone v. Boston, etc., R. Co.*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794; *Huber v. La Crosse City R. Co.*, 92 Wis. 636, 66 N. W. 708, 31 L. R. A. 583, 53 Am. St. Rep. 940.

But when the facts are undisputed and are susceptible of but one inference, the question is one of law for the court. *Tels v. Smuggler Min. Co.*, 158 Fed. 260, 85 C. C. A. 478, 15 L. R. A. (N. S.) 893; *Snyder v. Colorado Springs, etc., R. Co.*, 36 Colo. 288, 85 Pac. 686, 8 L. R. A. (N. S.) 781, 118 Am. St. Rep. 110; *Clark v. Wallace*, 51 Colo. 437, 118 Pac. 973, Ann. Cas. 1915B, 349, and note; *Illinois Central R. Co. v. Siler*, 229 Ill. 390, 82 N. E. 392, 15 L. R. A. (N. S.) 819, 11 Ann. Cas. 368; *Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535; *Missouri Pac. R. Co. v. Columbia*, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399; *Stone v. Boston, etc., R. Co.*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794; *Smith v. Public Service Corp.*, 78 N. J. Law, 478, 75 Atl. 937, 20 Ann. Cas. 151.

To the same effect is the rule where an independent intervening efficient cause is relied on by the defendant. *R. C. L. vol. 22, § 32*; *Clark v. Wallace*, 51 Colo. 437, 118 Pac. 973, Ann. Cas. 1913B, 355 and note.

[4] In determining what is proximate cause, the true rule is that the injury must be the natural and probable consequence of the act—such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act.

Hoag v. Lake Shore & M. S. R. Co., 85 Pa. 293, 27 Am. Rep. 653.

In Deming v. Merchants' Cotton Press, etc., Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518, this court said:

"The proximate cause of an injury may, in general, be stated to be that act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another, which, had it not happened, the injury would not have been inflicted."

This definition was approved in the later cases of Railroad v. Kelly, 91 Tenn. 699, 20 S. W. 312, 17 L. R. A. 691, 30 Am. St. Rep. 902, Anderson v. Miller, 96 Tenn. 35, 33 S. W. 615, 31 L. R. A. 604, 54 Am. St. Rep. 812, and Chattanooga Light, etc., Co. v. Hodges, 109 Tenn. 331, 70 S. W. 616, 60 L. R. A. 459, 97 Am. St. Rep. 844.

[5] The plaintiff's declaration avers a state of facts which show that the defendant Lee willfully and deliberately misrepresented the contents of said can to the plaintiff at the time he left it in his office, in that he told the plaintiff that it did not contain gasoline or any other explosive substance. The averments of the declaration are amply sustained by the proof offered on behalf of the plaintiff. While the plaintiff does not expressly so testify, it may be inferred from his testimony that if he had been advised that the can contained an explosive substance he would not have permitted the defendant Lee to leave it in his office. If the can had not been left in plaintiff's office by the defendant Lee it is certain that the accident, which resulted in injury to the plaintiff, would not have happened.

We are of the opinion that the question of whether or not the defendant Lee's act in leaving the can in the plaintiff's office, and stating to him that it did not contain anything dangerous or explosive, was the direct and proximate cause of the plaintiff's injuries was one for determination by the jury. We are of the opinion that the question of whether the defendant Lee should have reasonably anticipated that plaintiff might, through mistake, undertake to use the contents of the can for some of the purposes for which kerosene or coal oil is ordinarily used, and in doing so would sustain injury, was one for determination by the jury. We do not think it can be said, as a matter of law, that the defendant Lee could not reasonably have anticipated that such a result would happen from the leaving of the can in the plaintiff's office under the circumstances which the proof shows it was left. It is a matter of common knowledge that coal oil is generally used for illuminating purposes, both in lamps and lanterns, and is also commonly used for kindling fires, and that it is generally kept on every premises for one or both of these purposes, and in cans similar

to the one left by the defendant Lee in the plaintiff's office, containing gasoline.

In Waters-Pierce Oil Co. v. Deselmes, 18 Okl. 107, 89 Pac. 212, the defendant sold to Powers & De Selmes two barrels containing a mixture of coal oil and gasoline, as ordinary coal oil. The two barrels were emptied into a galvanized iron tank in their store. The plaintiff was a clerk of Powers & De Selmes, and carried two gallons of this oil to his home, and this oil became ignited while the plaintiff's wife was undertaking to kindle a fire in the stove. The evidence leading to that conclusion was circumstantial. The defendants sought to invoke the doctrine of contributory negligence upon the part of the plaintiff's wife in using the oil to kindle the fire in the stove. The court, in its opinion, said:

"With reference to the charge of contributory negligence contained in the answer of plaintiff in error, no proof having been introduced other than is shown by the general evidence in the case, which raises a presumption that the wife of defendant in error was at the time of the accident engaged in the act of kindling a fire with the use of the oil, we cannot hold that such defense is sustained. The use of coal oil for such purpose is too common and too well known for the court to say that it was negligence on her part to so use it, beside the instinct of self-preservation justifies the presumption that in so using it she did so with due care."

In Ellis v. Republic Oil Co., 133 Iowa, 11, 110 N. W. 20, the court said.

"The use of kerosene in kindling fires is too common and too well known for us to say that a person using reasonable care may not employ that agency without being chargeable with negligence."

In Peterson v. Standard Oil Co., 55 Or. 511, 106 Pac. 337, Ann. Cas. 1912A, 625, the court said:

"The common knowledge of the community is that its [kerosene] primary use is for the purpose of illumination; that secondarily it is used in oil stoves for heating purposes. It is also used for the purpose of removing grease and oils from wood or iron, and for kindling fires, as well as for many other purposes. Its use for any of these purposes is not uncommon, and we think that the employment of it for the purpose of kindling fires is not in itself negligence."

[6, 7] The fact that the plaintiff mistook the can containing the gasoline for his can, which contained coal oil, the two cans being identical, is not at all unreasonable or unnatural; and we are of the opinion that the defendants cannot be heard to say, after leaving the can containing a highly volatile fluid in the plaintiff's office, assuring him that it contained nothing dangerous or explosive, that the plaintiff was guilty of contributory negligence in mistaking the can containing gasoline for his own can, which

contained coal oil, and in attempting to kindle a fire in the office stove with its contents. The representations made by the defendants to the plaintiff as to the contents of the can were false and fraudulent, and constituted such willfulness, wantonness, and recklessness on his part as to show an utter disregard for the plaintiff's rights. This being true, the doctrine of contributory negligence cannot be invoked by the defendants to defeat his right to recover.

In view of the facts the defendants are responsible for the injury inflicted upon the plaintiff, even if it could be said that he were guilty of negligence in undertaking to kindle a fire in the office stove with what he thought to be coal oil. *Railroad v. Roe*, 118 Tenn. 601, 102 S. W. 343; *Birmingham R., etc., Co. v. Jung*, 161 Ala. 461, 49 South. 434, 18 Ann. Cas. 557. In both of these cases the rule is announced that contributory negligence is not available as a defense where the injuries complained of were caused by the wanton or willful misconduct of the defendant.

We are of the opinion, therefore, that the Court of Civil Appeals committed error in sustaining the defendants' motion for a directed verdict, and in dismissing the plaintiff's suit.

The defendants also filed a petition for writ of certiorari, seeking to have reviewed the action of the Court of Civil Appeals in refusing to pass on certain other assignments of error made by them in that court.

We have passed on these assignments of error, and have discussed them in a memorandum opinion, and they need not be discussed here. It suffices to say that none of them are sufficient to vitiate the verdict and judgment, and call for a reversal.

[8] Now, coming to the plaintiff's further assignment of error that the Court of Civil Appeals erred in holding that the verdict of the jury was excessive, we are of the opinion, after a careful reading of the evidence bearing upon the plaintiff's injuries, that the verdict was excessive. The evidence shows that the plaintiff was burned about the hands and forearms, and that there were some slight

burns about his face and head. The physician who attended him testified that all of these burns were first and second degree burns. The physician described the first degree burns as being those where there was a simple reddening of the skin, the burns not being sufficient to cause blisters, that the second degree burns were those which cause blisters and cause the skin to peel off, and that third degree burns were those of sufficient severity and depth to cause the flesh of the burned member to slough. According to the testimony of the physician the worst burns the plaintiff had were on his hands and forearms, and he says that these were second degree burns. The evidence does show that the skin peeled off of the plaintiff's hands and forearms, and left some scars upon both his hands and his forearms; but there is no evidence tending to show that he is permanently injured. There is no evidence tending to show that he incurred any expenses in the way of hospital bills or for medical treatment. While it is true that he was confined in the hospital 22 days, his hospital bill was paid by the railroad company. Furthermore, the proof fails to show that he lost anything in the way of earnings while he was injured. The evidence does show that his injuries were very painful for at least a few days, but that he has fully and permanently recovered; there remaining only some scars on his hands and forearms as a result of said burns.

We are of the opinion that the sum of \$2,500 would be ample compensation for the injuries sustained by the plaintiff. It results that the judgment of the Court of Civil Appeals will be modified, in so far as it sustained the defendants' motion for a directed verdict and dismissed the plaintiff's suit; but its action in holding that the verdict in plaintiff's favor is excessive will be affirmed. And a remittitur is ordered; and, unless the same is accepted by the plaintiff, the judgment will be reversed, and the case remanded for a new trial. If the remittitur is accepted, the judgment, less the amount of the remittitur, will be affirmed, with costs.

BAILEY & CO. v. LOVELESS et al. (No. 2.)

(Supreme Court of Arkansas. May 24, 1920.)

Appeal and error \S 581(2, 8), 756—Instructions not considered where there is no reference to motion for new trial or showing of exceptions saved.

Where, on appeal, there is no reference to the motion for new trial either in the abstract or the brief of appellant, and the abstract does not show that exceptions were saved to the giving of an instruction, such instruction cannot be considered.

Appeal from Circuit Court, Woodruff County; J. M. Jackson, Judge.

Action by Bailey & Co. against W. J. Loveless and others to recover the amount of a draft. Judgment for defendants, and plaintiffs appeal. **Affirmed.**

Jonas F. Dyson, of Cotton Plant, for appellants.

MCCULLOCH, C. J. Appellants instituted this action below against appellees to recover the amount of a draft drawn on the latter by one Saxton, payable to appellants, it being alleged that appellees received the draft into their possession and thereafter willfully destroyed it without paying same. Liability of appellees is asserted under section 137 of the Negotiable Instruments Law (Act No. 81 of 1913), which provides that if the drawee destroys a bill he will be deemed to have accepted the same. The case has been here before on appeal. 126 Ark. 257, 190 S. W. 430.

It appears from the testimony as abstracted that there was an issue in the case as to whether appellees' agent destroyed the draft, and, if so, whether it was done willfully or merely by accident. Appellants undertook to prove by admissions of appellees' agent that he deliberately threw the draft in the waste basket and burned it; but the proof adduced by appellee tended to show that the draft was not intentionally destroyed, but merely that it could not be found at the time, and that if it was destroyed at all it was done by accident.

The sole ground urged here for reversal of the cause is that the court erred in giving an instruction at the request of appellees on the subject of burden of proof. There is no reference to a motion for new trial either in the abstract or the brief of appellant. Neither does the abstract show that exceptions were saved to the giving of the instruction. These omissions are fatal to appellants' contention. The rules of this court require an abstract of the record, and in the absence of a recital in the abstract, showing that exceptions were properly saved at the time to the alleged erroneous ruling of the court and

brought forward in the motion for new trial, we must assume that no such exceptions were saved.

The judgment must therefore be affirmed.

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HINES, Director General of Railroads, v. GUNNELLS et al. (No. 11.)

(Supreme Court of Arkansas. May 24, 1920.)

Railroads \S 350(16) — Automobile driver's negligence in failing to stop held for jury.

In an action for damages to an automobile struck by a train, evidence that other tracks were blocked with cars, that plaintiff slowed down his car and looked and listened, that the locomotive was not working steam, and that no whistle was blown nor bell rung, *held* to make the issue as to whether plaintiff should have stopped his car before crossing the track one for the jury.

Appeal from Circuit Court, Columbia County; Chas. W. Smith, Judge.

Separate suits by J. F. Gunnells and P. N. Bustion against Walker D. Hines, Director General of Railroads, to recover for injuries to person and property. Judgment for J. F. Gunnells, and defendant appeals. **Affirmed.**

Daniel Upthegrove and J. R. Turney, both of St. Louis, Mo., and Gaughan & Sifford, of Camden, for appellants.

McKay & Smith, of Magnolia, for appellees.

SMITH, J. Separate suits were filed against the appellant railroad company by appellees, J. F. Gunnells and P. N. Bustion. The complaints were identical, each one claiming a separate personal injury, and, in addition, Gunnells claimed damages to his automobile on account of a collision between the auto in which they were riding and a locomotive on the line of appellant's railroad. The jury returned the following verdict:

"We, the jury, find for the plaintiff J. F. Gunnells and assess his damages sustained to his automobile in the sum of \$134, and as to the other issues we find for the defendant."

This verdict conclusively shows that the jury found nothing on account of personal injury for either plaintiff, although the testimony shows that each sustained a slight injury, for which compensation might have been allowed. Judgment was pronounced upon this verdict, and the railroad company has appealed.

The instructions requested by the railroad company would, if given, have directed a verdict in its favor, as they in effect told the jury it was the duty of the occupants of the car to have stopped the car before driving over the tracks. The court refused instruc-

tions to that effect, and, over appellant's objection, gave an instruction numbered 5 reading as follows:

"You are instructed that the plaintiff, in attempting to pass over defendant's track at the crossing, is only required to do what a man of ordinary care would do under similar circumstances to avoid any probable or possible danger from a passing train, and, if need be, stop as well as look and listen. If you find from the evidence in this case that the plaintiff in approaching the track at the crossing slowed up his automobile, looked and listened, and did not hear the approaching train, and did not hear any whistle blowing and any bell ringing, and that he could not see the approach of the train on account of the obstruction between him and the train, and you further find that this was all that a man of ordinary care would do under similar circumstances, then it will be your duty to find that the plaintiff is not guilty of contributory negligence, notwithstanding you find that the plaintiff did not bring his automobile to a full stop."

The testimony developed the following facts: The main line of the railroad runs east and west through the town of McNeil, and a number of tracks are situated south of the main track. There is a sharp curve in the main track to the north on the west side of the town at about the point where the whistle is usually blown for the station. On the morning the accident occurred all the tracks south of the main track were blocked with cars for some distance west of the crossing. Appellees were going north, and when they reached the crossing, which is of considerable width on account of the number of tracks, they slowed down the car, put it in low gear, and looked and listened and continued to look and listen for a train, and, not hearing one, drove on over the crossing without seeing the engine until they were within about five or six feet of it and too close to avoid the collision. The engineer admitted that the engine was not working steam, but that the train rolled into the station under its own momentum, and, according to the testimony offered on appellees' behalf, the whistle was not blown nor was the bell rung. The failure to blow the whistle or ring the bell constituted the negligence complained of, and the jury's verdict has resolved in appellees' favor the conflict in the testimony on that question.

We think the testimony recited made a case for the jury; in other words, we are unable to say as a matter of law that appellees should have stopped their car before crossing the tracks. Indeed, appellees insist that, if they had stopped the car, they could not have seen the train or its smoke, as very little smoke was escaping, and that it was making no noise which they could have heard,

and that, if they had stopped the car and had gotten out and walked up to the main track and looked in both directions, the train could have reached the crossing in the time it would have taken them to have gone back to the car and made it to the main track. Of course, one of the occupants of the car might have flagged it across the tracks; but the jury had the right to say whether due care on appellees' part imposed that duty. Appellee owned the car and was driving it. The instructions set out above told the jury that it was appellees' duty to do what men of ordinary care would have done under the circumstances; and we cannot say their conduct fell below that standard.

In the case of *St. Louis, I. M. & S. R. Co. v. Stacks*, 97 Ark. 410, 134 S. W. 317, substantially the same contention was made as is presented here, and it was there said:

"The evidence for appellee shows that neither the whistle was sounded nor the bell rung for the crossing; and while the omission of the engineer to give these statutory signals did not relieve appellee of the duty of looking and listening for the approach of trains, yet they are warnings which he had a right to rely on in determining whether a train was drawing near. According to appellee's own testimony, his view of an approaching train from the east was obstructed by box cars, both on the south and middle tracks. In such case, while the traveler must not relax his endeavor to see approaching trains, yet necessarily he relies to a great degree upon his sense of hearing to discover the approach of a train, and in doing this he listens not only for the noise made by the running of the train but for the signals which the engineer is required to give by ringing the bell or sounding the whistle for the crossing. Appellee's testimony tends to show that he was in possession of all his faculties and continually exercised them during his passage over the crossing. The testimony adduced by him shows that the headlight was dim, and on that account its rays did not warn him. It is admitted that the steam had been shut off, and that the train was drifting or gliding in, and on this account the jury might have inferred that the train came in with little noise, and no smoke escaping to give warning of its approach, that it had rounded the curve before appellee came upon the crossing, and that for this reason he could not see it on account of the box cars obstructing his view. If he could have seen it after it passed the curve, the jury might have found that it would have done no good for him to have stopped his wagon between the south and middle tracks to have tried to look between the box cars on those tracks."

The doctrine of that case was reiterated in the recent case of *Billingsley v. St. L. S. F. R. Co.*, 136 Ark. 1, 206 S. W. 43.

No error appearing, the judgment is affirmed.

RELIANCE LIFE INS. CO. v. HARDY.
(No. 4.)

(Supreme Court of Arkansas. May 24, 1920.)

1. Continuance \S 12—For illness of counsel within discretion of court.

Defendant life insurer's motion for postponement of trial on account of the illness of its leading counsel was addressed to the discretion of the trial court.

2. Continuance \S 12—Motion properly denied where defendant knew of illness of counsel.

Where defendant life insurer knew its leading counsel was ill, and should have anticipated services of other counsel might be necessary, but failed to take steps to procure them, trial court did not abuse discretion in overruling insurer's motion for postponement of trial on account of illness of counsel.

3. Insurance \S 360(3)—Life policy not forfeited for nonpayment of premium where insurer had funds belonging to insured.

Where an insurer, on last day of grace for payment of \$19.88 quarterly premium on life policy, had in its hands \$20 belonging to insured as a benefit payable to him under a health policy issued by insurer, it cannot claim the life policy was forfeited for insured's failure to pay the quarterly premium; if insurer had in its possession funds belonging to insured derived from any source, it was its duty to appropriate and apply them to prevent forfeiture.

Appeal from Circuit Court, Phillips County; J. M. Jackson, Judge.

Action by Velma Hales Hardy against the Reliance Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Milton B. Rose, of Memphis, Tenn., for appellant.

Moore & Vineyard and Fink & Dinning, all of Helena, for appellee.

WOOD, J. On July 3, 1916, the appellant issued to Eno D. Hardy two policies of insurance. One was a life policy and the other a health policy. They were separate instruments and separate contracts, but between the same parties. The health policy was issued for a period of 12 months and was made payable to the insured, and was not assignable, except by the written consent of the company. The life policy was payable to the executors, administrators, assigns, or beneficiaries of the insured. The annual premium on the health policy was \$19.50. The annual premium on the life policy was \$56.58. On August 9, 1917, at the request of the insured the premiums on the life policy were made payable quarterly instead of annually, and the beneficiary was changed to the insured's wife, Velma Hales Hardy, the appellee.

August 18, 1917, Eno D. Hardy contracted fistula and was confined on account thereof

10 days, which entitled him to sick benefits under his health policy in the sum of \$20. The claim for this sick benefit was sent in to the company, according to the testimony of the appellee, "some time in July or August." "She was not sure about the date." At any rate, there was a delay in paying this claim until November 10th, when the company sent Hardy, by letter, check for \$20, which he received November 14, 1917, and signed receipt to the company for the amount thereof, dated November 10, 1917. On the same day Hardy applied to the company to reinstate his policies, remitting to appellant, with his application, the sum of \$19.88. This application was declined by appellant on November 17, 1917. Appellant on that day returned to Hardy the amount of his remittance, which he accepted.

The quarterly premium due on October 3, 1917, on the life policy was the sum of \$19.88. Under the terms of the policy, if this quarterly premium was not paid one month after the same became due, the policy lapsed. If paid on the 3d of October or one month thereafter, then the policy did not lapse, but continued in force until the next quarterly payment, which was due January 3, 1918.

Hardy, the insured, died on the 20th of December, 1917. The appellee instituted this action on the life policy which was in the sum of \$3,000.

The appellant denied liability on the ground that, at the time of Hardy's death, the policy had lapsed, because of the nonpayment of the premium, which in order to keep the policy in force should have been paid on or before November 3, 1917.

The case was called for trial on October 30, 1919. Messrs. Bevins & Mundt had been retained the day before to assist Milton B. Rose, leading attorney for appellant in the trial of the cause. Appellant, through its assistant counsel, asked for a postponement of the trial until a later day of the term, assigning as a reason that they had not had sufficient time to acquaint themselves with the facts and law of the case, and that Milton B. Rose was sick and unable to attend. The court overruled the motion.

The above were the issues and facts developed at the hearing upon which both parties asked for a peremptory instruction. The court granted the prayer of the appellee and instructed the jury to return a verdict in the sum of \$3,337.60. Judgment was rendered for the appellee in that sum, from which is this appeal.

[1, 2] Appellant contends that the court erred in overruling its motion for a postponement to a later day in the term on account of the illness of its leading counsel, Milton B. Rose. The certificate of the physician attached to the motion shows that Rose had been ill all the summer. The issue had been made up for more than 18 months at the time

the motion for a postponement was filed. The continued illness of Rose during the summer before the day set for the trial of the cause should have caused the appellant to anticipate that the services of other counsel might be necessary at the trial, and proper diligence on its part would have resulted in the employment of such additional counsel in time for them to have prepared for the trial of the case when the same was called. At least, the motion was addressed to the discretion of the trial court, and we do not discover any abuse of discretion in overruling the motion.

The appellant contends that the undisputed evidence shows that the policy upon which this action was based lapsed and was forfeited on account of the failure of the insured to pay the premium due October 3, 1917, on or before November 3, 1917; the latter date being the last day of grace for the payment of the premium.

[3] Appellant's contention cannot be sustained for the reason that the undisputed evidence shows that on November 3, 1917, it had the sum of \$20 in its hands belonging to Hardy, which sum exceeded the amount that was then due the appellant for the premium on the policy in suit. It is of no consequence that this fund accrued to Hardy under the provisions of a different policy from that in suit. The policies were issued on the same day and were between the same parties; but even if that were not true, and if the appellant had in its possession funds belonging to Hardy derived from any source whatsoever, it was the duty of the appellant, in the absence of instructions from Hardy that he desired the use of the funds for some other purpose, to appropriate the same for the payment of his premium when it became due in order thereby to prevent forfeiture of the policy.

The undisputed evidence shows that Hardy was sick in August, 1917, and that his claim for \$20 sick benefits which had accrued under his health policy had been sent to the company long prior to October 3, 1917, when the premium was due. Yet the appellant delayed sending him the amount of the sick benefit until after November 3, 1917. If Hardy after making claim for sick benefit had directed the appellant that he desired the use of this amount for some other purpose than the payment of the premium on his life policy, then appellant would not have been warranted in appropriating the funds in its hands for the payment of the premium. But in the absence of such direction, appellant could not hold on to the funds of Hardy until the time for the payment of the premium had expired and then declare a forfeiture for the non-

payment of such premium. Since the payment of the premium was for Hardy's benefit, the presumption is that he would have consented thereto. But that matter is not left to presumption, for the undisputed proof here is that he desired to pay his premium and to continue his policy.

Hardy on November 10, 1917, applied for reinstatement and remitted \$19.88. On that date he had not yet received the \$20 sick benefit which reached him on the 14th, and, of course, he could not know whether the company had allowed his claim for sick benefit and whether it had applied same for the payment of his premium. At the time Hardy receipted the company for the sick benefit fund, the company had not returned to him the \$19.88, which he had remitted to it. This remittance was not returned to Hardy until the 17th. So there was no interval from October 3, 1917, until November 14th, when the company did not have money in its hands of Hardy's more than sufficient to have paid his premium.

The appellant, having kept in its hands money of the appellee until after time for the payment of Hardy's premium expired, will not be heard to say, in the absence of affirmative evidence to the contrary, that it had no right to use this money to pay the premium and thus prevent a forfeiture of Hardy's policy. In other words, the effect of the undisputed evidence is to show that the premium was paid.

The trial court was correct in so holding and in granting the prayer of appellee for a peremptory instruction in her favor. Although there is some difference in the facts, the case is ruled by the doctrine announced and the principles applied in *Union Central Life Ins. Co. v. Caldwell*, 68 Ark. 505, 58 S. W. 355, where we said:

"The doctrine does not arise out of the peculiar facts of any particular case. It does not depend upon contract, custom or course of dealing for its existence and potency. It has its origin in that fundamental principle of justice which will compel one who has funds in his hands belonging to another, which may be used, to use such funds, if at all, for the benefit, and not to the injury, of the owner; for his consent to the one, and dissent to the other, will be presumed. * * * These principles are founded upon reason and common fairness and honesty, and they will have application wherever it becomes necessary to prevent a forfeiture, which is favored neither at law nor in equity."

See, also, *Nat. Ins. Co. v. Mooney*, 111 Ark. 514, 164 S. W. 276; *Mutual Life Ins. Co. v. Henley*, 125 Ark. 372, 188 S. W. 829.

The judgment is correct, and is therefore affirmed.

BRADLEY COUNTY ROAD IMPROVEMENT DISTRICTS NOS. 1 AND 2 v. JARRATT et al. (No. 14.)

(Supreme Court of Arkansas. May 24, 1920.)

1. Highways \S 90—State highway department not bound to make preliminary survey, and where it fails district may engage engineers to make same; "may."

The provision of Road Laws 1919, vol. 1, Act No. 237, \S 5, that boards of commissioners of highway districts may make application to the state highway department for preliminary surveys and the department may make such plans and estimates, is not mandatory in view of the word "may," which, while used in a mandatory sense, ordinarily imports permission, possibility, or ability, and hence, as section 6 provides, it shall be the duty of the boards of commissioners to make improvements as expeditiously and as economically as possible, such a board has authority to engage an engineer to make preliminary surveys where the state highway department is unable to make the same for lack of funds.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, May.]

2. Appeal and error \S 839(1)—Questions not disposed of below will not be reviewed.

Questions not disposed of by trial court will not be reviewed on appeal.

Appeal from Bradley Chancery Court; E. G. Hammock, Chancellor.

Suit by E. J. Jarratt and others against the Bradley County Road Improvement Districts Nos. 1 and 2, consolidated with a suit by J. T. Tatum against the same defendants. From decrees of injunction, defendants appeal. Reversed and remanded, with directions.

J. R. Wilson, of Warren, for appellants.

W. C. Medley, of Eldorado, and J. C. Clary and B. L. Herring, both of Warren, for appellees.

HUMPHREYS, J. Appellees, E. J. Jarratt et al., property owners in Bradley county road improvement districts Nos. 1 and 2, instituted suit against appellants in the Bradley chancery court to restrain them from making a preliminary survey of the roads proposed to be constructed in said districts, created by Act No. 237 of the Legislature of 1919 (Road Laws 1919, vol. 1), and to cancel contracts entered into between the boards of commissioners of said road improvement districts with H. R. Carter, an engineer, to do all the engineering work connected with the improvements to be made and supervision of the construction thereof, at his own expense, for a compensation equal to 5 per cent. of the cost of construction not exceeding \$1,000,000 and 4 per cent. in excess of \$1,000,000, one-half of the compensa-

tion to be paid when the plans, specifications, and estimates of cost of the improvements are completed, and the balance in installments as the work progresses. The validity of the contracts was attacked on the grounds: First, that they embraced the cost of the preliminary surveys, plans, and estimates of cost of the improvements, which, under the act aforesaid, were to be made and prepared for said districts by the highway department of Arkansas, free of charge; and, second, that the contracts were procured by taking advantage of the ignorance of the commissioners as to the meaning and terms of the act creating the districts and are arbitrary, unjust, and inequitable.

Appellant H. R. Carter filed answer, admitting that he entered into the alleged contracts with said Bradley county road improvement districts, but denying that the boards of commissioners of said districts were without authority to embrace in the contracts the charge for preliminary surveys, plans, and estimates of the cost of improvements, and that the contracts were procured through a lack of knowledge on the part of the commissioners as to the meaning of the act creating the districts, or that they are arbitrary, unjust, and inequitable.

Appellee J. T. Tatum, alleged owner of real estate in said districts, also entered suit in said court to enjoin appellants from making a preliminary survey, plans, and estimates of the cost of the contemplated improvements in said district, upon the same grounds alleged in the bill of appellees E. J. Jarratt et al., and the further ground of the alleged invalidity of practically every section of Act No. 237 aforesaid, creating Bradley county road improvement districts Nos. 1 and 2.

Appellant H. R. Carter filed answer to the petition of appellee J. T. Tatum, specifically denying every allegation assailing the validity of his contracts with said improvement districts and the act of the Legislature creating them.

The testimony in the two cases was the same and disclosed that, after the passage of Act No. 237, creating the districts, the commissioners of each met in the office of the state highway commissioner and perfected an organization; that the commissioners thereupon made personal requests of the state highway department to have preliminary surveys made of the roads to be made under said Act No. 237, which requests were refused by the state highway commissioner for the reason that no funds were available for that purpose; that the appropriations were insufficient to cover preliminary surveys, plans, and estimates for proposed districts under the Alexander Road Law, which required preliminary surveys,

plans, and estimates of costs as prerequisites to the organization of proposed road districts; that only \$20,000 had been appropriated for the purpose of making preliminary surveys by the state highway department; that the general and special sessions of the Legislature of 1919 provided that 9,600 miles of roads in the state should be improved; that a preliminary survey thereof would have cost \$8 per mile, and a final survey to ascertain the yardage of the road would have cost from \$100 to \$125 per mile; that the boards of commissioners of Bradley county road improvement districts were informed by the state highway department that they would have to employ an engineer anyway, and he could make the survey under the direction of the state highway department and file the surveys, plans, and specifications with it for approval; that the course suggested was adopted; that three engineers made talks before the boards and applied for the position of engineer of each district, one of whom was H. R. Carter; that Carter did not tell the commissioners they would have to employ him, or use words to that effect; that, later, H. R. Carter was employed as engineer, and entered into written contracts with the commissioners for engineering services, including preliminary, as well as final, surveys, plans, and specifications for the improvements and supervision of the construction thereof, for a fee of 5 per cent. on the cost of said improvements up to \$1,000,000 and 4 per cent. in excess thereof.

The causes were submitted to the court upon the pleadings, testimony of the several witnesses, in substance detailed above, the written contracts of employment, and a certified copy of Act No. 237 aforesaid, from which the court found that it was the purpose and intent of section 5 of said Act No. 237 to absolve the property in said districts from the cost of preliminary surveys, plans, and specifications, and to place that burden absolutely upon the state highway department as a condition precedent to proceeding with the improvements. In accordance with this finding, the court rendered decrees against appellants, permanently enjoining them from making the preliminary surveys, plans, and estimates as a charge against the land situated in said districts, and from proceeding with the improvements at all until such time as the state highway department shall make the preliminary surveys, plans, and estimates of cost of more than one type of surface roads and transmit them to the commissioners of said districts. By consent of all parties, both causes were consolidated for the purpose of appeal, and an appeal from the decrees has been duly prosecuted to this court.

[1] It is insisted by appellants that the court erred in interpreting sections 5 and 6 of said Act No. 237 as mandatory upon the

state highway department to make the preliminary surveys, plans, and estimates of cost of improvements to be made in said districts free of charge against the lands thereof as a condition precedent to proceeding with the improvements. The requirement in section 5 of said act for the board of commissioners in each district, after qualification, to apply to the state highway department for preliminary surveys, plans, and estimates of cost of the proposed improvements, is clearly mandatory; but it is just as clear, from the language used in said section 5, when read in connection with the other sections of the act, that the duty imposed upon the state highway department to make the preliminary surveys, plans, and estimates of the cost of the improvement at the expense of the state was a sound discretionary one, dependent upon the conditions, facilities, etc. In this respect, the section reads:

"And the state highway department may make such plans and estimates on more than one type of surface for the roads, together with any recommendations that they may see fit to make."

Had the intention been to compel or force the state highway department to make the preliminary surveys, plans, and estimates, the Legislature could have easily employed the word "shall" in this connection, as it did in the first clause of the section, in relation to the application to said department for such surveys. The use of "shall" for "may" would not have been absolutely controlling as to the intent, but, in the connection used, would have been indicative of it. While the word "may" is frequently used in an imperative or mandatory sense, ordinarily its employment in statutes imports permission, possibility, ability, etc. 26 Cyc. 1590. Had the intention been to employ the word "may" in its imperative or mandatory sense in said section 5, the Legislature would certainly have imposed the duty upon the commissioners to adopt one of the preliminary surveys and plans furnished by said department. The section of the act immediately following made it optional with the commissioners whether they would accept the preliminary plans of said department, or some other plan. Again, the intention, in the use of the word "may" in said section 5, as imposing discretionary power only on the state highway department to make preliminary surveys, plans, and estimates, is indicated in the broad mandatory powers conferred on the commissioners of the districts by sections 3 and 7 of said act. Section 3 provides:

"It shall be the duty of the respective boards of commissioners to make the improvements in their respective districts as herein authorized, as expeditiously and economically as possible, and they shall have all the necessary powers to accomplish this purpose."

Section 7 provides:

"For the purpose of assisting them in the preparations of plans for the improvement in said districts, the commissioners of each of said districts may employ such persons as they see fit, including an engineer, and fix their compensation. * * *

It is apparent, from a reading of these two sections in connection with section 5 of said act, that the intention of the Legislature was that the commissioners should make the same as expeditiously and economically as possible, with the aid of preliminary surveys, plans, and estimates of the state highway department, if the conditions as to finances, etc., warranted the department in making them, but, if unable to procure them from the department upon request, then to employ an engineer to assist them in the preparation of the plans and completion of the improvements. No other interpretation of section 5 of said act would give effect to the other provisions of the act and the accomplishment of the improvements intended by the Legislature. The undisputed proof is to the effect that the commissioners requested the state highway department to make the preliminary surveys and that the request was denied for the reason that no funds were available for that purpose.

[2] The appellees contend that the decrees of injunction should be upheld because the engineering contracts were entered into without the exercise of discretion on the part of the commissioners and in ignorance by them of the provisions of the law, and for the further reason that the contracts are arbitrary, unjust, and inequitable. The interpretation placed upon the act by the commissioners, as empowering them to make a contract with an engineer for preliminary surveys, plans, and specifications, when unable to procure them from the state highway department for a good reason, was correct. The reasonableness or unreasonableness of the amount of the fee agreed upon for engineering services was not fully developed by the evidence nor passed upon by the court, so we refrain from expressing an opinion as to whether exorbitant, unjust, or inequitable.

A number of other questions are raised and argued by appellees in support of the injunction decrees, but they were not developed by the evidence or passed upon by the chancellor. The gist of the evidence and the decrees of the court were restricted to the proposition of whether the commissioners had authority under the act to employ an engineer to make preliminary surveys, plans, and estimates of cost of the improvements. Many of the questions raised have been settled adversely to the contentions of appellees in recent opinions written by this court. The other questions not having been

developed or passed upon by the chancellor, a decision of them at this time is pretermitted.

For the error indicated, the decrees of injunction are reversed, and the causes remanded, with directions to dissolve the writs and for such further proceedings as may be desired, not inconsistent with this opinion.

FAIRBAIRN v. POFAHL et al. (No. 28.)
(Supreme Court of Arkansas. May 31, 1920.)

1. Vendor and purchaser \S 254(3)—Vendor, giving bond for title and accepting notes, has an equitable mortgage.

Where a vendor sells land, taking the notes of the vendee for the purchase money, and executes a bond for title, the effect of the contract in equity is to create a mortgage in favor of the vendor on the land to secure the purchase money, subject to all the essential incidents of a mortgage.

2. Vendor and purchaser \S 278—Provision for acceleration of payment is valid, though not contained in notes.

Where vendor contracted to sell land, receiving a cash payment and a series of notes, the fact that the notes made no provision that, in case of two defaults, the vendor might declare the entire sum due, does not invalidate such provision in the contract.

3. Vendor and purchaser \S 278—Provision for acceleration of payment not invalid, as working forfeiture.

Where vendor sold land under a contract providing that, in event of two defaults in payment of a series of notes given for the purchase price, he might declare the entire sum due, such provision is not invalid as working a forfeiture, for the purchaser might thereupon pay the entire amount and in event the land was sold on foreclosure of the vendor's equitable mortgage, the purchaser would be entitled to any surplus in excess of the balance due.

Appeal from Pulaski Chancery Court; John E. Martineau, Chancellor.

Action by Minnie E. Fairbairn against J. H. Pofahl and another. From a decree dismissing the complaint, complainant appeals. Reversed and remanded, with directions.

Carmichael & Brooks, of Little Rock, for appellant.

A. J. Newman, of Little Rock, for appellee.

SMITH, J. This case was tried in the court below upon the following agreed statement of facts:

On September 16, 1918, appellant entered into a contract to sell E. C. Smith a lot in the city of Little Rock for the sum of \$1,200, of which \$100 was in cash, and the balance of purchase money was evidenced by 110

notes, for \$10 each; the first note falling due October 16, 1918, and one note on the 16th day of each month thereafter, with interest at 8 per cent. The contract of sale provided that, if a second default in payment was made, all the notes then remaining unpaid should at once become due and payable. The contract also provided that Smith should insure the property for appellant's benefit and should keep the premiums paid. Smith failed to insure the property, and made default for four consecutive months in the payment of his notes. Thereafter, for a valuable consideration, Smith assigned his contract to appellees J. H. and Mary Pofahl.

This suit was brought to enforce the contract, and at the time it was brought four notes were due and unpaid. After the suit had been brought and service had, an answer was filed by the Pofahls, in which they asked to be allowed to pay all money past due, and the court fixed a time within which they might do so, together with court costs and an allowance for an attorney's fee. Within the time limited the tender was made, and appellant's complaint dismissed, and this appeal is from that order.

Appellee states the issue to be decided as follows:

"Can the appellant, at her option, declare the residue of the promissory notes of appellees due and foreclose same upon a failure to pay two or more of such notes when due, as provided in the contract of sale, but not so provided or expressed in either or any of said notes?"

[1] This court has several times said that—

"Where a vendor sells lands, takes the notes of the vendee for the purchase money, and executes to him a bond for title, the effect of the contract in equity is to create a mortgage in favor of the vendor upon the land to secure the purchase money, subject to all the essential incidents of a mortgage." *Newman v. Mountain Park Land Co.*, 85 Ark. 208, 107 S. W. 391, 122 Am. St. Rep. 27; *Strauss v. White*, 66 Ark. 170, 51 S. W. 64, and cases there cited.

[2, 3] The law as thus announced is applicable to the facts of this case. Appellant has in equity a contract having the essential incidents of a mortgage, and it only remains to be decided whether the provision of the contract maturing all the notes in the event of the default stipulated against is valid and enforceable.

It is first insisted that the provision is void for the reason that the stipulation occurs only in the contract, and is not contained in the notes, or any of them. In the case of *Farnsworth v. Hoover*, 66 Ark. 367, 50 S. W. 865, a mortgage was given to secure a loan of \$500, due in five years, and the interest notes each provided that, on failure to pay interest within 30 days after due, the holder might collect principal and interest at once. That provision did not appear in the

mortgage securing the notes. It was there contended that the provision maturing the entire debt was void; but the court held otherwise, and in the opinion said:

"The mortgage sufficiently identifies the notes, evidencing the debt which it was given to secure. The mortgage being only a security or incident to the debt, it was not necessary for it also to contain a condition making the whole debt due upon failure to pay any installment of interest, in order to justify foreclosure for the entire debt. It was sufficient that the notes contained such a provision. The notes and mortgage were executed at the same time, and in relation to the same subject, as parts of one transaction constituting one contract. 1 Jones, *Mortg.* §§ 71, 76, 349, 354; *Fletcher v. Daugherty*, 13 Neb. 224. In the cases cited to support the opposite view, neither the note nor mortgage contained such a provision as that in the notes sued on herein. In the absence of such a clause in either the note or mortgage, there would, to be sure, be no authority to declare the whole debt due."

Here the bond for title and the notes constituted a single contract, and it is this contract or equitable mortgage which appellant seeks to enforce, and the notes merely evidence the sum due and secured by the contract, and we think the provision accelerating the payments, if otherwise valid, is not rendered unenforceable by reason of the fact that it does not appear in both the contract and the notes. In *Jones on Mortgages* (7th Ed.) vol. 1, § 76, the law is stated as follows:

"A stipulation that the whole sum shall become due and payable upon any default in the payment of the principal or interest is universally held to be legal and valid. It is not objectionable as being in the nature of a penalty or forfeiture."

A note to the text cites a large number of cases supporting the text quoted. Our own case of *Farnsworth v. Hoover*, supra, from which we have quoted, is itself authority for upholding the validity of a provision accelerating the maturity of payments, for such was the effect of that decision.

No forfeiture is worked by upholding the provision. Appellees may pay the sum due and the accrued interest, and thus perfect their right to a deed. They may purchase at the foreclosure sale and thus acquire the title; or, if another purchases at that sale and bids a sum in excess of the balance due, appellees will be entitled to that excess. In any event, their rights are not forfeited under the contract. By their default they have accelerated the terms of payment; but this is not a forfeiture.

It follows, therefore, that the court was in error in dismissing appellant's complaint, and that a decree should have been entered for the foreclosure of the lien, and the decree will therefore be reversed, and the cause remanded, with directions to enter a decree in accordance with this opinion.

CHAS. F. LUEHRMANN HARDWOOD LUMBER CO. v. COATS & GREEN.
(No. 395.)

(Supreme Court of Arkansas. May 10, 1920.
Rehearing Denied June 14, 1920.)

1. Sales §174 — Insistence for change in manner of inspection breach of contract by buyer.

Where contract of sale of lumber provided that inspection should be made in a certain manner at the mill, an insistence by the buyer that the inspection should be made at delivery as a condition precedent for payment, while contract required payment when loaded, constituted a breach of the contract.

2. Sales §174—Breach of contract as to payment warranted seller in refusing to perform.

Where buyer of lumber breached contract of sale by insisting that inspection should be made at place of delivery as condition precedent for payment, while contract required payment when loaded, seller was entitled to refuse to further perform.

3. Appeal and error §1012(1)—Findings not clearly against preponderance of evidence not disturbed.

Findings of fact which do not appear to be clearly against the preponderance of the evidence will not be disturbed on appeal.

Appeal from Lawrence Chancery Court; Lyman F. Reeder, Chancellor.

Action by the Charles L. Luehrmann Hardwood Lumber Company against Coats & Green. Judgment for defendants, and plaintiff appeals. Affirmed.

Oliver & Oliver, of Corning, for appellant.
Smith & Gibson, of Walnut Ridge, for appellees.

SMITH, J. Appellant is a corporation, with its situs in St. Louis, Mo., and is a dealer in lumber. Appellees were a copartnership, and owned and operated a sawmill at Ponder's Switch, about six miles east of Hoxie on the Frisco Railroad. Appellant and appellees entered into a contract in writing on June 6, 1917, whereby appellees, for a price there specified, agreed to saw for appellant 400,000 feet of gum lumber. The contract contained the following provisions:

"To begin cutting by 1st of July, and complete the order in 3 months. Lumber to remain on sticks from 90 to 120 days, or as ordered loaded by C. F. Luehrmann Hw. Lr. Co.

"This order to be followed up with regular stock order from Chas. F. Luehrmann, Hw. Lr. Co."

On August 14, 1917, appellant advanced \$500, and on September 9, 1917, made an additional advance of \$250, and on each occasion took a bill of sale for certain piles of lumber therein described. Appellees contended that these bills of sales were mere mort-

gages intended to secure the advances made; but the court found that they were in fact bills of sale, and appellees have prosecuted no appeal from that finding.

A controversy arose between the parties, and appellant brought suit in replevin for the lumber covered by the bills of sale, and by an amended complaint prayed judgment for damages for breach of the contract to deliver lumber. An answer was filed to the original complaint, in which ownership of the lumber replevied was denied; and, while no answer appears to have been filed to the amended complaint, its allegations were treated as being in issue. The cause was transferred to the chancery court, and was tried without any question of misjoinder of causes of action having been made, and as these causes could, under the act of May 11, 1905 (Acts 1905, p. 798), have been consolidated and heard together, had they been brought separately, we proceed to a consideration of the merits of the questions presented, as did the court below.

Appellees resisted the claim for damages upon the ground that appellant had breached the contract by a failure to comply with its terms, and had thereby absolved appellee from the legal duty of continued performance. The court below expressly found the fact to be that appellant had failed to make advances upon the lumber; but it does not appear that the contract contained any such requirement.

Under the order of delivery which issued in the cause appellant took possession of the piles of lumber contained in the bills of sale, and, after inspection, shipped it out. The lumber thus shipped measured out 56,984 feet, whereas in the bills of sale the piles so shipped were estimated to contain 70,000 feet, and judgment was prayed for the loss of profits sustained on this difference of approximately 14,000 feet. As to the lumber covered by the bills of sale, the court found that the sums of money there recited as paid were advanced as portions of the purchase money, and that nothing remained to be done except to grade the lumber according to the "National Rules," as provided by the contract between the parties, and to pay the balance of purchase money when so determined. The court found this balance to be \$482.33, and rendered judgment in appellee's favor for that amount.

The testimony showed an enhancement of from \$10 up per thousand in the market price of the lumber; but the court refused to award any sum as damages for the deficiency of 14,000 feet for the reason that the recitals in the bills of sale as to amount of lumber sold was a mere estimate, and the bills of sale conveyed only the lumber in the piles, much or little, and we are unable to say that that finding is clearly against the preponderance of the evidence.

The court also expressly found the fact to be that appellant had failed to furnish regular stock orders for additional lumber, and had failed to pay in cash for lumber when loaded, and that these defaults in the performance of the conditions of the contract released appellees from further performance on their part, and the correctness of this finding presents the controlling question in the case.

The senior member of the firm of Coats & Green was also the senior member of the firms of Coats & Inman and Coats & Milner, and appellees insist that this was but one partnership, in which Milner bought Inman's interest and, in turn, sold to Green. It is not clear, however, that this statement is correct; and it does appear that Coats operated at least two mills, and one of them under the firm name of Coats & Milner. That firm also had a contract with appellant to saw lumber, and there was a controversy over its terms; but it would, of course, make no difference whether appellant breached its contract with Coats & Milner if it in fact complied with the terms of the contract it had with appellees.

[1] The record contains correspondence between the parties, which shows that the differences between them became accentuated as the correspondence progressed. Appellees were complaining of appellant's failure to inspect and load out the lumber, and in a letter dated March 7, 1918, appellees declared themselves absolved from further obligation to perform because of breaches of the contract on appellant's part. The circumstances stressed in this letter were that a draft drawn to cover three cars of lumber (which had been inspected and loaded and shipped by appellant's representative) had been drawn on, and dishonored by, appellant. A reply to this letter was written in which it was stated that—

"While, if the writer had been in town when this draft was returned, might not have returned it, still I am of the opinion that, without any advice from Mr. Alexander, to the effect that you were going to draw a draft on us for the stock, and if he had advised us you were going to ship this stock subject to delivered inspection, and taking in consideration the fact that the office had no means of knowing how you are in your inspection, it would appear to be perfectly all right for the office to have had a doubt as to the advisability of paying the draft without having specific instructions."

This letter also stated that—

"We think, however, that we should see the lumber before we pay for it practically in full."

The imposition of this condition in regard to inspection operated as a demand that final inspection should be made at the point of delivery, rather than at the point of shipment, and the contract did not give that right.

By the terms of the contract lumber was "to be taken up on grades, National Rules to govern (at prices stated), all f. o. b. a 13-cent rate to St. Louis," and the terms of payment specified in the contract were "2 per cent. for cash when loaded." The lumber was "to be taken up" at the mill, and the contract provided how the inspection would be made, and the insistence that the inspection should be made otherwise or elsewhere, as a condition precedent for payment, while the contract required payment when loaded, constituted a breach of the contract.

[2] One cannot refuse to perform a contract according to its terms, and thereafter insist that the other party perform. So, if, as the court found, appellant had failed to perform the contract, either by furnishing specifications for sawing or in paying for lumber taken up, then it could not thereafter demand, as damages, the profit which would have accrued had appellees continued in the performance of the contract, notwithstanding appellant's prior breach thereof. *Gauger v. Sawyer & Austin Lbr. Co.*, 88 Ark. 422, 115 S. W. 157; *Harris Lbr. Co. v. Wheeler Lbr. Co.*, 88 Ark. 491, 115 S. W. 168; *Rodgers v. Wise*, 106 Ark. 310, 153 S. W. 253, 43 L. R. A. (N. S.) 1009.

[3] The court's finding of fact appears to be not clearly against the preponderance of the evidence, and will therefore be affirmed.

RUNDELL v. ROGERS. (No. 22.)

(Supreme Court of Arkansas. May 31, 1920.)

1. Landlord and tenant §150(1) — Landlord not agreeing to repair cannot be compelled to.

Unless a landlord agrees with his tenant to repair the leased premises, he cannot, in the absence of statute, be compelled to do so.

2. Customs and usages §16—Local custom not provable to render landlord liable for failure to repair.

A local custom cannot be shown to render a landlord liable for failure to make repairs in contravention of the rule that he is not required so to do in the absence of agreement or statute.

Appeal from Circuit Court, Saline County; M. H. Holleman, Special Judge.

Action by Bee Rogers against W. R. Rundell. From judgment for plaintiff, defendant appeals. Reversed, and cause remanded for new trial.

Appellant, pro se.

J. S. Utley, of Benton, for appellee.

WOOD, J. This action was brought by the appellee against the appellant. The appellee alleged that he rented about five acres of

land from the appellant which was to be cultivated in corn during the year 1918; that appellee was to pay one-third of what was produced to the appellant; that appellant with the permission of appellee gathered his share of the corn; that in doing so he gathered more than one-third; that the appellant negligently failed to keep the fence in good repair around the land, and thereby negligently permitted hogs to get in the field and to eat and destroy all the corn that appellant left; that on account of the negligence of the appellant, as set forth, the appellee lost 30 bushels of corn, worth \$1.75 per bushel. The appellant denied the allegations of the complaint.

The appellee testified to the renting of the land as set forth in the complaint and that he planted the same in corn; that after the crop was laid by he went away and was gone until late in the summer; that on his return he found that appellant's hogs had been getting in the corn; that the inclosure around appellant's pasture, which was within the same general inclosure as the cornfield, was not hog-proof; that he saw appellant's hogs in the pasture and saw hog tracks where they had been passing through an opening under a culvert between appellee's cornfield and appellant's pasture; that appellee gave appellant permission to gather his share of the corn; that later, when appellee came home, he found that all the corn was gone.

Over appellant's objection, appellee and other witnesses were permitted to testify that the custom in that locality was for the owner to keep up the fence around a farm when it was rented. To this ruling of the court the appellant duly excepted.

According to the undisputed evidence, there was no agreement on the part of the appellant to make repairs of any kind.

From a judgment in favor of the appellee is this appeal.

[1] "Unless a landlord agrees with his tenant to repair leased premises, he cannot, in the absence of a statute be compelled to do so," is a rule of law well established in this state and elsewhere. *Delaney v. Jackson*, 95 Ark. 131, 128 S. W. 859; *Jones v. Felker*, 72 Ark. 405, 80 S. W. 1088; *Brown v. Dwight Mfg. Co.*, 200 Ala. 376, 76 South. 292, L. R. A. 1917F, 997; 16 R. C. L. 1030, § 552, note 18; 18 Am. & Eng. Enc. of Law, 215, 4a.

[2] A local custom cannot be shown in order to render the landlord liable for failure to make repairs in contravention of the above well-established rule. 18 Am. & Eng. Enc. of Law, 217.

"The tendency of modern decisions is not to imply covenants which might and ought to have been expressed, if intended." *Sheets v. Selden*, 7 Wall. 423, 19 L. Ed. 166. Moreover, if it were competent to prove a local custom, the testimony adduced by the appel-

lee in this case was not sufficient to show that the custom was of such long standing as to be generally known. *St. L., I. M. & S. R. Co. v. Wirbel*, 108 Ark. 437, 158 S. W. 118; *Ward Furn. Mfg. Co. v. J. B. Isbell*, 81 Ark. 549, 99 S. W. 845.

The testimony concerning the local custom was therefore incompetent, and the court erred in admitting it. The error is prejudicial to appellant.

The judgment is therefore reversed, and the cause will be remanded for new trial.

HARDEMAN v. ARTHURS. (No. 21.)

(Supreme Court of Arkansas. May 31, 1920.)

1. Landlord and tenant ⇨323—Contract held to make cropper employé not tenant.

A contract, whereby one party was to furnish the tools, teams, seed, and land and the other to furnish the labor according to instructions of the first party, with nothing to show an intention to give the second party exclusive dominion of the land or of the crops planted thereon, creates the relation of employer and employé rather than that of landlord and tenant, though the land was to be cropped on shares.

2. Landlord and tenant ⇨326(6)—Title to crop under lease on shares is in landlord, so that a purchaser from cropper is guilty of conversion.

Ordinarily when the parties occupy the relation of landlord and tenant the title to the crop is in the tenant, but where they occupy relation of landlord and cropper on shares, the title to the crop is in the landlord, so that in the latter case a purchaser from the cropper is guilty of conversion.

Appeal from Circuit Court, Woodruff County; J. M. Jackson, Judge.

Action by L. P. Hardeman against W. A. Arthurs, in which William Wilson and another were brought in as parties defendant on motion of the original defendant. From a judgment dismissing the complaint as to defendant Arthurs, plaintiff appeals. Reversed, with directions to grant a new trial as to defendant Arthurs.

Jonas F. Dyson, of Cotton Plant, for appellant.

Roy D. Campbell, of Cotton Plant, for appellee.

WOOD, J. L. P. Hardeman, as party of the first part, entered into a contract with William and Grover Wilson, the parties of the second part, whereby the party of the first part was to furnish the tools, teams, seed, and the land as his part and the parties of the second part were to furnish all the labor necessary to cultivate the 40 acres of

land "according to the rules of share cropping." If the parties of the second part failed to perform the necessary labor according to the instructions of the first party or his foreman, the first party could have the same done at the current wages of the country after giving the second party notice, and charge the amount to the second party, to be paid out of their half of the crop. Such were the essential provisions of the contract under which the Wilsons cultivated the land of Hardeman for the year 1917. In December, 1917, the Wilsons sold to W. A. Arthurs a bale of cotton, produced by them on the farm of Hardeman under the above contract. Hardeman, hereafter for convenience called appellant, brought this action against Arthurs, hereafter called appellee, to recover the sum of \$129, which appellant alleged was the value of the bale of cotton belonging to appellant that appellee had purchased of the Wilsons.

The appellant alleged that appellee knew at the time he purchased the bale of cotton from the Wilsons that the same was raised by the Wilsons on appellant's land under a share cropper's contract. The appellee answered, denying the allegations of the appellant's complaint, and alleged that any cotton purchased by him from the Wilsons was purchased in good faith, without any knowledge of any interest or title of the appellant in the cotton. He alleged that the Wilsons were necessary parties, and moved that they be made parties defendant, which was done.

The Wilsons answered, admitting that they made a crop on the land of appellant in the year 1917; that appellant had furnished them certain supplies for that year, but alleged that they had performed work for the appellant, and that upon an accounting with appellant, including the bale of cotton sold by them to the appellee, they would be due the appellant the sum of \$32.50, which they tendered in open court. They further alleged that appellee purchased the bale of cotton from them in good faith, without any knowledge or notice of appellant's claim on the cotton. Appellant replied to the answer of the Wilsons, and set up that they were indebted to him in the sum of \$87.70, for which he asked judgment.

The appellant testified that the Wilsons worked a share crop with him. The testimony of the Wilsons, in substance, was to the effect that they made the contract to make a crop on appellant's place in the year of 1917; that appellant was to furnish everything and get one-half. They made five bales of cotton, and divided it all with appellant except the last bale, which was sold by them to the appellee for \$116.44.

Appellee testified that he bought the bale of cotton from the Wilsons; that he had no notice that he had any interest in the cotton. He had bought two bales from them previ-

ously. Appellee knew that the cotton came from the appellant's place, but did not know anything about the contract of appellant and the Wilsons. On cross-examination the appellee was asked:

"Q. At the time they sold the cotton to you, didn't they go into the facts of the case and tell you that they had been dividing this cotton with Hardeman out there? A. Well, I don't know, I don't remember if they did."

Appellant testified that the Wilsons raised five bales of cotton, including the bale in controversy, under the share crop contract, which he made an exhibit to his complaint.

The court instructed the jury to return a verdict in favor of the appellee, to which ruling the appellant excepted.

The appellant prayed for the following instruction:

"You are instructed that the title to the crop raised by one working on the shares is in the landlord, and one who purchases same or any part thereof is responsible to the landlord for the conversion thereof."

The court refused this prayer, to which ruling the appellant duly excepted. A judgment was entered, dismissing the appellant's complaint as to the appellee Arthurs, from which is this appeal.

[1] The court erred in instructing the jury to return a verdict in favor of the appellee. The contract, as we construe it, clearly creates the relation of employer and employé, rather than that of landlord and tenant. There is no language in the contract indicating that the share of the crop which appellant was to receive was for the use or rent of the land, or that the possession of the land was surrendered by the appellant to the Wilsons for the year 1917. There is nothing to show that the Wilsons had either exclusive dominion of the land during that period or of the crops to be planted thereon, giving them the right to pursue their own methods in the cultivation thereof, and the right to gather and hold the same as their own, until the division was made between them and the appellant. On the contrary, the language of the contract shows that appellant had the right to direct the Wilsons as to how they should perform the labor necessary for the cultivation and harvesting of the crop.

[2] In *Tinsley v. Craig*, 54 Ark. 346-349, 15 S. W. 897, we said:

"Ordinarily when the parties occupy the relation of landlord and tenant, the title to the crop is in the tenant, and he pays the landlord rent in kind or otherwise; and in general where they occupy the relation of landlord and cropper on shares, the title to the crop is in the landlord, and he delivers a part of it to the cropper in payment of his services."

The relation is determined by the terms of the contract, which in this case plainly

shows that the relation, as before stated, is that of employer and employé rather than landlord and tenant. See, also, *Hammock v. Creekmore*, 48 Ark. 264, 3 S. W. 180; *Neal v. Brandon*, 70 Ark. 79-82, 66 S. W. 200; *St. L., I. M. & S. Ry. Co. v. Hardie*, 87 Ark. 475-483, 113 S. W. 31; *Valentine v. Edwards*, 112 Ark. 354-356, 166 S. W. 531.

For the error indicated, the judgment is reversed with directions to grant appellant a new trial as to appellee Arthurs.

NEW CORONADO COAL CO. et al. v. JASPER. (No. 397.)

(Supreme Court of Arkansas. May 10, 1920.
Rehearing Denied June 14, 1920.)

1. Removal of causes ¶86(5) — Complaint charging joint liability against resident and nonresident must be traversed in petition for removal.

Material allegations of a complaint, charging joint liability against a resident and a nonresident defendant, must be traversed in a petition for removal to the federal court by a statement of facts conclusively showing that the plaintiff fraudulently joined the defendants in the suit to deprive the nonresident defendant of his right to a trial of the cause in the federal court, and such petition should preclude every theory of joint liability.

2. Removal of causes ¶86(5)—Petition for not sufficient to preclude theory of joint liability.

In an action against resident and nonresident defendants to recover damages for conversion of coal, a petition for removal of the cause to the federal court *held* not to sufficiently traverse the material allegations of the complaint as to the joint liability of the defendants.

3. Master and servant ¶313—Joint liability for conversion.

Where a master directs employé to take property of a third person, the master and servant are jointly liable for conversion.

4. Mines and minerals ¶51(3)—Evidence held to sustain finding that defendant pulled pillars in coal mine.

In an action by a mine owner for conversion of coal and for damages occasioned by the pulling of pillars in the mine, evidence *held* sufficient to sustain finding that defendants pulled the pillars in question.

5. Mines and minerals ¶51(3)—Evidence held to show wrongful mining of coal.

In an action for conversion of coal, evidence *held* sufficient to sustain a finding that the acts of defendants in taking coal from plaintiff's mine were willful, wanton, and malicious.

6. Evidence ¶208(2)—Record of another suit admissible to show knowledge of certain facts on the part of defendant.

In an action against several defendants for conversion of coal and wrongful pulling of pil-

lars in a mine, court did not err in permitting the complaint and proceedings in a prior suit to be read to the jury for sole purpose of showing that defendant's foreman knew the location of the dividing line between plaintiff's and defendant's mines at the time the pillars were pulled; such foreman having testified to the nature of the former suit and disposition made of it, thereby showing a knowledge of the contents of the complaint.

7. Partnership ¶219(4)—Service on one of several partners warrants judgment against partner served.

Where members of a partnership are sued, and service is only had upon one of them, a judgment in favor of plaintiff binds the served partner personally and as a partner, and partnership funds impounded by attachment and garnishment.

8. Appeal and error ¶1064(1)—Instruction permitting judgment against partnership instead of member harmless.

In an action against members of a partnership, only one of whom was served with process, an instruction directing the jury to find against the "New Coronado Coal Company," the firm name, could not have prejudiced the defendant served on the ground that a partnership cannot be sued as an entity and judgment rendered against it as such.

9. Trial ¶279—Party doubting meaning of instruction must make specific objection.

If there is any doubt as to what the court means in an instruction, party not satisfied therewith must make a specific objection challenging it on account of ambiguity.

10. Mines and minerals ¶51(5)—Profits properly awarded as damages for tortious act.

Where adjoining owner wrongfully pulled pillars in plaintiff's coal mine, causing a squeeze and rendering it impossible for plaintiff to mine his coal, which he had sold under contract, court properly charged that the measure of damages was the profit that plaintiff would have netted on the unrecoverable coal; such profits being ascertainable with reasonable certainty.

11. New trial ¶102(3)—Diligence not shown where one of several defendants knew of witness.

Court did not abuse its discretion in denying a motion for new trial for newly discovered evidence, where at least one of several defendants moving for a new trial must have, prior to the trial, known of the witness, and that he would testify favorably for defendants.

Appeal from Circuit Court, Sebastian County; Paul Little, Judge.

Action by John W. Jasper against the New Coronado Coal Company and others. Judgment for plaintiff, and certain defendants appeal. Affirmed.

Warner, Hardin & Warner, of Ft. Smith, for appellants.

Covington & Grant, of Ft. Smith, for appellee.

HUMPHREYS, J. Appellee, John W. Jasper, instituted this suit against appellants, Arkcoal Mining Company, a corporation, C. A. Beggs, B. J. Malone, Minnie Malone, M. A. Malone, A. M. Malone, and the New Coronado Coal Company, a partnership, alleged to have been composed of the five last-named parties, in the Sebastian circuit court, Greenwood district, to recover damages in the sum of \$55,681.50, on account of: (1) Wanton, willful, and malicious conversion of 2,820 tons of coal out of Central mine No. 5, on the southeast quarter of the southeast quarter, section 21, township 5 north, range 31 west, in said county; and (2) the wanton, willful, and malicious pulling of pillars in said mine, causing the roof to fall or squeeze down, thereby preventing appellee from mining 16,410 tons of solid coal and 10,000 tons of pillar coal.

The complaint contained an allegation, among others, that the appellants owned and operated a mine known as the "Phoenix property" just south of "Central No. 5 property" aforesaid; that B. J. Malone was general superintendent, and C. A. Beggs mine foreman, of the New Coronado Coal Company, and the members of said partnership operating the "Phoenix property"; that B. J. Malone, as such general superintendent, wrongfully directed the other employes of said company, as well as the mine foreman, and that C. A. Beggs, as such mine foreman, wrongfully directed the other employes, to make openings from the land and coal in the Phoenix property into and through the land and coal of Central No. 5 property, and, pursuant to said unlawful, willful, and wanton directions, did wrongfully take 2,820 tons of coal and cause the roof to cave in so as to prevent appellee from mining 16,410 tons of solid coal and 10,000 tons of pillar coal.

A. M. Malone filed a petition and bond for removal of the cause to the United States District Court for the Western District of Arkansas, setting up that the controversy involved issues between himself and appellee alone, in which appellee claimed damages against him in the sum of \$55,681.50 on account of an alleged wrongful act of removing and mining coal underneath land held by appellee under lease; that he was a non-resident and appellee a resident of the state of Arkansas; that the only residents of the state made defendants in appellee's suit were C. A. Beggs, B. J. Malone, and Minnie Malone, who had no interest whatever in the issues involved in the litigation; that they were joined as defendants in appellee's suit for the fraudulent purpose and with the fraudulent intent to prevent a removal of the cause from the state to the federal court; that the mining operations of the "Phoenix property" were under his immediate direction, and that C. A. Beggs, B. J. Malone, and Minnie Malone were in the employ of peti-

tioner and his partner, C. M. McKoin, and that neither of said parties were charged with the duty of directing or superintending the mining operations of the petitioner and C. M. McKoin aforesaid; that none of the alleged wrongful acts set forth in the complaint were done by either C. A. Beggs, B. J. Malone, or Minnie Malone, or with their knowledge or under their directions.

The petition to transfer the cause was overruled by the court, to which ruling appellants objected and excepted.

Thereupon A. M. Malone filed a separate answer, in which he admitted that the New Coronado Coal Company was composed of C. M. McKoin and himself, and that they mined 1,497 tons of coal out of a solid body in "Central No. 5 property," but charged that they did so in good faith, under an agreement which they believed gave them the right to do so, that he was willing to pay a reasonable royalty for the coal so mined, and in which he specifically denied all other material allegations of the complaint.

C. A. Beggs, B. J. Malone, and Minnie Malone filed separate answers, in which each specifically denied all the material allegations in the complaint.

The Arkcoal Mining Company and M. A. Malone were not served and did not appear, and C. M. McKoin was not made a party and did not appear.

The proceeding was by attachment and garnishment. In response to the writs of garnishment, the McAlister Fuel Company admitted an indebtedness of \$4,899.92 to the New Coronado Coal Company, and paid the amount into court; and the Merchants' National Bank of Ft. Smith admitted an indebtedness of \$3,185.30 to the New Coronado Coal Company and \$142.60 to A. M. Malone personally, and gave bond to pay same into court; and the Huntington State Bank admitted an indebtedness to C. A. Beggs of \$142.60 and paid it into court.

The cause was submitted to a jury upon the pleadings, evidence, and instructions of the court, which resulted in a verdict and judgment in favor of appellee for \$11,000.35 against the New Coronado Coal Company, a partnership composed of A. M. Malone and C. M. McKoin, and against A. M. Malone and C. A. Beggs, upon the theory that said parties had wrongfully converted 1,497 tons of coal belonging to appellee, of the value of \$3,068.85, at the rate of \$2.05 per ton, the price for which appellee had contracted to sell it on board cars, and for \$7,931.15, lost profits on 26,413 tons of coal rendered unrecoverable by wrongfully pulling pillars in "Central No. 5 property," thereby causing the roof to cave in or squeeze down and obstruct the opening to the coal. The garnishments were all sustained, the money deposited in court in response to the writs was ordered paid to appellee, and judgment rendered

in his favor against the garnishee and its bondsman which had not paid the fund into court. From the judgment an appeal has been prosecuted under proper proceedings to this court.

The record is too voluminous to incorporate a summary of the evidence of each witness in this opinion, and, for that reason, we can only make a general statement. Certain defendants were dropped from the suit for want of service and other causes, so the suit is one by appellee against C. A. Beggs, A. M. Malone, and the New Coronado Coal Company, composed of A. M. Malone and C. M. McKoin. In the fall of 1917 appellee purchased a tract of land called "Mottu property," west of "Central No. 5 property," which is a coal mine on the land heretofore described. On January 8, 1918, he leased "Central No. 5 property" for a term of two years for mining purposes, agreeing to sell the output of the mine for \$2.05 per ton, on board cars, to the owners of the property. Prior to the purchase of the "Mottu property" and the lease of "Central No. 5 property," appellee, in connection with L. E. Lake, under the corporate name of "Phoenix Coal & Mining Company," for a number of years operated the coal mine known as the "Coronado property" under lease. On July 20, 1917, the Phoenix Coal & Mining Company was ousted and the land sold, and afterwards conveyed to the Arkoal Mining Company, a nonresident corporation. A. M. Malone and C. M. McKoin leased it as partners under the partnership name of New Coronado Coal Company. The New Coronado Coal Company began to operate the mine in October, 1917. B. J. Malone was employed as general superintendent and directed the work on top of the ground. C. A. Beggs was employed as foreman and had direction of the work under ground. Between October, 1917, and June, 1918, the New Coronado Coal Company, by direction of A. M. Malone, under the supervision of the company's foreman, C. A. Beggs, crossed over the north line of the "Coronado property" onto "Central No. 5 property," mined and hauled out of the solid body of coal thereon 1,497 tons, taking it to the surface through the "Coronado property." After having mined that amount, the owner, Central Coal & Coke Company, enjoined appellants in the courts from mining more. Appellants' testimony tended to show that they mined the coal in good faith, believing appellee had surrendered his lease on the particular land from which the coal was taken, and that they had made an arrangement for exchange of coal by which they would acquire the title to the coal so mined.

Appellee's testimony tended to show that he declined to surrender his lease, and, in the face of his refusal and with full knowledge of his rights, appellants mined the coal.

Upon the damage issue growing out of the

alleged pulling of the supporting pillars between the "Coronado property" and "Central No. 5 property," appellants' witnesses, to the number of eight or nine, testified that the pillars in question were pulled by appellee in the spring of 1917, while operating the "Coronado property" in the corporate name of "Phoenix Coal Company"; that the caving of the roof occurred while witnesses were in the employ of the Phoenix Coal Company, and not after the New Coronado Company began to operate the mine; that the condition of the roof in "Central No. 5 property" at the time they testified was the same as when they pulled the pillars in the spring of 1917.

Appellee's witnesses testified that the squeeze, which obstructed the entry or slope and covered the track from the "Mottu" mine into and through "Central No. 5 property" along the south side thereof to the body of coal on the east end, was caused by the pulling of the pillars in the spring of 1918, along the line between the two latter properties; that they did not pull them; that early in the month of July, 1917, and later in the month when the Phoenix Coal Company was ejected from the "Coronado property," the pillars were intact and had been standing for 10 or 12 years.

Appellants' motion for new trial contained a request for new trial on account of newly discovered evidence of L. E. Lake. The evidence set out in the motion, to which Lake would subscribe, if present, was that he had personal charge of the mining operation of the Phoenix Coal & Mining Company in "Central No. 5 property" prior to and up to May 1, 1917, and that in April of that year, the pillars in question were pulled under the supervision of Bert Agnew at his direction; that appellants had no knowledge or means of knowing, and, after making diligent inquiry, did not learn of the facts to which Lake would testify or that he resided in Newton county, until after the trial. The motion for new trial was denied over the objection and exception of appellants.

[1-3] It is first contended that the court committed reversible error in overruling the petition to remove the cause to the federal court. The sole guide for a proper determination of this question must be found in the allegations of the complaint and petition for removal. The material allegations of the complaint, charging joint liability against resident and nonresident defendants, must be traversed in the petition of removal by a statement of facts conclusively showing that the plaintiff fraudulently joined the defendants in the suit to deprive the nonresident defendant of his right to a trial of the cause in the federal court. *C., R. I. & P. Ry. Co. v. Schwyhart*, 227 U. S. 184, 33 Sup. Ct. 250, 57 L. Ed. 473. We do not think the charge in the complaint that C. A. Malone individually, and as a partner in the New Coronado Coal

Company, became a joint tort-feasor with B. J. Malone and C. A. Beggs on account of their acts, respectively, as general superintendent and mine foreman, in ordering their employes to mine coal and pull pillars in appellants' mine, was sufficiently traversed. It is true A. M. Malone in the petition attempts to controvert joint liability by alleging that the wrongful acts charged "were not done or suffered to be done by either the said Beggs, B. J. Malone, or Minnie Malone, nor were they done with their knowledge or under their directions, and that they are in no way responsible for the alleged damages"; in other words, it is charged in the petition for transfer that A. M. Malone himself directed the employes, including Beggs and B. J. Malone. It is not denied in the petition to transfer that B. J. Malone was superintendent and C. A. Beggs mine foreman of the New Coronado Coal Company, composed of A. M. Malone and C. M. McKoin. Without such denial, the traverse was insufficient because A. M. Malone, individually and as a partner, would be liable jointly with either or both for acts done by them within the scope, or apparent scope, of their authority. In order to effect the transfer of the cause, the petition of removal should have precluded every theory of joint liability of the resident and nonresident defendants. There was no error in overruling the petition to transfer.

It is next insisted that the evidence is insufficient to support the verdict:

(1) Because there is no evidence to show appellants pulled the pillars which produced the squeeze that obstructed appellee's passageway to his coal in "Central No. 5 property." Appellee testified that in April, 1918, he laid a track from the "Mottu property" on the west in an easterly direction through the old workings in "Central No. 5 property" to a solid block of coal on the east side thereof for the purpose of mining it; that the New Coronado Coal Company was at the time working in the "Coronado property" immediately south of No. 5 aforesaid; that the pillars were standing when he built his track; that he did not pull them; that they were pulled, which caused the roof of "No. 5" to cave in, cover his track, and obstruct his passageway to the solid body of coal on the east. Marvin Repass testified that he helped appellee lay the track; that it was 800 or 900 feet long; that the squeeze, which covered it up and shut appellee out from the solid body of coal, came after the track had been laid, and the caving of the roof came from the direction where the New Coronado Coal & Mining Company, or Malones, were mining; that none of the pillars were pulled by appellee or his employe. The two mine inspectors, Boyd and Shaw, testified that the pillars along the line between the two properties were standing in the spring of 1917, Boyd

saying they were standing as late as July 7, 1917.

[4, 5] It is impossible to read the evidence without concluding that either appellants or appellee pulled the pillars in question. The evidence just detailed was substantial testimony from which the jury were warranted in concluding that appellants pulled the pillars which caused the squeeze that cut appellee off from his coal, and was sufficient in this particular to support the verdict.

(2) Because there is no evidence to show a wrongful conversion of the coal taken or a wrongful pulling of the pillars. The testimony offered by appellee with reference to the conversion of 1,497 tons of coal tended to show that it was converted after several futile attempts to get appellee to surrender his right thereto under lease from the owners of "Central No. 5 property," and that appellants continued the trespass until restrained by court order; and that offered with reference to wantonly pulling the pillars, that they were pulled with knowledge as to the location of the line between the two properties, and that the effect of pulling them would be to destroy appellee's entry, cover up his track of 800 or 900 feet, over which he was hauling coal from the east end of his mine, and to permanently cut him off from it and the pillar coal in the mine. This evidence was sufficient upon which to base an inference that the acts were wanton, wilful, malicious ones, and therefore enough legal, substantial evidence to support the verdict in this regard.

[8] It is next insisted that the court erred in permitting the complaint and other proceedings to be read to the jury in a suit filed November 17, 1917, by the Central Coal & Coke Company against C. A. Beggs and others to prevent them from taking coal off of the tract of land in question. This evidence was offered and admitted by the court for the sole purpose of showing that C. A. Beggs, foreman of the New Coronado Coal & Mining Company, knew the location of the dividing line between "Central No. 5 property" and the "Coronado property" at the time the pillars in said No. 5 were pulled. C. A. Beggs testified to the nature of the injunction suit and disposition made of it, thereby showing a knowledge of the contents of the complaint. We think the complaint and proceeding admissible for the purpose offered.

[7-8] It is next insisted that the court erred in giving appellee's instruction No. 1:

(1) Because the jury was directed to find against the New Coronado Coal Company for 1,497 tons of coal. This was the coal A. M. Malone and C. A. Beggs admitted taking from "Central No. 5 property" for the partnership and for which they offered to pay a reasonable royalty. The contention is made that the instruction is in conflict with the rule of law that a partnership cannot be sued as an entity and judgment rendered against

it as such. The suit was not against the partnership as a legal entity, nor was judgment rendered against it as such. The suit was against the New Coronado Coal Company, a partnership composed of A. M. Malone and C. M. McKoin. Judgment was rendered against it as an association of persons. There being no personal service on C. M. McKoin, the other partner, the effect of the suit and judgment was to bind A. M. Malone personally and as a partner, as well as the partnership fund impounded by attachment and garnishment. We are unable to see how any prejudice resulted to A. M. Malone, the only partner served, by the direction given to the jury of which complaint is made.

(2) Because the instruction assumed without justification that there was testimony from which the jury could find that C. A. Beggs directed the employes of the partnership and of A. M. Malone to remove the pillars from appellee's mine. We do not think the instruction assumed that there were separate employes of Malone and the partnership, and that C. A. Beggs directed all of them to do the wrongful act. The instruction in effect told the jury that A. M. Malone was liable individually and as a partner if the foreman wrongfully directed the employes, meaning one set of employes, to pull the pillars which caused the roof in said mine No. 5 to fall. If there was any doubt as to whether the court meant one or two sets of employes, appellants should have made a specific objection challenging the instruction on account of ambiguity.

(3) Because the instruction was misleading in that it was impossible for the jury to determine from the wording which Malone was the servant and which the master. The failure to insert the initials "B. J." before Malone could not have misled the jury. The undisputed evidence showed that B. J. Malone was the superintendent or employe, and by another instruction he was exempted from liability, so there could not have been a misunderstanding that A. M. Malone was intended by the use of the word "master" in the instruction.

(4) Because there was no evidence to warrant the submission of the issues as to whether appellants wrongfully removed the pillars in question. We ruled otherwise in the discussion of the question whether there was sufficient legal evidence to support the verdict.

(5) Because the instruction permitted a recovery for coal wrongfully converted at its reasonable value at the mouth of the shaft without deducting 25 cents per ton provided for in his contract of sale thereof to the Central Coal & Coke Company. The deduction provided for was a means adopted by appellee to pay an indebtedness of \$1,139.03 he

owed the Central Company on a past transaction, so it would have been improper to deduct this amount from the damages assessed against appellants for willful conversion.

[10] It is also insisted that the court erred in giving appellee's instruction No. 2, by charging therein that the measure of damages was the profit that appellee would have netted on the unrecoverable coal lost by the wrongful removal of the pillars. The contention is made that the correct rule for the measure of damages was the value of the leasehold estate, if destroyed by a wanton act of appellants, and not the profit which appellee might have made. It seems allowable as a general rule to award profits as damages resulting from tortious acts, if ascertainable with reasonable certainty. 8 R. C. L. 508; 17 C. J. p. 735. In the instant case the proof showed that appellee lost 27,800 tons of coal, 1,389 tons more than he claimed, on account of the squeeze, which the jury found was occasioned by appellants' wanton act of pulling the pillars in "Central No. 5 property," which was contracted to be sold at \$2.05 per ton on board cars, with expense of \$1.70 per ton for mining and placing same on top at pit mouth; that the entire amount, with reasonable effort, could have been mined before the expiration of appellee's lease. Appellee's net profit would have been 35 cents on each ton claimed, or a total of \$9,244.55, if placing the coal on top at pit mouth meant on board cars at pit, and there is nothing to show to the contrary. The jury awarded a much less amount as damages. The damages allowed were reasonably well established by the evidence.

[11] Lastly, it is contended that the court erred in not granting a new trial on account of the newly discovered evidence of L. E. Lake, who was a stockholder and manager of the Phoenix Coal & Mining Company in 1917, when, according to appellants' contention, the pillars were pulled and roof caused to fall by said company. C. A. Beggs, one of the appellants, must have been cognizant of Lake's interest in and management of the Phoenix Company, as he worked for the company as foreman for a long time and during the spring of 1917. Lake was not far away. No effort was made to get him or his evidence before the trial. The only excuse offered is that appellants had no idea what Lake would testify to until after the trial. Beggs' former connection with the company ought to have suggested that Lake, the former manager, could testify favorably for them. Sufficient diligence was not shown before the trial, and it cannot be said the court abused its discretion in refusing the motion for a new trial on account of newly discovered evidence.

No error appearing, the judgment is affirmed.

G. H. HAMMOND CO. v. JOSEPH MERCANTILE CO. (No. 404.)(Supreme Court of Arkansas. May 17, 1920.
Rehearing Denied June 7, 1920.)**1. Principal and agent §119(2)—Presumption as to authority to sell goods in own name stated.**

Where agent is engaged in an independent business, authority to sell in his own name goods consigned and delivered to him for sale is presumed from the nature of the business, but such presumption does not extend to agent who is engaged exclusively in selling his principal's goods.

2. Factors §1—Nature of the business of a "factor," stated; "commission merchant."

A factor or commission merchant is one engaged in an independent calling, and who buys and sells on commission any personal property left with or consigned to him for sale.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Commission Merchant; Factor.]

3. Principal and agent §103(8)—Authority to sell "overs" as agent's own goods held not to apply to exchanged goods of principal.

That plaintiff packing company permitted its agent to sell "overs," the increase in weight of meat shipped to such agent resulting from salt put on it, or to sell his own goods on his individual account, did not justify or authorize his sale of meat of plaintiff for which he had exchanged "overs" without plaintiff's knowledge or consent.

Appeal from Circuit Court, Greene County; R. H. Dudley, Judge.

Action by the G. H. Hammond Company against the Joseph Mercantile Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The plaintiff, G. H. Hammond Company, alleges in its complaint that it is a Michigan corporation duly authorized to do business in the state of Arkansas; that on the 6th day of May, 1918, the defendant, Joseph Mercantile Company, a domestic corporation, took into its possession and converted to its own use 1,165 pounds of bacon extras, belonging to the plaintiff, and of the value of \$308.10. The defendant answered, denying the allegations of the complaint. The facts are substantially as follows:

Ray Perkins of Paragould, Ark., entered into a written contract with the plaintiff for the sale of its meat, to be consigned to Perkins and kept by him in a storehouse in Paragould, Ark., and sold by him for the plaintiff. Perkins agreed to keep the goods in a suitable building and not mingle them with other merchandise, and to sell the same without expense to the plaintiff, except the commission he was to receive.

When dry salt meat was shipped to Perkins in carload lots, there would be some meat left over by reason of the meat being salted and sacked out. This would occur because Perkins only accounted to the plaintiff for the meat by weight. Perkins would put this left-over meat to one side in the house where he kept the plaintiff's meat, and was accustomed to sell it as his own. In May, 1918, he had a quantity of this dry salt meat, and asked the representatives of the defendant to purchase it from him. They told him that they could not use the dry salt extras, but that they could use some bacon extras if he had it. Perkins went back to the warehouse and exchanged the dry salt extras, which he claimed for bacon extras belonging to the plaintiff of equal value, and sold the bacon extras to the defendant as his own. The defendant paid Perkins for the bacon extras.

On cross-examination the president of the defendant company testified that he knew that Perkins was a broker for the plaintiff company, and that he had no right to sell the plaintiff's goods in his own name and receive payment therefor. He further stated, however, that he thought the goods he bought belonged to Perkins, and that he had frequently bought goods from Perkins which were called "overs," and which he understood belonged to Perkins. The bacon in question in this case was packed in the original boxes when it was delivered to the defendant. After it was delivered to the defendant, Perkins' warehouse burned down. The plaintiff did not know that Perkins claimed what he called the "overs" from carload lots, and that he sold the same on his individual account. The plaintiff demanded payment of the bacon extras from the defendant, and payment was refused by the defendant. Hence this lawsuit.

There was a verdict and judgment for the defendant, and the case is here on appeal.

D. G. Beauchamp, of Paragould, for appellant.

Huddleston, Fuhr & Futrell, of Paragould, for appellee.

HART, J. (after stating the facts as above). It is earnestly insisted by counsel for the plaintiff that the court erred in giving instruction No. 7, which is as follows:

"If the plaintiff authorized or knowingly permitted its factor, Perkins, to sell 'overs,' or any other of its goods, or his own goods, on his individual account as individual owner to customers, and said Perkins sold the bacon in question to defendant in that way, and the defendant, acting in good faith, and in ignorance of the rights of the plaintiff, and in the exercise of such care as an ordinary prudent person would use under the circumstances to ascertain whether said Perkins was selling his own goods or those of the plaintiff, and at the time

believed Perkins to be the true owner, or authorized to sell in his own name, then you will find for the defendant."

We think counsel for the plaintiff is right in his contention. The court in giving the instruction seems to have proceeded upon the theory that Perkins was a factor or commission merchant. Such is not the case. A factor is generally defined to be an agent who has a business, as well as goods, or merchandise consigned and delivered to him by or for his principal for a compensation commonly called a commission. 19 Cyc. 115; 11 R. C. L. 753; Story on Agency, 8 Ed. § 33, and Story on Sales, § 91.

[1, 2] The presumption of an authority to sell in these cases is inferred from the nature of the business of the agent, and it fails when the case will not warrant the presumption of his being a common agent for the sale of property of that description. 2 Kent's Com. 14 Ed. *622. A factor or commission merchant then is one engaged in an independent calling, and is one who buys and sells on commission, and who may sell any personal property which is left with or consigned to him for sale.

In discussing the difference between a factor and a broker or agent, the Supreme Court of the United States said:

"The difference between a factor or commission merchant and a broker is stated by all the books to be this: A factor may buy and sell in his own name, and he has the goods in his possession; while a broker, as such, cannot ordinarily buy or sell in his own name, and has no possession of the goods sold." *Slack v. Tucker & Co.*, 23 Wall. (U. S.) 321, 23 L. Ed. 143.

In the case at bar Perkins was not in pursuit of an independent calling, and did not have the authority to sell meat for persons generally, but only had the authority to sell the products of the plaintiff on a commission. It is true he sold the "overs," as he called them, on his own individual account, but he did not have the authority to sell meat generally for persons consigning same to him or leaving it in his possession. He did not attempt to exercise such authority. He was the exclusive agent for the plaintiff and his course of business clearly constituted him as the plaintiff's broker or agent as contradistinguished from a factor or commission merchant. The president of the defendant company knew that Perkins was the broker or agent of the plaintiff, and that he had no right to sell the plaintiff's goods for himself. According to the evidence adduced in favor of the plaintiff, he did not authorize Perkins to sell "overs" or any of its goods on his own account.

[3] It is true that, according to the testimony of Ray Perkins, the manager of the plaintiff company knew that the quantity of

meat shipped by it to Perkins would gain in weight on account of the salt put on it, and that he told Perkins that the company would be satisfied to receive the amount of meat it shipped to Perkins, thereby tacitly giving him the right to use what was called the "overs" on his own account. The fact, however, that the plaintiff company might permit Perkins to sell "overs" or his own goods on his individual account did not warrant the jury in finding for the defendant. The meat in question was not "overs," but was meat of the plaintiff for which Perkins had exchanged "overs" without the knowledge or consent of the plaintiff. The president of the defendant company admitted that he knew that Perkins was the broker or agent of the plaintiff, and that he had no right to sell the plaintiff's goods in his own name. Perkins was not a factor or commission merchant, and had no right to sell the products of the plaintiff in his own name. Therefore the court erred in assuming to the jury that Perkins was a factor, and in telling the jury to find for the defendant if it should further find that the plaintiff authorized or knowingly permitted its factor, Perkins, to sell "overs," or any of its goods, or his own goods on his individual account. Hence the instruction was erroneous, and necessarily prejudicial to the rights of the plaintiff.

For the error in giving instruction No. 7, the judgment must be reversed, and the cause remanded for a new trial.

BREASHEARS v. ARNETT. (No. 5.)

(Supreme Court of Arkansas. May 24, 1920.)

1. Municipal corporations \Rightarrow 706 (6, 7)—Negligence of auto driver and contributory negligence of pedestrian held for jury.

In an action for injuries to a pedestrian struck by an automobile, evidence that the driver was exceeding reasonable speed and sounded no warning before striking plaintiff, who was crossing in the middle of a block, *held* to show that negligence and contributory negligence were issues of fact for the jury.

2. Damages \Rightarrow 132 (7)—\$1,250 for injury to breast and knee, probably permanent, held not excessive.

A judgment of \$1,250 damages to a girl struck by an automobile, which resulted in serious injuries to her breast and knee, which latter were still continuing and would probably be permanent, resulting in her inability to do the hard work she had formerly been able to do, is not excessive.

Appeal from Circuit Court, Yell County; A. B. Priddy, Judge.

Action by Maud Arnett against Clayton Breashears. Judgment for plaintiff, and defendant appeals. Affirmed.

George E. Floyd, of Plainview, for appellant.

Chambers & Wilson, of Danville, and Heartsill Ragon, of Clarksville, for appellee.

WOOD, J. The appellee and her escort, Jack Walker, and Miss Eunice Holman and her escort, E. A. Mathis, all attended a moving picture show in the town of Plainview, Yell county, Ark., on the night of May 4, 1918. After the show was over appellee and her companion started across the street to a drug store for cold drinks. The street was 80 feet wide, and there were about 150 people on the street at the time and a number of automobiles. Appellee and her companions were crossing at about the middle of the block. There were public crossings, but there are no car lines on the street, and the people went across the street anywhere. Coming out of the picture show, the people went straight across the street.

Appellee and Walker were within about 10 feet of the curb on the opposite side of the street from the theater and going towards the drug store when the appellant, who was driving a Ford occupied by himself and several young ladies, ran upon the appellee and Walker. Walker saw that appellee was in direct track of the car and tried to shove her out of the way, but failed. Appellant struck the appellee, causing personal injuries for which she brought this action against the appellant to recover damages.

Appellee alleged that the appellant was negligent in running his car at an unusual rate of speed; that he did not have his car under proper control, and that he did not sound any alarm, warning appellee of the approach of his car. Appellant denied the allegations of the complaint as to negligence, and set up the defense of contributory negligence.

The appellee and her companions testified that the car was being driven by appellant at a greater speed than cars are ordinarily run upon the roads or streets. Appellant testified that he supposed he was going about 10 miles per hour. Several witnesses testified on behalf of the appellant to the same effect.

Walker weighed 193 pounds, and by the impact of the car he was thrown above the windshield. After the appellant hit appellee and Walker he stopped the car in about 75

feet. Appellant did not sound any alarm before he struck the appellee.

Appellee was 20 years of age and in perfect health. She did general farm and domestic work. Since her injury she has not had strength and health, and could not do work as before. When in health she had strength above the ordinary, and made as good "a hand as you could get on the farm." Appellee was knocked unconscious by the blow, and remained so for some time thereafter. She did not get out of bed for two weeks, and it was four weeks before she could get around. Her left knee, right side, chest, both elbows and knees and right hip were badly bruised. She was also injured in her breast. When ever she walked any distance her knee would swell and was painful.

The physician who attended the appellee testified that there were several scratched places and bruised spots too numerous to mention over her body; that the principal wounds were injury to the knee and a rib that was loose from its cartilage on the right side, which in the process of healing caused a knot on her breast. In the process of healing, from the inflammation, the kneecap had been thrown out, the fibers and tendons were enlarged, which left a thickened condition around the knee joint, and that it was impossible for him to tell how long an injury of this character would last. Some of them get well, while others are permanent injuries for a lifetime. The general rule is that a majority of them are permanent.

There was a jury trial, resulting in a verdict and judgment in favor of the appellee in the sum of \$1,250. From that judgment is this appeal.

[1] All of the instructions given by the court were not abstracted either by the appellant or the appellee, but the instructions that were set forth in the briefs of counsel show that the issues of negligence and contributory negligence were submitted under correct declarations of law. The issues of negligence and contributory negligence were issues of fact under the evidence for the jury.

[2] In view of the character of the injuries sustained by the appellee as shown by the evidence, it cannot be said that the amount of the verdict and judgment is excessive. There is no prejudicial error.

The judgment is correct, and is therefore affirmed.

CROFTON v. STATE. (No. 1.)

(Supreme Court of Arkansas. May 24, 1920.)

1. Homicide §254 — Second degree murder established by evidence.

Evidence held to support conviction of murder in the second degree.

2. Witnesses §380(5)—On being surprised at testimony of its witness, state could show his contrary statements before grand jury.

In murder trial in which accused claimed defense that he intervened to save his brother from attack of deceased, where state's witness, although in the main testifying favorably to the state, testified that deceased had a knife which he was using on accused's brother when accused fired the first shot, the state, being surprised at the latter testimony, was entitled to ask the witness if in testifying before the grand jury he had said anything about deceased's having a knife, under the rule allowing a party surprised at testimony of his own witness to show his prior contrary statements.

3. Homicide §203(3) — Dying declarations held admissible.

In murder trial, deceased's dying declarations held admissible under evidence that they were made after his expressing a belief that he would die.

Appeal from Circuit Court, Howard County; Jas. S. Steel, Judge.

Hudie Crofton was convicted of murder in the second degree, and appeals. Affirmed.

Jno. D. Arbuckle, Atty. Gen., and Silas W. Rogers, Asst. Atty. Gen., for the State.

MCCULLOCH, C. J. Appellant was convicted of murder in the second degree on an indictment charging him with killing Frank Owens on February 20, 1917. The trial jury found defendant guilty of the crime charged in the indictment and fixed his punishment at five years in the state penitentiary. An appeal was duly prosecuted to this court, but there has been no appearance of counsel in his behalf.

There were very numerous exceptions saved with respect to rulings of the court in admitting testimony offered by the state, and also with respect to giving and refusing instructions.

[1] Appellant and Frank Owens were both young negro men, and the shooting occurred when they, with other negroes, were returning from a singing school at Tollett, in Howard county, on the night of February 20, 1917. Owens and Ebbie Crofton, a brother of appellant, quarreled about their attentions to a girl and became engaged in a fight, and while so engaged appellant ran up and began firing at Owens with a pistol. According to the testimony adduced by the state, appellant ran up to the place where Owens and Ebbie Crofton were scuffling and fired

one shot at Owens, and Owens ran away, and appellant fired at him two or three times as he ran away. One of the shots took effect in Owens' back and pierced his body through and through, coming out in front near the nipple of one of his breasts.

There is some conflict in the testimony as to the row between Owens and Ebbie Crofton and its progress up to the time appellant ran up and fired the first shot. There was evidence to the effect that Owens was the aggressor in the difficulty, and that he had a knife in his hand and was endeavoring to use it on Ebbie Crofton. Appellant testified that they were returning from the singing school and walking through a certain pasture when he was told that his brother, Ebbie, and Frank Owens were engaged in a fight, and that Hence Burk, one of his companions, handed him a pistol, and that he ran up to the scene of the fight and, seeing his brother down on his all fours and Owens astride of him, he fired the pistol one time at Owens. He testified that after firing the first shot, Burk took the pistol and fired several times at Owens as he ran away. He testified that he was about 30 yards behind his brother and Owens when they were engaged in the fight, and that he heard his brother cry out asking some one to "Take him off! He is killing me."

The evidence was sufficient to sustain the verdict. That adduced by the state was sufficient to show that appellant's brother was not in great bodily harm at the time, and that appellant ran up to the scene of the fight and fired once at Owens while the fight was going on and again fired at him two or three times as he ran away. The jury could, under the testimony, have found appellant guilty of a lower degree of homicide; but the evidence was sufficient to warrant a conviction of murder in the second degree as charged in the indictment.

The assignments of error are, as before stated, very numerous, and it is unnecessary to discuss them all. The instructions of the court were full and complete and seem to have followed the usual form of instructions in such cases. We have not been able to discover in our examination of the transcript any error in the rulings of the court in regard to the giving and refusing of instructions.

[2] One of the rulings assigned as error is in permitting the state to ask one of its witnesses, R. D. Johnson, concerning his statement before the grand jury. Johnson was introduced as a witness and testified that he was present when the fight occurred between Frank Owens and Ebbie Crofton, and he stated that Owens had a knife and struck Ebbie on the head with it. He further testified that Owens ran off down the hill, and

that appellant fired at him two or three times as he ran away. The prosecuting attorney was permitted, over the objections of appellant's counsel, to ask concerning his statements before the grand jury. He was asked if, in his testimony before the grand jury, in detailing the circumstances of the fight, whether he had said anything about Owens having a knife. The witness admitted that he had made no reference to a knife in his testimony before the grand jury. The state had the right on being surprised at the testimony of its own witness to show contrary statements before the grand jury, for the purpose of breaking down the damaging testimony of the witness and impeaching his credibility. This is so where a party gives damaging testimony to the side which introduced him on the witness stand. *Dorian v. State*, 217 S. W. 485. That was the case here. While the testimony of the witness was favorable to the state's contention in many respects, he made the damaging statement that Frank Owens had a knife at the time and was using it on Ebbie Crofton at the time appellant ran up and fired the first shot.

[3] Another assignment of error is in respect to the ruling of the court in allowing Georgiana Owens, the mother of Frank Owens, to testify as to the dying declarations of Owens. Owens lived about four months after he was shot and died from the effects of the wound, and at times he was hopeful of recovery, but afterwards entirely despaired of all hope and expressed his belief that he would die. His mother testified to certain statements made to her by deceased after he expressed to her his belief that he would die. We are of the opinion that, taking her testimony as a whole, there was enough to show that the statements were made at the approach of death and under the belief that death was impending. The testimony falls within rules of evidence often announced by this court. *Evans v. State*, 58 Ark. 47, 22 S. W. 1026.

We are unable to discover any prejudicial error in the record, and the judgment must therefore be affirmed. It is so ordered.

PUMPHREY v. FURLOW. (No. 8.)

(Supreme Court of Arkansas. May 24, 1920.)

1. Partnership §53—Evidence held insufficient to show partnership in purchase of land.

In a suit to recover money, which plaintiff alleged he was fraudulently induced to overpay to defendant for purchase price of land, and to have such amount declared a lien on the land, plaintiff alleging that defendant agreed to purchase the land at not exceeding \$25 per acre

and to let plaintiff have part of it for the amount paid, evidence held insufficient to show the existence of a partnership between plaintiff and defendant; there being no agreement to hold the land and sell it, nor to share in profit and loss.

2. Trusts §77—No resulting trust, where defendant sold land to plaintiff at increased price.

Where plaintiff alleged that defendant had agreed to purchase a certain tract of land at not exceeding \$25 per acre and to sell part of it to him at the price paid, and it appeared that defendant purchased the land for \$15 an acre and sold part of it to plaintiff for \$25, which payment was subsequently made, a resulting trust did not arise in plaintiff's favor, for, to constitute such a trust, the purchase money must be paid by another, or secured by another, at the same time or previously to the purchase, and must be part of the transaction.

3. Joint adventures §5(2)—Evidence in suit between joint adventurers to obtain overpayment held to support decree for defendant.

In a suit to recover a payment alleged to have been fraudulently induced by defendant, based on an alleged contract whereby defendant was to purchase certain land at a price not exceeding \$25 an acre and to sell part of it to plaintiff for the amount actually paid, conflicting evidence held to support a judgment for defendant.

Wood, J., dissenting.

Appeal from Little River Chancery Court; Jas. D. Shaver, Chancellor.

Suit by W. I. Pumphrey against Nathan Furlow. Decree of dismissal, and plaintiff appeals. Affirmed.

W. I. Pumphrey brought this suit in equity against Nathan Furlow to recover the sum of \$1,044.32, which he alleges he was fraudulently induced to overpay the defendant for the purchase price of a tract of land, and to have said amount declared a lien on the land. The defendant filed an answer, denying all the material allegations of the complaint.

According to the testimony of W. I. Pumphrey, he was a negro 64 years of age and had lived in Little River county, Ark., for 31 years, during which time he had been farming and teaching school. He lived near the defendant, Furlow, and had known him since the latter's boyhood. Furlow was a white man, and Pumphrey had the utmost confidence in him. In the summer of 1917, Pumphrey made an oral agreement with the defendant to buy a tract of land containing 174.71 acres. He went to see the defendant, and asked him what the land could be bought for. The defendant stated that he did not know the price, and after some discussion about the land agreed with Pumphrey that they would buy it together. Because Pumphrey was a negro, Furlow concluded the negotiations for the land with the owner, who

lived at another place in Arkansas. It was agreed between the parties that Furlow should buy the land for any price he could get it for up to \$25 per acre. Furlow was to take the contract in his own name, and subsequently to let Pumphrey have part of the land at what Furlow had agreed to pay for it. Furlow reported to Pumphrey that he had to pay the \$25 an acre for the land, when as a matter of fact he had bought it for \$15 an acre. A survey was made of the land, and it was agreed between them that Pumphrey should take 101.71 acres at \$25 an acre. A written contract between the parties was entered into to that effect. It was understood that the defendant should keep the remainder of the land. Each party entered into possession of his part of the land. Furlow bought the land on a credit, and the amount allotted to Pumphrey at \$25 an acre paid the whole purchase price, except a small amount, which Furlow paid in the beginning. Pumphrey paid for the land with two bank checks given Furlow during the fall of 1917. At the time the bank cashier offered to lend Furlow the money with which to pay for his part of the land, and they acted like they were fixing up a mortgage. Again Pumphrey stated that Furlow promised to sell his part of the land to him for just what it cost him.

Austin Hall, another negro, who had lived on Furlow's place for about 8 years, was a witness for the plaintiff. According to his testimony he had known both parties about 25 years and had worked for the defendant for about 8 years. In the latter part of the summer of that year he heard a conversation between the plaintiff and defendant about the purchase of some land near them. The defendant first asked the plaintiff to go and see the owners about the purchase of the land. The plaintiff suggested that he was a negro, and that it would be better for the defendant to go and make the purchase. The defendant said he was satisfied they could get it for \$25 an acre, but that he would get it as cheap as he could. The plaintiff agreed that he would pay as much as \$25 an acre for a part of the land. We quote from the record a part of the testimony of the witness A. Hall, as follows:

"Q. Then you understand that they were partners in buying the land and Furlow had authority to act for both? A. Yes, sir.

"Q. Did you hear Pumphrey explain that in terms of that character that he would intrust him with handling the deal? A. Yes, sir.

"Q. They were both to pay the same price per acre for the land; was that the way? A. Well that has kinder slipped my memory. I know of the partnership, and that is about all I remember.

"W. I. Pumphrey: That is why you were called in the conversation. He said: 'I will let you have the land for the same price I pay for it.'

"Q. Do you remember any other discussion as to what the land would cost—that each of

them was to pay the same price for it? A. Yes, sir.

"Q. And that was why you were called? A. Yes, sir; I said he was all right. We have been working together for 8 years, and I said I believe you are all right myself.

"Q. That is what you were called for as a witness when they were discussing that, and you vouched for both of them? A. Yes, sir."

The defendant, Furlow, was a witness for himself. He denied that he agreed to buy the land as cheap as he could and sell part of it to Pumphrey. According to his testimony, he was on a contract for the purchase of the land on September 10, 1917. After he had made the contract for the purchase of the land, he had it surveyed, and on October 6, 1917, he entered into a written contract to sell Pumphrey 101.71 acres for the price of \$25 an acre. According to Furlow's testimony, Pumphrey urged him to buy the land, and told him that he would pay him as much as \$25 per acre for 100 acres of it. Pumphrey wanted Furlow to buy the land, because he thought he could make a better trade for it. Furlow never agreed to let Pumphrey have any part of the land for what he paid for it. It was understood between them that Pumphrey was to give him \$25 for the land. Furlow bought it for \$15 an acre, and made the trade entirely on his own account. Subsequently, when he found out that Pumphrey was dissatisfied with the trade, he offered to take it off of his hands and to pay him a good profit. The lands began to rise in value shortly after Furlow purchased them.

E. C. Payne, the cashier of the bank through which Pumphrey paid for the land, denied that he and Furlow acted as if they were fixing up a mortgage on the land to secure Furlow's part of the purchase money. He stated positively that there was no effort on his part to do anything of that kind, and that he could not recall any conversation which tended to show that fact. He admitted that Furlow had suggested to him that he did not want Pumphrey to know what he had paid for the land.

J. E. Davis testified that he bought some timber from Pumphrey off of the part of the land which Furlow sold to Pumphrey. He said that Pumphrey told him that he did not know what trade Furlow had made for the purchase of the land. Other testimony will be stated or referred to in the opinion.

The chancellor found the issues in favor of the defendant, and dismissed the plaintiff's complaint for want of equity. The plaintiff has appealed.

A. D. Du Laney, A. P. Steel, and John J. Du Laney, all of Ashdown, for appellant.

S. C. Reynolds, of Ashdown, for appellee.

HART, J. (after stating the facts as above).

[1] Counsel for the plaintiff first insists that a partnership existed between the plain-

tiff and defendant with regard to the lands. There is nothing in the testimony to establish this fact. It was a mere conclusion on his part, suggested by the question asked him. The testimony of the parties to this suit shows conclusively that no partnership existed between them. According to Pumphrey's own testimony, Furlow was to buy the land, and was to let him have a part of it at the price he paid for it. There was no agreement to hold the land, and sell it, and share the profits and losses arising from the transaction. There was no community of interest whatever between them. In order to constitute a partnership, it is necessary that there should be something more than a joint ownership of the property. There was no agreement to buy the lands for the purpose of resale, sharing equally in the expenses and profits, as was the case in *Beebe v. Oentine*, 97 Ark. 390, 134 S. W. 936. Hence they were not partners in fact nor in law.

[2] Again, it was contended by counsel for the plaintiff that under the facts a resale trust arose in favor of the plaintiff. We cannot agree with counsel in this contention. In *Red Bud Realty Co. v. South*, 96 Ark. 281, 131 S. W. 340, it was held that a resulting trust did not arise where a trustee purchased property solely upon his own credit and subsequently paid for it with trust funds. In order to constitute a resulting trust, the purchase money must be paid by another, or secured by another at the same time or previously to the purchase, and must be a part of that transaction. The trust must arise by virtue of the purchase, and, as none was created at that time, none can arise afterwards. In order to create a resulting trust in favor of one who pays the purchase money for property bought in the name of another, the payment must be contemporary with the trust, and not afterwards. Here, according to Pumphrey's own testimony, the purchase money was paid by him some time after the contract of purchase was made. Hence no resulting trust arose in his favor.

[3] Finally it is insisted that Pumphrey and Furlow entered into an oral agreement whereby the latter was to buy the tract of land and let the former have a part of it at the price originally paid for it, and that this contract was executed by Furlow's purchasing the land, and at a later date entering into a written contract with Pumphrey to sell him a part of it at \$25 per acre, when in truth and in fact Furlow had bought it for \$15 per acre. Even if it be held that this entitled Pumphrey to an abatement of the purchase price, it cannot be said that the decree of the chancellor should be reversed; nor can it be said that the finding of the chancellor in favor of the defendant is against the preponderance of the evidence. The testimony of the parties to this suit is in direct and irreconcilable conflict. Pumphrey stated in post-

tive terms that it was understood between him and Furlow that Furlow should buy the land and let him have a part of it at the original purchase price. On the other hand, Furlow is equally positive that no such agreement was made between him and Pumphrey. He stated that Pumphrey agreed to give him as much as \$25 an acre for a part of the land in order to induce him to go and make a trade for the land. He admits that he bought the land for \$15 an acre, but denies in most positive terms that he agreed to let Pumphrey have a part of it at that price. According to his testimony, it was understood in advance that Pumphrey was to pay him \$25 an acre for the land, and that Pumphrey actually agreed to pay that price at the time their written contract was executed.

It is insisted by counsel for the plaintiff that the plaintiff's testimony is strongly corroborated by the witness A. Hall. We do not think so. In the first place, Hall admitted that he did not like Furlow, and, when his whole testimony is examined in the record, it shows that he simply answered "Yes" to direct questions propounded to him. On cross-examination he showed that he did not know much about the matter, or at least did not understand it. He admitted that the transaction had slipped his memory.

Again, it is insisted that the testimony of the plaintiff is corroborated by the cashier of the bank, because he admitted that Furlow had told him that he did not want Pumphrey to know what he had paid for the land. This does not tend to corroborate the plaintiff's testimony. It may be that Furlow did not want Pumphrey to know what he gave for the land, for fear that Pumphrey would not carry out his agreement to purchase a part of it for \$25 an acre. It will be remembered that their agreement in the beginning was a verbal one. Then, too, according to Pumphrey, when he paid for his part of the land, the cashier of the bank and Furlow acted as if they were drawing up a mortgage in favor of the bank for Furlow's part of the purchase money. Both the cashier of the bank and Furlow denied that anything of this kind occurred.

Again, it is contended that the fact that Furlow withheld his contract from the record tended to corroborate the testimony of Pumphrey. We do not think so. There is nothing to indicate that it was withheld for that purpose. On the other hand, as soon as Pumphrey asked for the contract, it was delivered to him. The evidence of Furlow is corroborated to a certain extent by that of Davis, who bought some timber from Pumphrey on the part of the land allotted to him. Davis said that at the time he bought the timber Pumphrey told him that he did not know what Furlow had paid for the land. This tends to corroborate the testimony of Furlow.

It follows that the decree will be affirmed.

WOOD, J., dissents, holding with appellant on the last proposition, to wit, that appellant and appellee entered into an oral agreement whereby appellee was to buy the tract of land, and let appellant have a portion of it at the same price that appellee paid for it per acre. The finding of the trial court on this issue is clearly against the preponderance of the evidence.

MCCORKLE v. H. K. COCHRAN CO.
(No. 17.)

(Supreme Court of Arkansas. May 31, 1920.)

1. Frauds, statute of §159—Peremptory instruction on conflicting evidence, error.

Giving peremptory instruction for plaintiff in action on a contract required to be in writing is error, there being a sharp conflict in the evidence as to whether it was oral or written.

2. Evidence §410—Parol evidence admissible to add to contract, where memorandum is not signed as required by statute of frauds.

A contract to sell goods, required by statute of frauds to be in writing signed by the party to be charged, rests in parol if he did not sign the memorandum of sale, and so no rule of evidence is violated by oral testimony of a term in addition to that in the writing.

3. Frauds, statute of §152(1)—Not required to be pleaded where plaintiff declares on written contract and defendant denies it.

The statute of frauds need be pleaded only when plaintiff attempts to recover on an oral contract, and so not where plaintiff declares on a written contract signed by defendant, and defendant denies that he entered into a written contract.

Appeal from Circuit Court, St. Francis County; J. M. Jackson, Judge.

Action by the H. K. Cochran Company against T. G. McCorkle. Judgment for plaintiff, and defendant appeals. Reversed and remanded for new trial.

W. J. Lanier, of Forrest City, for appellant.
Mann & Mann, of Forrest City, for appellee.

MCCULLOCH, C. J. Appellee, a domestic corporation, sued appellant in the court below to recover damages for breach of an alleged contract for the sale by appellee to appellant of a carload of oats, bran, chops, and meal. It is alleged in the complaint that the contract was in writing, dated January 14, 1919, and specified that there was to be a delivery of the carload of stuff on January 31, 1919. Appellant denied in his answer that he had executed a written contract for

the purchase of the commodity as set forth in the complaint. There was a trial of the issues before a jury, and the court directed the jury to return a verdict in favor of appellee, which was done, and judgment was rendered accordingly.

Appellee's agent, Mr. Ownes, testified that he made the sale to appellant at the latter's place of business at Wheatley, Ark.; that appellant gave witness the order which witness reduced to writing and made a carbon copy thereof; and that appellant signed the original order, and witness delivered to appellant the carbon copy to which he subscribed the name of appellee. The original order with appellant's name signed to it was exhibited to the jury by the witness and was introduced in evidence. Appellant testified as a witness in his own behalf and denied that he signed the written order. He testified that the order was verbal, and that it was reduced to writing by Mr. Ownes as a memorandum of the sale, and that a carbon copy was delivered to him, but that he did not sign either the original or the carbon copy. He offered to testify that it was agreed between him and Mr. Ownes as a part of the oral contract of sale that he should have the right to cancel the order at any time on or before the date of delivery, January 31, 1919, and that he directed appellee before the date of delivery to cancel the order. The court excluded this testimony from the jury and, as before stated, gave a peremptory instruction in favor of appellee. We are of the opinion that the court erred in excluding the offered testimony, as well as in giving the peremptory instruction.

[1, 2] The main issue in the case was whether or not the contract was oral or written, and there was a sharp conflict in the testimony on that issue. Appellant testified positively that he did not sign the written order. If that was true, the written memorandum signed by appellee alone did not constitute a written contract and was within the statute of frauds. *Lee v. Vaughan's Seed Store*, 101 Ark. 68, 141 S. W. 496, 37 L. R. A. (N. S.) 352. Appellant not having bound himself by writing, the contract rested in parol, and no rule of evidence was violated by permitting oral testimony to be introduced establishing the additional agreement not set forth in the writing, to the effect that appellant should have the right to cancel the order before delivery.

[3] The point is made by counsel for appellee that the statute of frauds was not pleaded, but the answer to that contention is that the denial in appellant's answer was as broad as the allegation in the complaint. Appellee declared upon a written contract signed by appellant, and the latter denied that he entered into a written contract. It is unnecessary to plead the statute of frauds

until appellee undertakes to recover upon an oral contract.

For the errors indicated, the judgment is reversed, and the cause remanded for a new trial.

LAVENDER et al. v. FINCH. (No. 6.)

(Supreme Court of Arkansas. May 24, 1920.)

1. Sales \S 316(1)—Statutory remedy of seller cannot be enforced where property has reached purchaser for value.

The statutory remedy in the nature of attachment authorized by Kirby's Dig. \S 4966, 4967, in favor of a vendor of chattels to enforce payment of the purchase money, is not a lien, and cannot be enforced where the property has passed into the hands of a purchaser for value, though with notice before purchase that the price has not been paid.

2. Sales \S 328—Whether company, in whose hands timber attached, purchased through or from purchaser held for jury.

In action by seller of timber, wherein defendant company brought cross-action for wrongful attachment under Kirby's Dig. \S 4966, 4967, where there was evidence on both sides on question whether individual defendant who purchased timber from plaintiff was acting for himself or as agent for defendant company, instruction submitting issue whether company purchased timber direct from individual defendant, so that plaintiff's statutory remedy was not enforceable against defendant company, should have been given.

3. Trial \S 252(19)—Where undisputed evidence negatives payment, instruction on issue of payment properly refused.

Where undisputed evidence showed timber had not been paid for by individual defendant, instruction that, if jury found timber attached in hands of corporate defendant was fully paid for by individual defendant as set forth in timber deed, plaintiff could not recover against corporate defendant, was properly refused.

4. Pleading \S 380—Evidence on point not in issue inadmissible.

Where there was no issue, in view of an individual defendant's express admission, as to amount of consideration he was to pay for timber purchased from plaintiff by corporate defendant either through or from the individual defendant, his testimony in explanation of plaintiff's timber deed to him, as to how consideration of \$8,000 was arrived at, was inadmissible.

Appeal from Circuit Court, Cleburne County; J. M. Shinn, Judge.

Action by Carl Finch against M. M. Lavender and others, doing business as the Holly Grove Lumber Company. From judgment for plaintiff against defendants Lavender and the company, they appeal. Judgment as to defendant Lavender affirmed, and as to defendant company reversed and cause remanded.

Lee & Moore, of Clarendon, for appellants.
Geo. J. Crump, of Harrison, for appellee.

WOOD, J. Carl Finch executed a timber deed to M. M. Lavender conveying to him all the timber except cedar upon 320 acres of land described in the deed situated in Cleburne county, Ark. The consideration was \$8,000; \$1,600 cash and the balance of \$4,400 to be paid in semi-monthly payments of \$450 beginning from the date when the timber operations on the land were started. Lavender was to have two years from the date of the deed for cutting and removing the timber. The conveyance was subject to a lien on the timber in favor of C. L. Moore for \$750. The instrument contains the following provision:

"The payment of \$450 semimonthly are computed on basis of manufacture of 150,000 feet of lumber per month. In the event that said M. M. Lavender should fail to manufacture said amount the monthly payments shall be reduced in proportion to the number of feet of lumber manufactured. In the event that more than 150,000 feet of lumber is manufactured monthly then in that event the semimonthly payments are to be increased in proportion to the amount so manufactured. The above conditions shall be of natural origin and not of willful neglect or negligence.

"Lien is hereby retained upon the timber hereinafter mentioned to secure the residue of said above-mentioned deferred payments."

The appellee instituted this action against M. M. Lavender, H. K. Wellborn, and James Walls, doing business as the Holly Grove Lumber Company, hereafter for convenience called the company. He set up the timber deed and alleged that the sum of \$2,740 was due him thereunder; that the timber was sold to the company. He alleged that he had a specific lien on 100,000 feet of lumber in the possession of the company for the sum due him under the timber deed. He prayed for a specific attachment of the lumber for the balance due him.

Appellant Lavender answered denying that he was a partner in the company. He alleged that the company was composed of H. K. Wellborn, J. B. Wellborn, and J. A. Walls; that he had no interest in the company. He admitted the execution of the timber deed, and denied that the company knew anything about it. He alleged that they had no interest under the timber deed. Denied that the timber was purchased by him for the company. Alleged that it was purchased for himself. He denied that he was due the appellee any sum, and by way of cross-action he set up that the appellee had represented that there were at least 1,000,000 feet of merchantable timber on the land described in the timber deed; that these representations were designedly made to induce Lavender to purchase the timber; that he relied upon

them; that such representations were false and were known to be false by the appellee at the time they were made.

Lavender alleged that there were only 470,652 feet of merchantable timber, and that he had more than paid the price of such timber in accordance with the terms of the timber deed. He stated that the payments required under the timber deed would amount to \$2,823.93 and that he had paid appellee the sum of \$3,097.47. He denied the allegations of appellee's petition for specific attachment. Alleged that the 100,000 feet of lumber was the property of the company; that he in good faith had sold the lumber to the company. He prayed that the writ of attachment be dissolved and for such other relief as he might be entitled to have.

The company answered denying that Lavender was a member of the company and denied the allegations of appellee's complaint as to it. It alleged substantially the same facts as were set forth in the separate answer of Lavender and denied the allegations of appellee's petition for specific attachment. It alleged that the lumber attached was purchased by it from Lavender and that the attachment was wrongfully issued. It set up that by reason thereof it had been damaged in the sum of \$3,000, for which it prayed judgment.

The appellee answered the cross-complaint of Lavender and the company and denied specifically their allegations and prayed that they be dismissed and that he have judgment as asked in his original complaint.

The appellee testified that he executed the timber deed to Lavender; that Lavender told him that he was in the employ of the company; that he was its agent or partner; that he was letting the company have the timber that was cut from appellee's timber; that the company handled it exclusively; that in discussing the trade Lavender asked appellee about the amount of the timber, and appellee told him that it had been estimated at 1,250,000 feet. Appellee was not present when the estimate was made, but that was his information. Before the trade was consummated, appellee and Lavender agreed upon the price of the timber. Lavender went upon the land and made an estimate of the timber and came back and bought the timber of the appellee. Appellee did not represent to Lavender that the tract of land carried 1,000,000 feet of timber or more. Appellee was not an experienced lumberman, but Lavender was. They went back and forth across the land, and Lavender estimated it by the trees, and that is the basis upon which he bought it. Appellee was selling the timber for \$6,000 on the tract of land consisting of 320 acres. He sold it as a lump trade, and Lavender thought that there was ample timber there to justify him in buying same and paying the sum of \$6,000 for it.

Appellee further testified that Lavender

had paid him under his contract \$2,222.47, leaving a balance due him of approximately \$2,937.50, including a lien on the property at Harrison, which appellee took in part payment of the purchase money.

W. R. Casey testified that he was an attorney, and that he was employed by the appellee to institute suit against Lavender; that the day before the suit was instituted he heard the conversation between the appellee and Lavender in which Lavender admitted that he owed appellee on the contract the difference between the payments, a statement of which he exhibited, and \$6,000 the consideration named in the timber deed. He stated that he was sorry that he had not been able to pay, but the timber had not turned out as he had expected it to turn out. In the conversation Lavender told them that the timber was bought for the company; that he was acting merely as its agent; that he received a salary and some little commission; that was the reason that witness included the company as party defendant in the suit. Lavender said that most of the lumber attached came off of the land and belonged to the company. Upon that statement witness attached the lumber.

Lavender testified that he had bought the timber from appellee as evidenced by the timber deed; that he had cut and removed all the timber from the land embraced in that deed; that there were 470,272 feet; that he had paid appellee for this timber under the contract; that he did not owe him anything but in fact had overpaid him. He denied the conversation testified to by witness Casey. He stated that there was no one interested with him in the purchase of the timber from appellee. He denied that he had ever told or indicated to any one that he was the agent of the company. He stated that he told appellee and Casey that he was employed on a salary of \$50 per month and a commission of 50 cents per thousand to buy and handle lumber for them. His contract with the company was in writing. The company was in no sense interested in the purchase of the timber from appellee. He and appellee made an estimate of the timber before the deed was executed. Appellee stated that he was sure that there was 1,000,000 feet. Witness thought there would be something like 1,000,000 feet, and told appellee that he could afford to purchase at \$6 per thousand if there were 1,000,000 feet, and a contract was entered upon under the assumption that there was 1,000,000 feet. Witness made the payments as the contract provided. When the lumber was cut and brought to witness, he sold it to the company. It paid for it, and witness paid appellee. Witness was never at any time a partner in the company, in this timber deal or any other matter. The company did not authorize witness to buy any timber for it. Witness was only authorized to buy lumber for the company. Witness did

not want the attachment brought against the company, as they did not have a thing in the world to do with the deal; that is the reason witness asked appellee and Casey not to attach. Witness did not know exactly how much they attached, but there must have been 150,000 feet. The company got the lumber and shipped it away.

There was testimony corroborating the testimony of Lavender as to the amount of the timber.

Toney Lewis testified that his firm, the Lewis Bros., contracted with Lavender to cut the timber on the land in controversy, and it proceeded to cut all the commercial timber on the tract; that Lavender paid for same with checks on Heber Springs bank.

H. K. Wellborn testified: That the company was composed of himself, Walls, and B. G. Wellborn. That Lavender was not a member of the firm and had never at any time been the agent of the company. The company bought a portion of the pine timber that came from appellee's land and paid for all the lumber it bought from Lavender; that the lumber that was attached was not all the lumber the company had bought and paid for. It paid Lavender \$7,291.31 for the lumber. The company had nothing to do with the purchase of the tract of timber from the appellee. Did not know anything about it and was not interested in it. That the lumber attached was paid for by the company before the attachment was issued, and some of the lumber came from other parties. The company hired Lavender at \$50 per month and gave him a commission on lumber bought. The company also gave him a commission on lumber sold, the same as they gave other people. The company put a \$1,000 in the bank of Heber Springs with the understanding that when a load of lumber came to town Lavender was to buy it and give a check. The company told Lavender what he could pay for the lumber, and the \$1,000 was placed in the bank for him to buy lumber with. If he did not have a statement at the bank showing the number of feet and from whom purchased, the bank would not pay the check. The jury returned the following verdict:

"We, the jury, find for the plaintiff against the defendant M. M. Lavender in the sum of \$2,740 and sustain the attachment herein on the lumber."

The court rendered judgment against Lavender in favor of the appellee for that sum and sustained the attachment. The court also rendered judgment against the company and its bondsmen. From that judgment is this appeal.

The appellant company asked the court to instruct the jury in substance that, if the company purchased the lumber from Lavender and paid him for the same before the issuance of the writ of attachment, their verdict should be for the company, even though

Lavender may not have paid the appellee for the timber and even though the company had actual notice that the purchase money had not been paid by Lavender.

[1] The court erred in refusing to grant this prayer for instruction. Appellee asked and obtained specific attachment of the timber under the provisions of chapter 101 of Kirby's Digest. In *Neal v. Cone*, 76 Ark. 273, 88 S. W. 952, we held:

"The statutory remedy authorized by Kirby's Digest, §§ 4366, 4967, in favor of a vendor of chattels, to enforce payment of the purchase money, is not a lien, and cannot be enforced where the property has passed into the hands of purchasers for value, even though they may have had notice before their purchase that the purchase money had not been paid."

See, also, *McComb v. Judsonia St. Bank*, 91 Ark. 218, 120 S. W. 844.

[2] The appellee caused the attachment to be issued on the theory that Lavender was a partner in the company or that he was the agent of the company to purchase the timber of the appellee. The court instructed the jury that the undisputed evidence showed that Lavender was not a partner in the company. There was testimony tending to prove that he was not the agent of the company for the purchase of the timber. There was evidence to warrant the finding, and therefore a submission of the issue to the jury as to whether or not the company purchased the timber direct from Lavender. Therefore the above prayer for instruction should have been granted.

The appellant company also asked the court to instruct the jury that, if they found that the timber attached was fully paid for by Lavender in the manner set forth in the timber deed, the appellee could not recover as against the company.

[3] As we construe the timber deed, the undisputed evidence shows that the timber had not been paid for by Lavender. Therefore there was no testimony to warrant the submission of that issue to the jury, and the court did not err in refusing to grant such prayer.

The company urges that there was a conflict in some of the instructions given by the court, which we find to be the case; but we deem it unnecessary to discuss these for the reason that the court is not likely to repeat this error on rehearing.

Appellant Lavender contends that by the terms of the timber deed he was to pay appellee \$6 per thousand for all commercial timber except the cedar on the 320 acres of land described in the deed, and that the court erred in refusing to permit him to testify in explanation of the timber deed as to how the consideration of \$6,000 was arrived at; but we do not find in the abstract of appellant where the court refused to permit testimony to this effect to be introduced by Lavender.

According to the abstract, no ruling of the court was elicited on that issue.

[4] Moreover, the appellee alleged that the sum of \$6,000 was to be paid for the timber. Appellant Lavender does not deny that such was the consideration, but, on the contrary, he expressly admits that "he was induced to purchase said timber at and for the sum of \$6,000." There was therefore no issue as to the amount of the consideration that Lavender was to pay for the timber. Even if Lavender had offered the testimony as above contended by him, the court would not have erred in excluding the same and thus restricting the parties to the issue raised by the pleadings.

The appellant Lavender, while admitting that he was to pay \$6,000 for the timber, alleged that this consideration was agreed upon on account of the false representations of the appellee to the effect that there was 1,000,000 feet of timber in the tract. But there was no testimony to warrant the court in submitting an issue of deceit and fraud to the jury. Under the undisputed evidence, the court would have been justified in instructing the jury to return a verdict in favor of the appellee on this issue.

There was no error in the rulings of the court on the issues between the appellee and appellant Lavender. There was evidence to sustain the verdict as to appellant Lavender. The judgment as to him is therefore correct, and it will be affirmed.

As to the appellant company, the judgment will be reversed and the cause, for the error indicated, will be remanded for a new trial.

DAMRON v. BOWLEN. (No. 30.)

(Supreme Court of Arkansas. May 31, 1920.)

Deeds §211(1)—Evidence held to sustain finding of aged grantor's incapacity.

In suit by an aged woman, formerly incompetent and under guardianship, to cancel her deed to an 80-acre farm, evidence held to sustain the finding of the trial court in favor of plaintiff that she did not possess capacity to execute the deed.

Appeal from White Chancery Court; John E. Martineau, Chancellor.

Suit by Hattie M. Bowlen against Mollie L. Damron. From judgment for plaintiff, defendant appeals. Affirmed.

Brundidge & Neely, of Searcy, and Gardner K. Oliphint, of Little Rock, for appellant. Culbert L. Pearce, of Bald Knob, for appellee.

SMITH, J. This suit was instituted August 19, 1919, by appellee to cancel a deed

which she had executed to appellant on October 26, 1918, and had delivered on the following day, to an 80-acre farm owned by her. The deed provided that appellee should remain in full and complete possession of the land during her life, and that she should receive as her own all rents and profits therefrom, and that she should have the exclusive control and management thereof. Appellee was past 70 years, and was childless. She had no blood relatives, except some nephews; but appellant and a Mrs. De Lille had both lived with appellee before they were married, and each of them called appellee mother, and she called each of them daughter. In May, 1918, appellee executed and delivered to Mrs. De Lille a deed to another 80-acre tract of land she owned, and appellant insists that there was no more consideration for that deed than there was for her own, and that the consideration in each case was love and affection, and she insists that the fact that no suit has been brought to cancel the De Lille deed should be strongly persuasive of the grantor's capacity to execute the two deeds. This litigation does not involve the De Lille deed; but it appears that Mrs. De Lille was an adopted daughter, and had lived in appellee's home for many years, while appellant was not an adopted daughter, and had lived in appellee's home only a few months altogether; in fact, for a period of about 15 years there was no communication between appellant and appellee. Appellee lived on the farm near Bald Knob, in White county, and appellant's home was at Bono, in Craighead county. Appellant came to appellee's home in response to a telegram, signed by appellee, asking her to do so, and appellee within a few days after appellant's arrival executed and delivered the deed here sought to be canceled.

It is not shown that any undue influence was exerted to obtain the deed, but the court found that appellee did not possess sufficient mental capacity to comprehend the effect of her action in executing the deed, and decreed its cancellation, and this appeal is from that decree.

Appellee testified that she was past 70, and that her health was feeble; that she was told that she had frequently called the name of appellant during a spell of illness she had had, but that she had no recollection of having done so, and that if she did this it was done in delirium because of the fever she had; and that she was sick when she executed the deed and did not realize or appreciate what she had done; and that, while she remembered something about the transaction, it was "kind of like a dream to her." Mrs. De Lille testified that appellant's husband went to town for a notary public, and that Mr. De Lille went with him; that the deed had been prepared before the notary came,

and that the notary was there only a few minutes; and that appellee at the time was just getting over an attack of the influenza, from which she had been suffering.

A Dr. W. A. Clark testified that he had known appellee for 30 years, and that he had been her family physician for the 2 years immediately preceding the time of taking his deposition; that in November or December, 1917, appellee was adjudged insane by the probate court of White county, and he was appointed her guardian, and that he served as such until April or May, 1918, when he procured his discharge; that appellee was taken to a hospital in Memphis in August, 1917, and remained there for five months, during which time her condition, both mental and physical, was very bad; that after her return from the hospital her condition was improved, but that she had since had other serious illness. He expressed the opinion that appellee was incapable of transacting ordinary business affairs, and that "her mind is like a child's mind," but that she was in better physical condition in the last three months than she had been in for more than 2 years before.

A Dr. Cleveland testified that he had known appellee for 35 years, and for the large part of that time had been her physician, and he expressed the opinion that in recent years "she has very much deteriorated, both mentally and physically," and "in my opinion she was not capable of transacting important business" at the time of the execution of the deed.

J. S. Baker, a near neighbor who had known appellee intimately since 1880, testified that "her mind seemed kind of wavy," and a number of other neighbors detailed various incidents upon which they based the opinion that appellee's mentality had failed, and that she was not capable of understanding and transacting important business.

A tenant on the place named Sprouse, in response to the question whether appellee had sufficient mental capacity to execute the deed, expressed the opinion that, if she had mind enough to bring a suit to set her deed aside, she had mind enough to make the deed. Another tenant named Russell expressed the opinion that he had observed no change in appellee's mentality, and that she had the capacity to make the deed or other contract. He testified that no one could get along with appellee, and he had been unable to do so, and that she came into the field where he was plowing, and stated that he was trespassing and ordered him out of the field.

Other witnesses who had known appellee for varying lengths of time, and who had more or less association with her, expressed the opinion that she was sane. Some of these witnesses had had opportunity to see and observe appellee quite frequently, while oth-

ers based opinions upon observation so slight as to carry but little weight.

The two physicians had special opportunities to observe appellee; but, even without their testimony, the evidence appears to be fairly balanced on the question of appellee's competency. The testimony of these physicians should, of course, be considered; in fact, their testimony is highly persuasive, and upon a consideration of the whole testimony we have concluded that the finding of the court below is not clearly against the preponderance of the evidence, and the decree is therefore affirmed.

HARROWER v. INSURANCE CO. OF NORTH AMERICA et al. (No. 19.)

(Supreme Court of Arkansas. May 31, 1920.)

1. Contracts \S 245(2)—Evidence \S 441(1)— Oral agreements and antecedent writings merge in subsequent written contract.

Oral agreements and antecedent writings forming a part of negotiations for a contract become merged in the subsequent written contract, and are incompetent for the purpose of enlarging the scope of such written contract.

2. Evidence \S 441(13)—Insurance \S 131(3) —Oral contract merged in written contract.

Where insurer and insured entered into an oral agreement for a policy covering a term of three years, "and then from year to year," etc., and the insurer delivered a policy for one year, which was accepted by insured and the premium paid, the policy executed and delivered constituted a contract between the parties, and the oral agreement was merged into it, and was incompetent as evidence to enlarge the scope of the written contract.

3. Frauds, statute of \S 45(1)—Contract to insure for a year, providing for issuance of other policies for three years, within statute.

An oral agreement, at the time a policy of insurance was issued for one year, that other policies should be issued from year to year for three years, was an agreement which was not to be performed within a year, and was within the statute of frauds (Kirby's Dig. \S 3654).

4. Frauds, statute of \S 150(1)—Statute prop- erly raised by demurrer.

Question as to whether contract set out in petition was within statute of frauds was properly raised by demurrer.

Appeal from Circuit Court, Yell County, Dardanelle District; A. B. Priddy, Judge.

Action by Mrs. Lela H. Harrower against the Insurance Company of North America and another. Judgment for defendants, and plaintiff appeals. Affirmed.

John B. Crownover, of Dardanelle, for appellant.

Mehaffy, Donham & Mehaffy, of Little Rock, for appellees.

McCULLOCH, C. J. Appellant instituted this action in the circuit court of Yell county, Dardanelle district, to recover on an alleged oral agreement between her and the two insurance companies sued, whereby the latter agreed to insure her property, consisting of a stock of merchandise and store fixtures, against loss or destruction by fire. The court sustained a demurrer to the complaint, and rendered judgment dismissing the complaint, from which an appeal has been prosecuted.

It is alleged in the complaint that appellant entered into a contract with the said companies, acting through their general agent at Dardanelle, on January 28, 1916, whereby it was agreed that the companies should insure her property "for the term of three years from that date, and then from year to year until such time as she might direct such contract should cease, provided defendants continued the business of writing fire insurance in said town of Dardanelle after said term of three years."

It is further alleged that, pursuant to said contract, the said companies issued and delivered to her a joint policy for the first year in part performance of the original agreement, and that she paid the premium for that policy and at that time directed the agent to write other policies "from year to year during the said three years and to come for the premium money when such policies were so written," and that the said companies, through their agent agreed to do so. It is also alleged that the property was destroyed by fire on October 8, 1918.

[1, 2] It is familiar law that prior oral agreements and antecedent writings forming a part of the negotiations for a contract become merged in the subsequent written contract and are incompetent as evidence for the purpose of enlarging the scope of such written contract. *Graves v. Bodcaw Lumber Co.*, 129 Ark. 354, 196 S. W. 800. This applies to the alleged oral agreement set forth in the first part of the complaint, for according to the allegations of the complaint the agreement was for a policy covering the term of three years from that time "and then from year to year," etc., and that the companies issued and delivered a policy for one year, which was accepted by appellant and the premium paid. The policy issued and delivered constituted a contract between the parties and all antecedent negotiations and agreements were merged into it. *Union National Bank, Oshkosh, v. German Ins. Co.*, 71 Fed. 473, 18 C. C. A. 203; *Moore v. Insurance Co.*, 72 Iowa, 414, 34 N. W. 183; *Commercial Accident Co. v. Bates*, 176 Ill. 194, 52 N. E. 49;

Insurance Co. v. Mowry, 96 U. S. 544, 24 L. Ed. 674.

[3] The last allegation with respect to the agreement between the parties is that at the time of the issuance of the policy the further agreement was that other policies should be "issued from year to year during the said three years," and this contract, according to the allegations, was not to be performed within a year from the making thereof and was within the statute of frauds. *Kirby's Digest*, § 3654. According to the allegations of the complaint, this contract was executory, and was not to take effect immediately, and was not a contract of insurance, but was one to insure or to issue a policy at a future date. A contract of insurance usually takes effect immediately, whereas a contract to insure or to issue a policy takes effect at a future date. The distinction between the two classes of contracts is made clear in the cases cited on the brief of counsel for appellees.

[4] The question as to the contract being within the statute of frauds was properly raised by demurrer. *Izard v. Connecticut Fire Ins. Co.*, 128 Ark. 433, 194 S. W. 1032.

The court was therefore correct in sustaining the demurrer, and the judgment is affirmed.

FIRST NAT. BANK OF FORREST CITY v. N. R. McFALL & CO. (No. 412.)

(Supreme Court of Arkansas. May 17, 1920.
Rehearing Denied June 14, 1920.)

1. Banks and banking — Dishonor of check held slander of business warranting general, without proof of special, damages.

Refusal of a bank to honor a merchants' or traders' check when sufficient funds are on deposit constitutes a slander of the merchant's or trader's business, and general damages are allowed as a matter of course, without proof of special damages.

2. Banks and banking — Dishonor of check conclusively presumed from wrongful dishonor of check.

Where a merchants' or traders' check is wrongfully dishonored by the bank, damage is conclusively presumed, and is not rebuttable by proof.

3. Banks and banking — Mitigation of damages for wrongful dishonor of check may be shown.

Although the presumption that a depositor is substantially damaged by wrongful dishonor of his check is conclusive, proof that no injury was sustained is nevertheless admissible in mitigation of damages.

McCulloch, C. J., dissenting.

Appeal from Circuit Court, St. Francis County; J. M. Jackson, Judge.

Action by N. R. McFall & Co. against the First National Bank of Forrest City. Judgment for plaintiff, and defendant appeals. Affirmed.

R. J. Williams and Mann, Bussey & Mann, all of Forrest City, for appellant.

C. W. Norton, of Forrest City, for appellee.

HUMPHREYS, J. Appellee, a mercantile partnership composed of N. R. McFall and W. A. Scales, instituted suit against appellant, an incorporated bank, in the St. Francis circuit court, to recover damages on account of appellant's refusal to pay checks drawn by appellee on checking funds theretofore deposited by it in said bank. This is the second appeal in the case. The first appeal appeared here under the style of N. R. McFall et al. v. First National Bank of Forrest City, and is reported in 138 Ark. 370, 211 S. W. 919. The case was reversed on the first appeal and remanded for a new trial, because the trial court instructed the jury that it was incumbent upon appellee to prove actual damages to justify a recovery in excess of nominal damages. In reversing the case, this court laid down the rule that merchants' and traders' checks, wrongfully dishonored through mistake or otherwise by the bank upon which drawn, are entitled to recover substantial damages against the bank dishonoring them, without pleading or proof of special injury. In other words, the court announced the doctrine that the law presumed the wrongful dishonor of merchants' and traders' checks substantially damaged their credit, for which they could recover temperate or reasonable damages. This rule became the law of the case and served as the court's guide on the retrial of the cause.

The only difference between the testimony on the former and present appeals is that the present record reflects evidence adduced by appellant tending to show that the credit of appellee was not injured by the dishonor of the checks. Upon reversal and remand, the cause was submitted to a jury upon the pleadings, evidence, and instructions of the court, conforming to the rule announced in the former appeal, which resulted in a verdict and judgment for \$500 against appellant in favor of appellee. From the judgment an appeal has been duly prosecuted to this court.

[1, 2] It is insisted by appellant that the only effect of the rule announced in the former appeal was to place the burden upon appellant to show that appellee's credit was not injured, in order to exempt it from liability

for substantial damages, and that, having made such affirmative showing, it was entitled to an instruction to the effect that the presumption of substantial damages, resulting from the wrongful dishonor of a merchant's or trader's check, could be overcome by evidence showing to the contrary. Two instructions, Nos. 2 and 3, requested by appellant and refused by the court, were to that effect. It is urged that the court committed reversible error in refusing to give them. One reason for the rule allowing a merchant or trader temperate or reasonable damages for the wrongful dishonor of his checks on mere proof of his character of business is because it is almost impossible to prove special injury or damage. It is just as impossible to prove that no injury resulted as to prove it did. For that reason, if no other, the doctrine contended for by appellant is not sound. The wrongful dishonor of a merchant's or trader's check is a slander on his business. The foundation of his business is the credit which is injured per se by the dishonor of his paper. So this character of case is akin to and comes within the category of slander suits in which general damages are allowed as a matter of course without proof of special damages. The necessary and natural consequence of the dishonor of a merchant's or trader's check is to substantially damage him, and the conclusive presumption indulged by the law that he is damaged is based upon such necessary or natural result. Conclusive presumptions of law are irrebuttable by proof. The court did not therefore err in refusing to give appellant's requests Nos. 2 and 3.

[3] Notwithstanding the law presumes a depositor is substantially damaged by the wrongful dishonor of his check and that he is entitled to temperate damages without proof of special damage, yet it is permissible to make such proof in mitigation of damages. The fact that such proof is admissible in behalf of a merchant or trader whose check had been wrongfully dishonored would suggest the right on the part of the bank dishonoring the check to affirmatively show that no injury to such depositor's credit resulted, in mitigation of damages, but it could only be used in mitigation of damages, because, if the rule were otherwise, the conclusive presumption of substantial damages, indulged by the law, might be rendered nugatory.

No error appearing, the judgment is affirmed.

McCULLOCH, C. J., dissents.

RUDOLPH v. KELLY. (No. 23.)

(Supreme Court of Arkansas. May 31, 1920.)

1. Sales §323—Testimony properly excluded as not germane to issue.

In action to recover a touring car, claimed by defendant to have been purchased by him with a deed to certain land, testimony for plaintiff as to the value of the land, and that at the time the witness traded it to defendant for defendant's automobile, which defendant had been trying to induce plaintiff to accept in exchange for his car, defendant represented that he had the right to sell the car, etc., held properly excluded, as not germane to issue.

2. Pleading §36(2)—Plaintiff cannot claim no sale to defendant, while claiming a sale effected by false representations.

In action to recover automobile, claimed by defendant to have been bought by him with a deed, plaintiff will not be heard to say in one breath that he did not sell the car to defendant, and in the next breath that, if he did sell it, defendant made false representations.

Appeal from Circuit Court, Clark County; George R. Haynie, Judge.

Action by Irvin H. Rudolph against J. E. Kelly. From a judgment for defendant, plaintiff appeals. Affirmed.

McMillan & McMillan, of Arkadelphia, for appellant.

W. H. Mizell, of Arkadelphia, and D. D. Glover, of Malvern, for appellee.

WOOD, J. This action was brought by the appellant against the appellee to recover the possession of a Ford touring car. The appellant alleged that he was the owner and entitled to the immediate possession of the car; that it was worth \$500; that the appellee upon demand of appellant refused to surrender the same. The appellee denied the allegations of the complaint, and alleged that he had been damaged by the wrongful bringing of the suit in the sum of \$500, for which he asked judgment.

The facts, which the testimony on behalf of the appellee tended to show, are substantially as follows: Appellant was a dealer in automobiles. The appellee owned a Chevrolet car, and proposed to the appellant to trade him the same for a Ford. This the appellant refused. The appellee gave his Chevrolet and the sum of \$50 to Charlie Allen for a 40-acre tract of land near Arkadelphia, Ark. While the appellee was negotiating for this land, the appellant told him that, if he could make the deal with Allen for the land, appellant would give the appellee the Ford car for the land. After the appellee had bought the land, he and his wife made the deed to the appellant. While appellee was negotiating for the land, the appellant told

appellee that he was going away, and that appellee could make the deed and deliver it to appellant's agent, Thompson, who was authorized to receive it. The appellee delivered the deed to appellant's agent, who delivered to appellee the Ford car.

The facts, which the testimony on behalf of the appellant tended to show, are substantially as follows: When appellee proposed to trade appellant 40 acres of land for appellant's Ford car, appellant told appellee that he might make the trade if the land was all right. Appellee said it was a 40-acre tract of good land; that the timber had never been cut over, and he thought it was worth \$400. Appellant let appellee have the car in controversy, to deliver appellee's Chevrolet, which appellee had traded for the land. Appellee never brought the car back. Appellant was to get a note secured by the land and a Ford car. Appellant had never seen the land at the time he agreed to take same in trade for the car. The appellant did not trade the car for the land. Appellee did not make the deed to the appellant before he (appellee) took possession of the car. Appellee had the car in his possession, which appellant had loaned him, and when appellant got back from Hot Springs he found that appellee had left the deed with appellant's agent, Thompson. Appellant denied that he had instructed his agent, Thompson, to deliver the car and accept the deed in his absence.

Appellant testified that the car in controversy was taken in on trade for a Dodge car from one Brewer; the understanding being that he, appellant, or Brewer, had the right to dispose of it for \$500, the amount of the balance Brewer owed on the Dodge car. The effect of appellant's testimony was that he did not own the car in controversy at the time he loaned the same to the appellee; that it was only left with him by Brewer to secure appellant in the sum of \$500, for the balance of the purchase money due him from Brewer for a Dodge car, which either he or Brewer had the right to sell; that appellant loaned the car in controversy to the appellee; that appellant was contemplating a trade of the car with the appellee for 40 acres of land, provided the appellee obtained the land, but that the trade between the appellant and appellee had not been consummated at the time appellant left for Hot Springs. The trade between appellant and appellee, according to appellant's version, was that he was to sell appellee the car for \$500 and take the appellee's note for same secured by the land and the car.

The appellant offered to prove by Charlie Adams the value of the land which appellant sold to the appellee. The court refused to admit this testimony, to which ruling the appellant excepted. The appellant further

offered to show by witness Allen that, at the time he traded the land to the appellee for the Chevrolet car, appellee represented that he had the right to sell the Chevrolet; that at that time one Dr. Moore held a \$75 ownership note against the car which appellee traded to Allen for the land.

The court refused to allow this testimony, to which ruling the appellant duly excepted. The trial resulted in a verdict and judgment in favor of the appellee. From that judgment is this appeal.

[1] The court did not err in its rulings. The offered testimony was not germane to the issue between the appellant and the appellee. The offered testimony related to issues that were entirely collateral. The clear-cut issue between the appellant and the appellee, as set forth by the pleadings and the testimony of the parties, respectively, is whether or not the appellant had sold the automobile in controversy to the appellee for the tract of land conveyed by the appellee to appellant. Appellant set up in his complaint that he was the owner and entitled to immediate possession of the automobile. He grounded his ownership and right to possession on the following testimony:

"The trade was I was to get a note secured by the land and the Ford car. I loaned him the car to go make the trade with Mr. Allen and deliver the Chevrolet to Mr. Allen."

In his rebuttal testimony, the appellant again stated:

"The trade is like I stated it was in my original statement. I did not trade the car for the piece of land."

On the other hand, appellee denied that the appellant was the owner of the car, and testified in part:

"I traded my land for the car. I got the land from Charlie Allen. Traded Allen a Chevrolet car, and Allen made me a deed to the land. It was a fractional 40, but the same land traded to me by Allen was traded to Rudolph. We made an even trade, the land for the car."

[2] The appellant will not be heard to say, in one breath, "I did not sell the car," and in the next breath, "But, if I did sell it, the appellee made false representations which caused me to do so, and the appellee consequently had no title to the land which he gave me in consideration for the automobile." A party will not be allowed in this manner to play fast and loose in a lawsuit. The positions which appellant thus asks the court to allow him to assume in this litigation were wholly inconsistent with each other. Furthermore, even if the appellant had set up that there was a sale of the automobile, and that the consideration therefor had failed on account of the deceit and fraud of the appellee, there is no testimony

whatever in the record to sustain such contention. There is no testimony to prove that if the sale was made, which was asserted by the appellee and denied by the appellant, the consideration failed because the appellee had no title to the land. On the contrary, the undisputed evidence shows that his title to the land was complete.

The issue, and the only issue, between the appellant and the appellee, was submitted to the jury under correct instructions. There was evidence to sustain the verdict.

Affirmed.

HUGHES v. GARDNER. (No. 20.)

(Supreme Court of Arkansas. May 31, 1920.)

1. Appeal and error \S 1097(1)—Declarations of law on first appeal controlling on second.

On a second appeal where the issues and facts are the same as on the first appeal, what was declared as the law on the first appeal must control.

2. Bills and notes \S 485—Note presumed genuine, and burden on defendant in absence of denial by affidavit.

Kirby's Dig. \S 3108, authorizing a writing purporting to have been executed by a party and referred to in and filed with a pleading, to be read as genuine against such party, unless he denies its genuineness by affidavit before trial, allows note sued on in absence of such affidavit, to be introduced without formal proof of execution and with presumption of its genuineness, casting on defendant the burden of proving it not genuine.

3. Bills and notes \S 537(2)—Genuineness of signature for jury on conflicting evidence.

Genuineness of defendant's signature to note sued on is for the jury, there being not only the presumption of genuineness under Kirby's Dig. \S 3108, because of defendant's failure to file affidavit of denial, but there being introduced for comparison a recorded mortgage purporting, and testified by plaintiff, to have been executed by defendant, though opposed to this is the testimony of defendant and others that the signature to the note is not hers.

Appeal from Circuit Court, Benton County; W. A. Dickson, Judge.

Action by John Gardner against Pearl Hughes. Judgment for plaintiff, and defendant appeals. Affirmed.

W. N. Ivie, of Rogers, for appellant.

Rice & Rice, of Bentonville, for appellee.

WOOD, J. This action was brought by the appellee against the appellant. The action was grounded on a promissory note dated June 23, 1913, purporting to have been executed by E. R. Hughes and appellant, Pearl Hughes, to the appellee for the sum of \$500.

In defense of the action appellant set up *non est factum* and *coverture*.

This is the second appeal in this case. *Gardner v. Hughes*, 136 Ark. 382, 206 S. W. 678.

[1] The issues here are the same as they were on the former appeal. Therefore, unless there has been some substantial change in the facts, what was declared as the law on the former appeal must control now under the familiar doctrine of the law of the case. *Hartford Fire Ins. Co. v. Enoch*, 79 Ark. 475, 96 S. W. 393; *Morgan Engineering Co. v. Cache River Drainage Dist.*, 122 Ark. 491, 184 S. W. 57; *Carter v. Younger*, 123 Ark. 266, 185 S. W. 435; *U. S. Annuity & Life Ins. Co. v. Peak*, 129 Ark. 50, 195 S. W. 392, 1 A. L. R. 1259.

On the former appeal the court directed a verdict in favor of Pearl Hughes. On the issue of *non est factum*, under the facts developed in the former appeal, we said:

"If the undisputed evidence showed that appellee did not sign the note, it was proper for the court to sustain her plea of *non est factum* by directed verdict. Under the state of pleadings, the note itself is introduced, and her signature is *prima facie* genuine. * * * Her subsequent denial thereof raised a question of disputed fact, which could only be determined by the jury."

Mrs. Hughes testified on the former trial as she did at the last trial that she did not sign the note. On the former appeal we held that her testimony did not overcome the *prima facie* genuineness of the note under the state of the pleadings, and that it was still a question for the jury as to whether the note was genuine.

On this issue, if there were no other testimony in the present record than that of Mrs. Hughes, this court under the rule of law of the case would be bound by its former announcement, even though such announcement was erroneous.

On the last trial, Mrs. Gould, the mother of Mrs. Hughes, testified that she was familiar with the latter's handwriting, and that the signature on the note in controversy was not that of Mrs. Hughes. E. G. Sharp, cashier of the Farmers' State Bank in Rogers, testified that he had in his possession checks signed by Mrs. Hughes and knew her signature, and that he did not believe that the signature on the note was that of Mrs. Hughes.

[2] Section 3108 of Kirby's Digest provides:

"Where a writing purporting to have been executed by one of the parties is referred to in, and filed with, a pleading, it may be read as genuine against such party, unless he denies its genuineness by affidavit before the trial is begun."

This is a rule for the production of evidence which relieves the plaintiff, who sues

on a writing purporting to have been executed by the defendant, of the burden of proving the genuineness of the writing before its introduction as evidence where the defendant by affidavit has not denied the genuineness of the writing before the trial is begun. But in the absence of this statute the plaintiff would have the burden of showing the genuineness of the writing before he could introduce the same in evidence. The purpose of the statute, however, was only to permit the reading or introduction of the writing without formal proof of its execution and to make it *prima facie* genuine. Where the defendant has not complied with this statute, the plaintiff may introduce and read the writing on which his action is founded, and under the statute the presumption is that it is genuine. The burden is then cast upon the defendant, if he would defeat the action, to prove that the writing is not genuine.

In other words, a failure upon the part of the defendant to comply with the statute raises the inference or presumption of law that the writing on which he is sued and purporting to be signed by him is genuine, and, having failed to file the affidavit provided by the statute, the burden is cast on him to show that it is not genuine.

The rule applicable to such presumptions is announced in 16 Cyc. 1073, as follows:

"A presumption of law is a rule of law announcing a definite probative weight attached by jurisprudence to a proposition of logic. It is an assumption made by the law that a strong inference of fact is *prima facie* correct, and will, therefore, sustain the burden of evidence, until conflicting facts on the point are shown. When such evidence is introduced, the assumption of law is *functus officio* and drops out of sight. The inference of fact which has been assumed to be correct continues to have its logical weight in the case."

[3] Learned counsel for appellant contends that, under the above rule, the presumption that the note is genuine has been overcome by the testimony of appellant and her two corroborating witnesses that the signature is not appellant's. But we are not called to determine whether the testimony thus produced by appellant is sufficient to overcome the *prima facie* genuineness of the note raised by the failure of appellant to comply with the statute, for the reason that appellee did not rest upon the statutory presumption. Appellee introduced in evidence a mortgage which purported to be signed by appellant and duly acknowledged by her. This mortgage was recorded. Counsel for appellant objected to the introduction of the mortgage on the ground that it was not the basis of the suit and had not been filed with any pleading in the case, and was therefore not a paper that could be used in evidence for the purpose of comparing the signature thereon with the signature on the

note to prove the genuineness of the latter. The court overruled the objection and permitted the appellee to introduce the mortgage.

Counsel for appellant says in his brief that the signing and execution of the mortgage was denied under oath, and that this mortgage was clearly inadmissible under the doctrine announced by this court in *Miller v. Jones*, Adm'r, 32 Ark. 337, where we held (quoting syllabus):

"Proof of handwriting may be made by comparison, by the jury, of the writing to be proven with other writings, admitted to be genuine, already in the case; but a comparison by writings not already in the case, is not admissible."

Now when the mortgage was offered and introduced in evidence appellant did not object to its introduction on the ground that it was not signed by her, but only on the ground that "It is not sued on in this case, and is not a paper belonging to or filed with any pleading in the suit." Besides, as we construe the record, abstracted by appellant, the execution of the mortgage by appellant was not disputed when appellee was seeking to prove that the signature to the note was made by the same person who signed the mortgage.

The record shows the following on the redirect examination of witness Sharp by the appellee:

Q. Now, I will ask you to take these two signatures and this signature to the mortgage introduced. The signature of Pearl Hughes to the mortgage and the signature on that note, and tell the jury whether they are the same.

Counsel for Defendant, W. N. Ivie: I object to that. In the first place, there is no contest or dispute about these two signatures.

The Court: You admit they are by the same party?

Counsel for Defendant, W. N. Ivie: We do not admit that they are the same party, but we deny signing either note or mortgage. It is not disputed.

The Court: If you do not dispute it, there is no use of going into it.

Counsel for Defendant, W. N. Ivie: We do not dispute it.

Counsel for Plaintiff, C. M. Rice: Let the record show it, then, that there is no dispute.

The Court: All right.

The above examination concluded the testimony on behalf of the appellee. The appellee testified, at the time the mortgage was introduced, that they (E. R. and Pearl Hughes) executed and delivered to him the mortgage to secure the note, and appellee's counsel then announced that the purpose of introducing the mortgage was to compare the signatures. Therefore the manifest purpose of the above examination of witness Sharp was to show, by comparison of the signature to the note which was in dispute, with the signature to the mortgage, the execution of which by appellant had been prov-

ed and was not in dispute, that appellant had signed the note as well as the mortgage. The court evidently so understood it, and obviously counsel for appellant so understood it. If counsel wished to object to the mortgage on the ground that appellant had not signed same, then was the time for him to speak and let the court know that he made this additional objection to the mortgage as evidence. True, the appellant testified that she "signed neither one of them." But even at that time appellant did not ask to have the mortgage excluded, on the ground that it had not been signed by her.

We conclude therefore that the court did not err in admitting the mortgage in evidence for the purpose indicated. This mortgage and the admission of appellant's counsel in open court in connection therewith, to the effect that there was no dispute that the signature to the note was by the same party who signed the mortgage, were most cogent facts before the jury on the last trial that they did not have before them on the first.

In the case of *Miller v. Jones*, *supra*, papers that were not in evidence and that had been excluded were handed to the jury for the comparison of signatures on papers that were in evidence in the case, and we held that—

"It was error * * * to allow the papers not in the case to be handed to the jury for a comparison with those read in evidence."

That case has no application for the reason that here the mortgage was read in evidence and was a paper in the case.

Concerning the issue of coverture on the former appeal, we said:

"There a substantial proof in the case tending to show that the money was loaned to appellee on the statement that it was to be used for the purpose of going East to look after her separate property. If her signature was genuine, a question for the jury to determine, then the proof tended to show that appellee armed her husband with a negotiable instrument to raise money for her personal benefit and she would be bound by the statement of her agent, thus authorized to raise money for her, to the effect that money was wanted for her personal benefit. Appellee's denial that the money was borrowed for her personal benefit or that of her separate property raised a question of fact for the jury to determine."

On the issue of coverture the facts developed at the last trial are substantially the same as they were in the first trial. In all essential particulars there is no material difference. Hence what was said on this issue on the former appeal is controlling. *Hartford Fire Ins. Co. v. Enoch*, *supra*; *Ins. Co. v. Peak*, *supra*.

The court did not err in refusing to take the issue of non est factum and coverture

from the jury. These issues were submitted under correct instructions.

Appellant, as one of the grounds of her motion for new trial, challenges the integrity of the verdict on account of alleged misconduct of one of the jurors as set forth in an affidavit attached to the motion. It could serve no useful purpose to set out and comment upon the contents of the affidavit. It suffices to say that we have considered the same and find that the trial court did not err in refusing to set aside the verdict because of alleged misconduct of one of the jurors.

There is no reversible error.

The judgment is therefore affirmed.

LIGHTLE v. SCHMIDT et al. (No. 25.)

(Supreme Court of Arkansas. May 31, 1920.)

Lis pendens — 25(1) — Purchaser in unenforceable parol contract made prior to notice of suit involving title held bound by notice.

Where suit for specific performance of a written contract was instituted by a buyer of land before the seller's deed to a third person pursuant to an earlier parol contract of sale was delivered, and before the third person had paid any part of the purchase money or had taken possession, the third person's contract was unenforceable, and he was therefore affected by the buyer's *lis pendens* filed under Kirby's Dig. § 5149.

Appeal from White Chancery Court; John E. Martineau, Chancellor.

Suit by J. E. Lightle against Sidney W. Schmidt, wherein J. S. Booth intervened. From decree dismissing the complaint, plaintiff appeals. Reversed, and cause remanded.

On the 18th day of May, 1919, J. E. Lightle brought suit in equity against Sidney W. Schmidt to enforce the specific performance of a written contract for the sale of a tract of land in White county, Ark., and a *lis pendens* notice was filed under the provisions of section 5149 of Kirby's Digest.

J. S. Booth filed an intervention and claimed to be an innocent purchaser for value of the land in controversy.

It appears from the record that the duly authorized agent of Sidney W. Schmidt entered into a written contract with J. E. Lightle to convey to him the land in controversy, and, it being conceded that the contract was binding upon Schmidt, it is not necessary to set it out in the statement of facts.

Another agent of Schmidt entered into a verbal contract with J. S. Booth for the sale of the land in controversy to him. A deed was forwarded to Schmidt for execution and

was received and executed by Schmidt on May 17, 1919. Schmidt, after executing the deed, held it for a few days to see if his other agent would not get a greater price for the land. Schmidt was notified by telegram that J. E. Lightle, on the 19th of May, 1919, had filed a suit for specific performance of the contract for the sale of the land made with him. The parol contract between the agent of Schmidt and J. S. Booth for the sale of the land in controversy was made on May 15, 1919. Under its terms the cashier of a bank was directed to pay the purchase money when the deed and abstract of title was delivered to it. Booth did not enter into possession of the land and was notified of the suit by Lightle for a specific performance before the deed was delivered to the bank.

The complaint of the plaintiff was dismissed for want of equity, and the case is here on appeal.

Brundidge & Neelly, of Searcy, for appellant.

Miller & Yingling and Eugene Cypert, all of Searcy, for appellees.

HART, J. (after stating the facts as above). It is conceded that the contract between Lightle and Schmidt was one that the former might enforce in a suit for specific performance if Booth was bound by the *lis pendens* notice filed when the suit was instituted. In *Marshall v. Whatley*, 136 Ga. 805, 72 S. E. 244, 36 L. R. A. (N. S.) 552, it was held that a suit for the specific performance of a contract for the sale of real estate is within the rule as to *lis pendens*, and that one who acquires an interest in the property pending the suit from a party thereto is bound by the result of the suit. Several decisions from courts of last resort of other states are cited in support of the rule. The doctrine of *lis pendens* is founded on public policy and has been long adhered to as essential to the due administration of justice in order that an end may be put to litigation. *Bailey v. Ford*, 132 Ark. 208, 200 S. W. 797.

Counsel for Booth seek to uphold the decree upon the principles announced in *Moulton v. Kolodzik*, 97 Minn. 423, 107 N. W. 154, 7 Ann. Cas. 1090, and *Parks v. Smoot*, 105 Ky. 63, 48 S. W. 146, in which it is held that a person who enters into an executory contract for the purchase of land, prior to the institution of a suit involving the title thereto, acquires an interest in the land and may after such suit is brought pay the purchase money and receive a deed to the land unaffected by the rule of *lis pendens*. Those cases, however, have no application to the facts in the present case. In each of those cases the executory contract of sale was binding and enforceable in equity. It is true that in the latter case the contract of sale was a parol one, but the purchaser had entered into the possession

of the land and was entitled to a specific performance of his contract. Here the suit by Lightle for specific performance was instituted before the deed to Booth was delivered and before Booth had paid any part of the purchase money. Neither had Booth entered into the possession of the land. Hence he was not entitled to a specific performance of his contract. Before the rights of parties completing a parol contract for the sale of lands pending litigation will be protected, it must appear that the interest under the executory agreement is capable of being enforced. *Rooney v. Michael*, 84 Ala. 585, 4 South. 421. In order that the interest acquired by Booth may be effectual against the rule of *lis pendens*, his contract must be enforceable. *Gibler et al. v. Trimble*, 14 Ohio, 323, and *Clarkson v. Morgan's Devisees*, 6 B. Mon. (Ky.) 441.

As we have already seen, the contract with Booth was not obligatory on the parties and could not have been enforced. Therefore he was affected by the *lis pendens* notice in the suit for specific performance by Lightle against Schmidt.

It follows that the chancery court erred in dismissing the complaint of the plaintiff for want of equity. For that error the decree must be reversed, and the cause remanded for further proceedings in accordance with the principles of equity and not inconsistent with this opinion.

MITCHELL v. REDUS. (No. 32.)

(Supreme Court of Arkansas. May 31, 1920.)

1. Specific performance §55—Contract held unenforceable on account of agreement to stifle prosecution.

Where plaintiff was placed in possession of defendant's property under promise to convey it to her either on condition she would not prosecute defendant for carnal abuse of her daughter, or sue him for damages, or else under a voluntary oral gift, a court of equity will not enforce specific performance, on account of the illegality.

2. Specific performance §47—Betterments on property given orally held too slight to support specific performance.

Repairs costing \$2 or \$3, made by plaintiff on the roof of property orally given her by defendant, were betterments too inconsequential to be classed as valuable and permanent to entitle her to specific performance of defendant's agreement to convey.

Appeal from Pulaski Chancery Court; John E. Martineau, Chancellor.

Suit by Luevina Mitchell against L. W. Redus. From decree dismissing the bill, plaintiff appeals. Affirmed.

J. A. Weas, of North Little Rock, and Gardner K. Oliphint, of Little Rock, for appellant.
John M. Rose, of Little Rock, for appellee.

HUMPHREYS, J. Appellant instituted suit against appellee, on the 28th day of July, 1919, in the Pulaski chancery court, to require him to execute her a deed to lots 7 and 8, block 6, Ratterree's addition to Argenta, Ark., in accordance with an alleged agreement to that effect between them. Appellee filed answer, denying that he had agreed to convey the lots to her. The cause was submitted to the court upon the pleadings and evidence, which resulted in a dismissal of appellant's bill for want of equity. From that decree, an appeal has been duly prosecuted to this court.

The undisputed evidence showed that appellee, a married negro man, employed a negro girl, 12 years of age, in May, 1915, daughter of appellant, to work in his rooming house in Argenta; that she remained in his employ a number of months, and during that time gave birth to a boy child, who bears the name of appellee.

The testimony of appellant tended to show that appellee assumed responsibility for the pregnancy of the girl, and voluntarily agreed to convey said property to appellant when he paid it out, and, in the meantime, to keep it in repair, if appellant would not prosecute him for carnal abuse or sue him for damages; that she agreed to the proposal, and, pursuant to the agreement, was placed in the possession of the property, where she has since continuously resided with her family, including the girl and child; that, during the occupancy, appellee paid the taxes, kept the property in repair, and made permanent improvements thereon, appellant expending \$2 or \$3 only, for repairs on the roof; that appellee never collected any rent from her or demanded any until a short time before the institution of the suit; that appellee then attempted to sell the property to a third party, and demanded possession thereof.

Appellee's testimony tended to show that he was not the father of the child; that he never assumed responsibility for it; that he never promised to convey the property to the appellant to prevent her from prosecuting or suing him; that he never placed her in possession thereof under a contract to convey it to her when he paid for it, but, on the contrary, placed her in possession under a contract of tenancy, which remained in force until the institution of this suit.

[1, 2] It is unnecessary to analyze and determine in whose favor the evidence preponderates in order to adjudge the issues involved in this appeal. Giving the evidence of appellee full credence, it shows either that she was placed in possession of the property un-

der promise to convey it to her, on condition she would not prosecute appellee for carnal abuse or sue him for damages, or else under a voluntary oral gift. A court of equity will not enforce specific performance in either case. First: "Any contract, the consideration of which in whole or in part is to conceal a crime or to stifle a prosecution therefor, is illegal and void, though it may represent a just debt and security for its payment." *Goodrum v. Merchants' & Planters' Bank*, 102 Ark. 326, 144 S. W. 198, Ann. Cas. 1914A, 511. Appellant's evidence carries an admission that the consideration, in part, for the sale and seisin of the lots was to stifle a prosecution for carnal abuse. This necessarily rendered the contract void and nonenforceable as against public policy. Second: "A parol gift of land will not be enforced unless followed by possession and by valuable and substantial improvements made by the donee, or unless there are some other special facts which would render the failure to complete the donation peculiarly inequitable." *Young v. Crawford*, 82 Ark. 33, 100 S. W. 87. The evidence is entirely barren of special facts in relation to the property, or its occupancy which would render the failure to complete the donation peculiarly inequitable and unjust. Likewise, the betterments placed upon the property by appellant were too inconsequential to be classed as valuable and permanent.

No error appearing, the decree is affirmed.

HEMPSTEAD COUNTY v. WILSON. (No. 16.)

(Supreme Court of Arkansas. May 31, 1920.)

1. Appeal and error \S 907(5)—Court must assume documentary evidence not in exceptions had force for successful party.

Where the testimony of a witness as set forth in the bill of exceptions shows that he testified from certain documentary evidence, and that it constituted a part of the evidence in the case, but it was not copied in the bill of exceptions, the Supreme Court must assume that such documentary evidence had some probative force in establishing the claim of plaintiff, who secured judgment.

2. Appeal and error \S 1082(2) — Objection to items of county clerk's fee bill cannot be first made on county's appeal from circuit court.

Where no objection as to the insufficiency of the specification of items of the fee bill of the county clerk was made in the circuit court on appeal from allowance of claim by county court, it is too late for the county to raise the question on its appeal from circuit court.

Appeal from Circuit Court, Hempstead County; George R. Haynie, Judge.

Action by John L. Wilson against Hempstead County. From judgment for plaintiff, defendant appeals. Affirmed.

U. A. Gentry, of Hope, for appellant.
Steve Carrigan, of Hope, for appellee.

McCULLOCH, C. J. Appellee Wilson is county clerk of Hempstead county and filed a claim for fees against the county in the following form:

"Washington, Ark., April 28, 1919.

"County of Hempstead, to John L. Wilson, County Clerk, Dr.

"Services in and about County Court, Fee Book, pages 165 and 168, \$133.05."

An affidavit in statutory form was attached to the claim. The county court allowed \$99.15 of the claim, but refused to allow the balance, and appellee prosecuted an appeal to the circuit court, where, on a trial anew, the claim was allowed in full.

[1] It is contended that there was not sufficient evidence to sustain the judgment. Mr. O. C. Bailey, the clerk of the circuit court, was introduced as a witness, and testified concerning appellee's fee bill, and as to the method of making out circuit court fee bills. It appears from the testimony that the fees of appellee were based upon services performed with reference to the fee bills approved by the circuit court and filed with the county court for allowance. The testimony of Mr. Bailey, as set forth in the bill of exceptions, showed that he testified from the itemized circuit court fee bills, and they constituted a part of the evidence in the case; but they were not copied in the bill of exceptions. We must assume therefore that those fee bills had some probative force in establishing appellee's claim in connection with the testimony of Mr. Bailey.

It is also contended that appellee's claim was not presented in proper form, in that it was not itemized as required by statute, which provides that—

"The county court shall require an itemized account of any claims presented to them for allowance, sworn to as required by the preceding section, and may, in all cases require satisfactory evidence, in addition thereto, of the correctness of the account, and may examine the parties and witnesses on oath touching the same." Kirby's Digest, § 1454.

[2] Appellee's claim as filed did set forth the pages of the fee book in the office of the county clerk for the specification of the items. No objection as to the insufficiency of the specification of the items was made in the court below, and it is too late to raise that question here for the first time. If objection had been made on that point, the court could have permitted amendment.

We are of the opinion therefore that there are no grounds for a reversal of the judgment, and the same is affirmed.

PATTON et al. v. TAYLOR. (No. 13.)

(Supreme Court of Arkansas. May 24, 1920.)

1. Insane persons §71—Chancery court held to have jurisdiction to cancel curator's deed.

A court of chancery has jurisdiction of a suit to cancel a deed given by a curator under order of court, expunge it from the record, and to regain possession of land, the remedy at law either by motion to vacate or by certiorari not being effective to reach cancellation or to expunge the deed from the record, and therefore not being adequate and complete.

2. Insane persons §94(1)—Court may inquire into defendant's sanity for purpose of particular suit.

It is proper when a defendant not under guardianship develops evidence of insanity for the court to inquire into his mental condition for purposes of the particular suit in order to protect his interests by the appointment of a guardian or next friend to defend for him.

3. Insane persons §87—Power to sue and be sued stated.

An insane person not under guardianship may sue and be sued the same as a sane person.

4. Appeal and error §174—Former insanity of party cannot be first raised on appeal.

In a suit by a plaintiff formerly insane to cancel a curator's deed and certain judgments and orders, defendants, not having initiated an inquiry into plaintiff's sanity below, cannot, on appeal, insist that the suit should have been dismissed on account of the insanity of plaintiff below.

5. Insane persons §70—Probate court held not to have jurisdiction to sell realty of non-resident insane person.

Acts 1905, p. 198, §§ 1, 2, not authorizing appointment of guardian for nonresident insane person on sale of property in this state by local guardians, and section 3, limiting the jurisdiction of probate courts over the property of nonresidents to authority to appoint guardians and to sell upon proper bond, do not give a probate court jurisdiction over the person or property of a nonresident insane person so as to authorize a local guardian to make a valid conveyance of such insane person's realty.

6. Improvements §4(1)—Purchaser of land under void judicial proceedings not precluded from benefits of betterment statute.

A purchaser of land under a curator's deed given by order of court under void judicial proceedings is not thereby precluded from the benefits of the betterment statute, since occupants of land under color of title, who make improvements thereon in good faith believing themselves to be the owners thereof, are protected

under such statute to the extent of the enhanced value of the lands by reason of their improvements.

7. Improvements §4(2)—Test of good faith under betterment statute stated.

To entitle an occupant of land to remuneration for his improvements under the betterment statute, the test of good faith is whether he made the improvements in the honest belief that he was the true proprietor, and in ignorance that any other person claimed a better right to the land.

8. Insane persons §71—Purchaser held entitled to value of improvements in suit by ward to cancel deed.

The purchaser of land under a curator's deed, given under void judicial proceedings, who make improvements upon the land, held entitled, in a suit by the ward to cancel the deed, to a lien on the land for its enhanced value by reason of the improvements made by him.

9. Improvements §4(5)—Under betterment statute, recovery may be had for enhanced value of land.

In allowing for improvements under the betterment statute, evidence should be considered as to the enhanced value of the land by reason of the improvements, and the cost of the improvements is merely a circumstance tending to establish such enhanced value.

Appeal from Benton Chancery Court; B. F. McMahan, Chancellor.

Suit by Amanda E. Taylor against J. W. Patton and others, to cancel a deed and certain orders and judgments. Decree for complainant, and defendants appeal. Affirmed in part, and in part reversed and remanded, with directions.

Rice & Rice, of Bentonville, for appellants.

HUMPHREYS, J. Appellee instituted suit against appellants in the Benton chancery court to cancel a deed from M. C. Patton, as curator, to J. W. Patton, of date September 9, 1916, conveying the following described real estate in Benton county, Ark., to wit: N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, section 21, and S. $\frac{1}{2}$ S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$, section 16, all in township 20 N., range 32 W.—to expunge the record thereof and to cancel the orders and judgments of the Benton county probate court, ordering and confirming the sale of said land. On the 14th day of August, 1916, appellant, M. C. Patton, mother of appellee, applied to the Benton county probate court for appointment as guardian of appellee's estate, consisting of the lands aforesaid, without notice to and the presence of appellee before the court. Application for said appointment was made under section 1, Act 77, Acts of the General Assembly of 1905. Letters of guardianship were immediately issued, and on the same day appellant, M. C. Patton, applied for an order of sale of said land under section 2 of said act, and procured it without giving 30

days' notice in a newspaper published in said county, as provided in said section. Pursuant to said order, the land was sold at public sale, after 20 days' notice in a newspaper of general circulation in said county, to J. W. Patton, the highest bidder at said sale, for \$1,000, the full value of the land, according to the evidence. The sale was reported to, and confirmed by, the court. A deed was ordered, executed, approved, and delivered to the purchaser, J. W. Patton, who took possession of the land and began to make improvements thereon after the sale, and completed them after procuring and recording his deed. The improvements consisted of clearing, digging a well, building a house and barn, etc. At the time and prior to the appointment of M. O. Patton as guardian for appellee aforesaid appellee had been a resident of Oklahoma for eight or nine years, and was adjudicated insane, and confined in the asylum at Vinita in said state on the 1st day of July, 1916, where she remained until June, 1917, at which time she was discharged, as recovered. The chancery court canceled the deed, orders, and proceedings of the probate court in relation to the sale of the lands, decreed possession thereof to appellee, denied appellant, J. W. Patton, a lien on the land for his improvements, but permitted him to remove them in so far as it was possible without injury to the land. From that judgment and decree an appeal has been duly prosecuted to this court.

[1] Appellants contend that the chancery court had no jurisdiction to try the cause, because appellee had a complete and adequate remedy at law, either by motion to vacate the orders and judgments of the probate court or by certiorari to quash them. The gist of the action was to cancel the deed, expunge same from the record, and regain possession of the land. The remedy at law, either by motion to vacate the judgment or by certiorari, would not have reached the cancellation of the deed or the expunging of same from the record, and therefore would not have been adequate and complete.

[2-4] It is next insisted that the court should have dismissed the cause, because not brought by guardian or next friend. This suit was filed on August 1, 1919, after appellee had been discharged from the Vinita asylum, as recovered. The certificate of the medical superintendent of that institution is as follows:

"I hereby certify that Amanda E. Taylor was received in this institution on the first day of July, 1916, from Ottawa county and discharged June, 1917, as recovered."

The evidence tended to show appellee was afflicted with periodical insanity, having lucid intervals. It is proper, when a defendant, not under guardianship, develops evidences of insanity for the court to inquire into his mental condition for purposes of the particular suit, in order to protect his inter-

ests by the appointment of a guardian or next friend to defend for him. *Peters v. Townsend*, 93 Ark. 103, 124 S. W. 255. Such inquiry might be appropriate to protect a sane defendant against the unauthorized suit of an insane person, but no such inquiry was suggested or demanded by appellants, and none was made on the court's own motion. An insane person, not under guardianship, can sue and be sued the same as a sane person. *Peters v. Townsend*, *supra*. Not having initiated such inquiry in the court below, appellants cannot now insist that the suit should have been dismissed on account of the insanity of appellee, the plaintiff below.

[5] It is next insisted that the probate court had jurisdiction of the subject-matter of litigation, and that the proceedings therein are not subject to attack. The probate court of Benton county had no jurisdiction over the person or property of appellee, and could acquire none by the appointment of a local guardian. Sections 1 and 2, Act 77, Acts 1905, do not authorize the appointment of a guardian for a nonresident insane person, nor the sale of such an one's property in this state by local guardian. Those sections only apply to insane citizens of this state confined in institutions or asylums for insane, either in or out of the state. Section 3 of said act governs with reference to the sale of the property of nonresidents who are insane. That section limits the jurisdiction of the probate courts of this state over the property of nonresidents who are insane to authority to order the duly appointed guardian, or his agent under power of attorney, in the state of his residence, to sell said property and receive the proceeds therefor upon the execution of proper bond. The proceedings therefore, of the probate court of Benton county, in appointing a local guardian to sell the real estate in question, were without authority and void.

[6-9] Lastly, it is insisted that the court erred in denying appellant, J. W. Patton, remuneration for his improvements to the extent that they enhanced the value of the real estate. The mere fact that he purchased the land under void judicial proceedings cannot preclude him from the benefits of the betterment statute. Occupants of land under color of title, who make improvements thereon in good faith, believing themselves to be the owners thereof, are protected under that statute to the extent of the enhanced value of the lands by reason of their improvements. To entitle an occupant to remuneration for his improvements, the test of good faith is: Did he make them in the honest belief that he was the true proprietor and in ignorance that any other person claimed a better right to the land? *Beard v. Dansby*, 48 Ark. 183, 2 S. W. 701. Applying that test in this case, we think appellant, J. W. Patton, was entitled to a lien on the land for its enhanced

value by reason of the improvements made by him. Practically all the improvements were after he obtained a deed to the land. All the parties connected with the transaction thought the proceedings to sell the land were legal. There is nothing from which collusion in the sale and purchase thereof can reasonably be inferred. The property sold for its full value. J. W. Patton was a young farmer, inexperienced in titles. The evidence with reference to the value of the improvements consisted largely of the cost thereof. It should have been directed to the enhanced value of the land by reason of the improvements. The cost thereof would only be a circumstance tending to establish the enhanced value of the property on account of the improvements.

For the error indicated; the decree is reversed, in so far as it denied appellant, J. W. Patton, a lien on the land for the enhanced value thereof because of the improvements he made thereon, and the cause remanded, with directions to proceed in accordance with this opinion. In all other respects, the decree is affirmed.

INTER-STATE BUSINESS MEN'S ACC. ASS'N v. SANDERSON. (No. 18.)

(Supreme Court of Arkansas. May 31, 1920.)

1. Insurance §665(5)—Insured held prevented from attending to business by disease.

In an action on a health policy evidence held to warrant the finding that insured was compelled by disease to refrain from performing every act of business, and was under the constant care of a physician, etc.

2. Insurance §525 — Insured may "remain continuously and strictly within the house" within policy, though he takes outdoor exercise.

Where a health policy provided benefits if the insured should by disease be compelled to "remain continuously and strictly within the house" under treatment of a regular physician, the fact that insured took air and exercise under direction of his physician will not preclude recovery, but insured cannot recover if the disease was one which required him to remain outside of the house rather than within it; the insurer having fixed the terms of the contract.

3. Insurance §668(11) — Whether insured confined to house within health policy held for jury.

In an action on a health policy, where the insured claimed the benefit prescribed for strict confinement in the house, the question whether he was so confined, it appearing that he made daily trips for medicinal waters, etc., held for the jury.

4. Trial §177 — Requested instruction not waived by request for peremptory instruction.

Though both parties requested peremptory instructions, yet where defendant request-

ed another instruction, submitting the issues to the jury, it did not waive its right to such submission.

5. Trial §177 — Requested instruction on clauses of policy held to preserve right to submission, though peremptory instruction also requested.

In an action on a health policy where both the insured and insurer requested peremptory instructions, the insurer's requested instruction, submitting the two clauses of the policy under which the insured claimed benefits, was sufficient to preserve its right to submission of the issues to the jury; the clause being self-explanatory.

6. Evidence §589—Jury not required to accept uncontradicted testimony of party.

Where plaintiff was one of the principal witnesses in his own behalf, the jury are not, because of his interest, bound to accept his testimony.

Appeal from Circuit Court, Miller County; George R. Haynie, Judge.

Action by H. G. Sanderson against the Inter-State Business Men's Accident Association. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

Arnold & Arnold, of Texarkana, for appellant.

M. E. Sanderson, of Texarkana, for appellee.

McCULLOCH, C. J. This is an action on a policy of insurance issued by appellant to appellee, insuring appellee "against loss of time by disease not due to accidental injury." The two clauses of the policy on which the action is founded read as follows:

"Loss by Disease.

"Section III.

"House confinement \$50.00 first week and 29 succeeding weeks.

"The insurance provided shall cover only in the event that the disease shall compel the insured to remain continuously and strictly within the house for a period of or exceeding two full weeks and be under the constant treatment of a regular physician.

"Nonconfinement \$15.00 first week and \$20.00 for 8 weeks.

"The insurance provided shall cover only in the event the disease shall compel the insured to refrain from performing every act of business and be under the constant treatment of a regular physician."

Liability is asserted for the maximum amount (\$175) allowed under the second clause, and for 25 weeks, or \$1,250, under the first clause. Appellant conceded liability for the amount sought to be recovered under the second clause, and tendered the amount to appellee. On the trial of the issues before

a jury the court gave a peremptory instruction in appellee's favor. The question now before us on this appeal is whether or not the testimony presented an issue which should have been submitted to the jury.

[1] The case was tried on the testimony of appellee himself and Dr. Phillips, who was appellee's physician. Appellant introduced no testimony at all. Appellee resided at Ash-down at the time he was stricken with the disease which caused the loss of time involved in this inquiry, and was engaged in farming and in the retail lumber business. He was manager of a lumber yard, and looked after the office work, as well as the outside business. He became ill in the early part of the year 1918 while the policy was in force, and on consulting Dr. Phillips it was found that he was suffering with nephritis. On March 13, 1918, the physician pronounced appellee's condition of health to be very serious, and thereafter appellant gave but little attention to business, and his condition of health continued to grow worse. The testimony tended to show that he was entirely unable to give attention to business, and that he merely went down to his place of business, from time to time, to attend to business to a very limited extent. The evidence was sufficient, we think, to justify the finding that appellee's disease was sufficient to cause him to "refrain from performing every act of business and be under the constant treatment of a regular physician," within the meaning of the second clause of the policy. However, appellant concedes liability on this branch of the case, and it is unnecessary to discuss the evidence at length so far as it tends to establish liability under that clause.

On July 5, 1918, Dr. Phillips, who had been attending appellee regularly up to that time, advised him that his condition had become so serious that he should give up all matters of business and pleasure and go to Marlin Wells, Tex., to receive the benefit of the water and climate of that place. The physician also advised appellee that the fresh air and sunshine of that climate, together with the water, would do more to build him up than anything else. At that time appellee had become very much weakened from the disease and was easily fatigued. To use the exact language of the physician, his testimony was that—

"The fresh air and sunshine to this patient were more beneficial than remaining in the house, and tended to arrest the disease from which he was suffering."

Pursuant to the physician's advice, appellee sold out his business and moved to Marlin, Tex., where he remained for a considerable time for the purpose of getting the benefit of the mineral water and the climate at that place. He was under the treatment of another physician while he was there, but his

course of conduct and the progress of the disease is disclosed entirely by appellee's own testimony, as he did not introduce any other witness as to his stay at Marlin Wells.

Appellee stated in his testimony that he was confined to the house during his stay there, except that he made a daily trip to the post office to get his mail, and made trips a distance of four blocks, to the wells to get water twice a day, and that he occasionally would stop for a short time at one of the stores along the way and make a purchase. He testified that there was a large pavilion at the well, and that he would occasionally sit there for half an hour at a time, and that while at home he spent much of the time sitting out on the porch. On cross-examination of appellee it was drawn out that he had made two or three statements to appellant, and in response to the question whether or not that he had been "strictly and continuously confined within the house" he answered in the negative.

Each side asked for a peremptory instruction, and in addition to that appellant asked the court to give the following instruction:

"You are instructed that the policy sued on herein reads that plaintiff is entitled to recover only in two events:

"First. In the event the disease shall compel the insured to remain continuously and strictly within the house for a period of or exceeding two full weeks and be under the constant treatment of a regular physician, he is entitled to recover \$50 for the first week and 29 succeeding weeks.

"Second. In the event the disease shall compel the insured to refrain from performing every act of business and be under the constant treatment of a regular physician, he is entitled to recover \$15 for the first week and \$20 per week for eight weeks, and you are instructed that the plaintiff is entitled to recover nothing herein except as provided for in said policy covering total disability, and for such time as he was only partially disabled on account of illness, he is entitled to recover nothing."

[2-4] It is contended by learned counsel for appellant in the first place that according to the undisputed evidence there can be no recovery under the first clause of the policy, for the reason that appellee's disease was not sufficient to compel him "to remain strictly and continuously within the house" within the meaning of the terms of the policy. It is argued that according to appellee's own testimony he was not continuously confined to his house by the disease, but that he left the house each day for the purpose of making trips to the well and certain other purposes. On the other hand, it is contended by appellee that according to the undisputed evidence he was confined to the house continuously within the meaning of the policy, and that the court was correct in giving a peremptory instruction. We are of the opinion that this

branch of the case is ruled by the law as declared by this court in the case of *Great Eastern Casualty Co. v. Robins*, 111 Ark. 607, 164 S. W. 750, where we held, quoting from the syllabus, that—

"The term continuous confinement, within the meaning of an indemnity insurance policy, insuring plaintiff against sickness, does not mean that plaintiff must have been confined within the house every minute or hour, and the fact that he went out occasionally for the purpose of taking exercise and fresh air under the instructions of his physicians is not sufficient to prevent plaintiff from recovering in an action on the policy."

The court in that case had given an instruction in line with the law as declared above, and we approved that instruction, notwithstanding the fact that there was undisputed evidence to the effect that the insured, though confined to the house by disease, went out for a short time each day, under the directions of his physician, for the purpose of getting sunshine and fresh air. The language of the policy in that case was substantially the same as the language of the policy now before us, except the word "strictly" is used in this policy, but was not used in the policy in the other case. We do not think that the use of that word changes the effect of this clause of the policy. If the language of the policy in the other case was not to be literally construed so as to take the case without its operation because the insured had in fact been outside the walls of the house, we do not think the use of the word "strictly" in the policy now before us would call for a more literal application of the language used. It would be a very unreasonable construction to put on the policy, and would practically nullify the benefits paid for under the policy, to say that because a man was out of the house one time he was not insured against loss. If necessary daily trips to get water and for sunshine under the advice of a physician excluded the insured from the benefits under the policy, then it would follow that a single excursion from the house under any circumstances would have the same effect. The language should have reasonable interpretation to give the policy some effect rather than to nullify it.

On the other hand, it does not follow that if it is necessary for the insured to remain out of the house for the purpose of getting fresh air he can claim the benefits of the policy, because the insurer had the right to state the terms upon which its obligation was incurred, and they saw fit, in this instance, to insure only against such diseases as continuously confined to the house. If the disease required the insured to remain outside of the house, rather than to remain in the house, it does not come within the terms of

the policy. But short trips away from the house for purposes necessary to bring beneficial results to the health of the insured does not take the case out of the operation of the language of the policy, which requires confinement to the house. Our conclusion is therefore that the testimony presented a question of fact for the determination of the jury as to whether or not appellee's disease and his state of health at the time required continuous confinement to the house, within the meaning of the policy, notwithstanding his short trips out for water and sunshine, and this issue should have been submitted to the jury. Both sides asked for a peremptory instruction, but appellant did not waive its right to insist on a submission of the issues to the jury, as it asked another instruction submitting the issues. *St. L. S. W. Ry. Co. v. Mulkey*, 100 Ark. 71, 139 S. W. 643, Ann. Cas. 1913C, 1339; *Sims v. Everett*, 113 Ark. 198, 168 S. W. 559, L. R. A. 1918C, 7, Ann. Cas. 1916C, 629; *Supreme Tribe of Ben Hur v. Galley*, 117 Ark. 145, 173 S. W. 838; *St. L. I. M. & S. Ry. Co. v. Ingram*, 118 Ark. 377, 176 S. W. 692.

[5] It is said by counsel for appellee that the additional instruction asked by appellant was not correct, and that therefore the case stood as if appellant had only asked for the peremptory instruction so as to bring it in the operation of the rule in *Mulkey v. Railway*, supra.

Instruction No. 2, requested by appellant, was a substantial copy of the two clauses of the policy, which were self-explanatory. The effect of the instruction, if given, would have been to submit to the jury the question of fact as to whether or not appellant's contention fell within the clause of the policy.

[6] It cannot be said that the testimony was undisputed, as there was no other testimony adduced in support of appellee's right of action under the first clause of the policy, and, appellee being an interested witness, the jury was not bound to accept his testimony. *Skilern v. Baker*, 82 Ark. 80, 100 S. W. 764, 118 Am. St. Rep. 52, 12 Ann. Cas. 243; *Lilly v. Robinson Merc. Co.*, 106 Ark. 571, 153 S. W. 820; *Harris v. Bush, Receiver*, 129 Ark. 369, 196 S. W. 471. Besides, under appellee's own testimony, it was a question for the jury to determine whether or not the disease was sufficient to compel his continuous confinement to the house. If the jury accepted his testimony as true, different inferences might have been drawn from it with respect to the effect of the disease in confining him to the house, except as to necessary trips for the benefit of the water and sunshine.

For the error of the court in withdrawing the case from the jury by a peremptory instruction, the judgment will be reversed, and the cause remanded for a new trial.

CITY OF DERMOTT et al. v. STINSON.
(No. 7.)

(Supreme Court of Arkansas. May 24, 1920.
Rehearing Denied June 14, 1920.)

1. Adverse possession §33 — Evidence held to show city must have known abutting owners were claiming common.

In property owner's suit to enjoin city's interference with a claimed common, evidence held to show that, so far as city was concerned, it did not recognize that abutting owners had any title to the common, but also that title was in dispute, showing city authorities must have known circumstances, and that abutting lot owners, plaintiff among them, were holding and claiming to own the property, and yet took no steps to oust them.

2. Adverse possession §31—Holding of common by abutting owners sufficient to give city notice of claims.

Where a common, on which certain lots abutted, was claimed by each abutting owner, and fenced so that lots extended across common to a street, character of inclosures and holdings was such as to give notice to members of city council that owners of abutting lots were claiming common adversely.

3. Adverse possession §50 — Contract between lot owner claiming part of common and city held a recognition of lot owner's rights.

So-called contract, executed by a lot owner abutting on a common and claiming to own part thereof, and by the city, concerning the building of sidewalks along the street on which the common abutted, held not a recognition by lot owner of title in city to land comprising common, being rather a recognition by city that lot owner was owner of his part of common, having right to possession.

4. Adverse possession §7(2)—Possession of common for statutory period gave title.

Where a lot owner occupied part of an abutting common from 1883 to 1918, when he was given notice by the city to remove his fence, holding adversely, openly, and continuously, he acquired title by such adverse possession for statutory period of 35 years.

5. Adverse possession §109—Lot owner with title to common by adverse possession held not estopped to assert it.

Lot owner abutting on common who acquired title to a portion thereof by 35 years' adverse possession held not estopped by accepting from the city an amount expended in the construction of a sidewalk along the street on which the common abutted, and by surrendering the contract concerning the sidewalk, from asserting title to his part of the common.

Appeal from Chicot Chancery Court; N. B. Scott, Special Chancellor.

Suit by H. O. Stinson against the City of Dermott and others. From decree for plaintiff, defendants appeal. Affirmed.

D. Dudley Crenshaw, of Dermott, for appellants.

Streett & Burnside, of Lake Village, for appellee.

WOOD, J. The city of Dermott, through its council, passed a resolution to open a certain common within the city limits.

The appellee instituted this action against the appellants to enjoin the opening of the common. He alleged that he is the owner of lots 3 and 4 of the original hamlet of Dermott, as platted by S. A. Duke, March 30, 1882, which plat was duly recorded in Chicot county. He alleged that he occupied these lots with an additional strip contiguous thereto, as his homestead, and that he and his predecessors in title had been in the continuous, open, and adverse possession of same for more than 35 years, claiming to own same. He alleged that the strip of land which adjoined his lots is a part of what was designated in the plat filed by Duke as a "common"; that about the year 1883 by common consent of the owners of the lots adjoining upon said common, the same was inclosed by the respective owners, thus extending their holdings the width of each of their said lots west to the public road, which afterwards was incorporated and became a part of the Main street of the city of Dermott; that until July 8, 1918, no legal steps had ever been taken to question the appellee's title or right to possession of said tract. But on the above date the city of Dermott caused notice to be served upon the appellee to vacate the property and that appellants are now threatening to enter upon and tear down the fence and commit other acts of waste and trespass to the irreparable damage of the appellee. Appellee prayed that the appellants be enjoined and that his title to the tract of land be quieted.

The appellants answered and denied the allegations of the appellee's complaint and pleaded that the appellee was estopped by an instrument which he and S. A. Duke, the original owner and dedicator of the lands then constituting the hamlet, now the city of Dermott, and others signed on March 30, 1882, and which was duly recorded on March 13, 1883. In that instrument it was recited, among other things, that the original plat filed by Duke was a correct plat of the hamlet of Dermott; that the streets, alleys, and commons as designated on that plat shall forever be common property for the use and benefit of the owners of property in Dermott and the public generally; that the streets, alleys, and commons should never be occupied or used for any other purpose except by the unanimous consent of every owner of real estate in the hamlet.

The appellee testified that he is the owner of lots 3 and 4 in block 4 of the original hamlet of Dermott abutting on the strip of land

in controversy; that he had been in the possession of these lots since March 25, 1882, at which time he purchased the same from S. A. Duke and obtained a warranty deed, which he introduced; that he had been in possession of the strip of land in controversy immediately west of his lots and between them and Main street of the city of Dermott since his acquisition of title to the lots mentioned; that he and other parties joined with Duke, the original owner of the lots, in the deed and plat of original dedication to the hamlet of Dermott; that the fence at that date was where it is now; that, a short time after this instrument was signed by him and others, the signers thereof agreed to abrogate the deed of dedication and continue their fences out to the boundary of the public road as it then existed; that at the time of dedication and continuously thereafter the strip of land in controversy has remained inclosed; that the strip of property has been inclosed and held as a part of his property ever since that date; that no attempt had been made by the city to oust him from the possession of the strip in controversy until the summer of 1918; that he used the front of his place, the strip in controversy, for a pasture; that January 10, 1910, he accepted a so-called "contract" from the town of Dermott, which is as follows:

"This contract, made and entered into by and between the incorporated town of Dermott and H. C. Stinson, witnesseth:

"Whereas, the said H. C. Stinson has caused to be constructed along the west boundary line of that part of the common lying in front and west of lots 3 and 4 in block 4 in the original town of Dermott, owned by him, concrete sidewalk and has paid for the same;

"The said town of Dermott hereby agrees to and with the said H. C. Stinson that in the event the said H. C. Stinson should ever be divested of that part of the said common lying west of said lot by any act or consent of said town, then in that event it will repay to said H. C. Stinson any and all sums of money expended in the construction of sidewalk, without interest.

"And the said H. C. Stinson hereby agrees on his part that he will maintain said sidewalk and a reasonably good looking fence along said western boundary of said common where same is situated in front or west of his lots 3 and 4 in block 4."

Appellee testified with reference to this contract that, when he signed the agreement about the sidewalk, he did not recognize the town's right to the property; that he knew the town claimed it and he claimed it; that he took the money back as a condition of his surrender of the contract; that he thought as long as the town had used his money six or seven years he might use the money himself; that he received notice from the town to move his fence back, but did not remember whether it was before or after he accepted the money; that he did not move the fence when he accepted the money or

when he received notice to move same; that he got out the injunction because he did not intend to give it up; that the north end of the common is occupied by a brick building, and so far as he can tell is standing where the original building stood in 1882 and 1883; that no portion of the common has been open to the public since 1883, and the city has not since that time until the matter of the sidewalks came up in 1910 sought to eject any of the owners from the strip of land dedicated as the common.

R. A. Buckner testified that he came to Dermott in 1884, and that at that time the common was occupied out to the street and he knew nothing of its existence for several years; that the appellee and other owners of lots abutting the strip in controversy were then and have since been in possession of same; that it was inclosed and had been occupied since 1884; that appellee claimed the common as his property; that he had never heard the title or right to possession of the common called in question until five or six years ago, when witness was employed as town attorney; at that time some of the council wished to take it, others did not; at that time appellee claimed the common abutting his lots as his own, and witness believed other property owners did likewise; that at the time the question of building the sidewalks was up before the council appellee claimed the property and talked to witness about making defense if the city ever attempted to assert title to the property. Different individuals, among them members of the city council, had talked about whether they ought to take possession of the common or not, but there was never any action taken by the council.

Other witnesses testified substantially corroborating the testimony of the above witnesses. One of the witnesses stated that so far as he knew no owner of property in that plat had ever recognized the right of the public in that land; that he had known the property since 1900; that when the town required the property owners, along the strip in controversy, to put down sidewalks, there was a question raised at the time as to the right of the town to require that sidewalks be put down. Witness asked whether if the property owners should put it down themselves if they could put it back on the line. The city authorities assured witness that there was no danger of the property owners losing their property, but for their protection the city would give them a 99-year lease. The town did not claim the title to the land when it offered them the 99-year lease. Witness only wanted it to settle any dispute that there might be as to the title.

Witness J. T. Crenshaw testified for the appellants that he had been a resident of Dermott since 1881; that he had been connected with the city government at various

times as alderman, mayor, and recorder, since it was incorporated. The strip in controversy was dedicated to the hamlet of Dermott by Maj. Duke, who wanted to put out trees on it. Dermott was a small place then, and no one took any interest in it. While witness was a member of the council and had charge of the city business, "the common was recognized as belonging to the town, but the people along there recognized it as belonging to them." There were two opinions about it.

Witness did not know that the property owners claimed the common as their own. The people there had fenced it and lived there and were using it. The common was always recognized as city property. Witness could not say whether the owners of the lots abutting the common ever recognized it as city property or not. They recognized it as their own property and had it fenced in. There had always been a dispute about it. The city took active steps last year towards the assertion of its rights when they made one Belser move his house up when they found it to be on the parkway. Witness could think of no other assertion of right by the city.

Other witnesses, some of them owners of lots abutting the common, testified that they did not claim the common and that in conversation with other abutting owners the right of the city to the common was recognized.

Witness Rayborn had lived in Dermott since 1880, during which time he had held all of the offices of the city except treasurer. During his administration there were so many discussions concerning the common that he could not name any certain time only when the sidewalk was built; that while he was in office the town authorities were never notified that any of the owners of property abutting the common claimed the property in front of their lots as their own, but they all recognized that the town owned it; that he was mayor a long time, the last time in 1913; that in 1918 the appellee said to witness:

"This is where Delaney run the line between our property and the city property. He run it a little too close to my house, a little over the line, because the line is where the cedar trees are in front of where Petticord used to live, because Petticord set those cedar trees on the line."

Witness further testified that the abutting owners all had good fences on their lines and did not present claim to any of the city property until after the death of Duke; that while witness was connected with the council there was no action taken by the city to open the common, "because there was an agreement for the people to move when they were dissatisfied and wanted the common opened."

W. D. Trotter testified that he had lived in the community since 1874; that the com-

mon since the city was incorporated had been generally regarded as public property; that he had never heard of a controversy about the property until the one came up with Belser; that that part of the common had been inclosed all the time witness had resided in Dermott.

The above are substantially the facts upon which the trial court found that the appellee had been in open, continuous, and adverse possession for more than 35 years of the strip of land designated as the common; that appellee was not estopped from setting up title by limitation; and that he had acquired title to the property.

The court thereupon entered a decree perpetually enjoining the appellants from interfering with the appellee's possession. From that decree is this appeal.

The undisputed testimony shows that in 1882 S. A. Duke, the original owner of the land in controversy, owned a farm in Chicot county, Ark.; that he platted a part of the same into blocks and lots with streets and alleys and a strip of land designated as the public common, of which the land in controversy is a part; that he designated the lands thus platted as the hamlet of Dermott; that on March 25, 1882, he sold lots 3 and 4, block 4, of the hamlet of Dermott to the appellee. Of the lands thus platted he had sold other lots to A. E. Petticord and C. P. Freeman. On March 30, 1882, all of the then property owners of the lands which had been platted by Duke as the hamlet of Dermott signed the instrument set out in the statement, dedicating the streets, alleys, and common to the public of the hamlet of Dermott. That instrument recites that the common thus donated by Duke should never be "occupied, inclosed, or used for any other purpose except by the unanimous consent of every owner of real estate in the said hamlet."

The appellee testified that, a very short time after the plat was made and the instrument above mentioned was signed by him, the then owners of the property agreed among themselves to abrogate that contract and continue their fences out to the boundary of the public road as it then existed. He states that the parties interested at that time agreed to take what was designated as the common into their lots and hold them as a part of their property. All the other original signers of the instrument are dead. This testimony of the appellee is undisputed.

The testimony of the appellee is positive to the effect that there had never been a time since he took possession of the strip of land that it had not been inclosed and held by him as a part of his property. The evidence is undisputed that the possession of the strip known as the common was taken and held by the owners of the abutting lots, and a preponderance of the evidence shows

that these abutting property owners were holding the common adversely to the city of Dermott. All except one of the owners of lots abutting the strip designated as the common testified corroborating the testimony of the appellee that they went into the possession and were holding as their own, and adversely to the city, the part of the strip abutting their lots, and the width of each lot to the public road which is now Main street of the city of Dermott.

The testimony of the appellee that the strip designated as the common was held adversely by the abutting lot owners is corroborated by witnesses who, it occurs to us, were in the best situation to know the facts and who gave the most direct and specific testimony concerning the adverse claim. For instance, J. T. Orenshaw, one of the oldest residents of the town and who had been officially connected with the city government ever since it became an incorporated town, testified that—

"The common was recognized as belonging to the town, but the people along there recognized it as belonging to them."

His testimony thus shows that, so far as the city was concerned, it claimed the property as its own, but, so far as the property owners were concerned, they were claiming it as their own property.

Likewise, the testimony of Rayborn, who was an old resident and had held all the offices of the city except treasurer, shows that there had been discussions concerning the common in the city council so many times during his administration that he could not name any certain time.

[1] The testimony of these witnesses proves clearly that so far as the city was concerned it did not recognize that the abutting property owners had any title to the common, but it also as clearly shows that the matter was in dispute. It clearly shows that the city fathers must have known the circumstances and have known that the abutting lot owners were holding and claiming to own the property, and yet took no steps to oust them from possession and to open the common to the public until notice was served upon them in 1918 to remove their fences.

[2] The testimony shows that the so-called "common" was not inclosed by the property owners by one common fence, but that each had the part claimed by him in a separate inclosure extending his lot its entire width to Main street of the city of Dermott. The character of these inclosures and holdings was such as to give notice to the members of the city council that the owners of abutting lots were claiming the strip designated as the common adversely.

[3] The instrument of January 10, 1910, be-

tween the appellee and the city, designated as a "contract," concerning the building of sidewalks, is not, as we construe it, a recognition by the appellee of title in the city of Dermott to the land in controversy. On the contrary, this instrument appears to us to be rather a recognition by the city of Dermott that the appellee was the owner and had a right to the possession of the property.

[4] We conclude therefore that appellee's occupancy of the land from 1883 to 1918, when he was given notice to remove his fence, was of such a character as to be entirely inconsistent with the idea of mere permissible possession by the city of Dermott. A preponderance of the evidence, on the contrary, shows that it was adverse, open, and continuous for the statutory period, and that he therefore acquired title by adverse possession. *Gee v. Hatley*, 114 Ark. 384, 170 S. W. 72. The trial court was correct in so holding.

[5] We are also convinced that, after having acquired such title, appellee was not estopped by accepting from the city of Dermott the amount that had been expended in the construction of the sidewalk and surrendering the contract concerning same. If we are correct in our view that appellee had acquired title by adverse possession, then appellee's contract with Dermott concerning the sidewalk would not operate to divest him of the title and invest title in the city. Such was not the purport, nor the effect, of that "contract." *Hudson v. Stillwell*, 80 Ark. 575-578, 98 S. W. 856. See, also, *Broad v. Beatty*, 73 Ark. 110, 83 S. W. 389; *Shirey v. Whitlow*, 80 Ark. 444, 97 S. W. 444; *Turquett v. McMurray*, 110 Ark. 197, 161 S. W. 175; *Hutt v. Smith*, 118 Ark. 10, 175 S. W. 399.

The decree is correct.

Affirmed.

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SPIVEY et al., School Directors, v. TAYLOR,
County Treasurer. (No. 24.)

(Supreme Court of Arkansas. May 31, 1920.)

1. Judgment ¶299(1), 342(1)—Courts lose control over judgment after lapse of term.

Courts of record lose control over their judgments after the lapse of the term, and, in the absence of a statute conferring such power, cannot at a subsequent term alter or vacate them.

2. Courts ¶185—Where objections to report of county treasurer, confirmed by judgment, were not disposed of during term, action was final, and objectors could appeal.

Where county court, on objections to county treasurer's report, did not set aside a judgment confirming the treasurer's accounts, but continued the cause until another day of the same term for further testimony, and the term lapsed without the petition having been heard,

it was error for the circuit court to dismiss an appeal by the objectors; the judgment of the county court having become final at the close of the term.

Appeal from Circuit Court, St. Francis County; J. M. Jackson, Judge.

Objections by W. A. Spivey and others, as School Directors of a common school district, to the report of George P. Taylor, as County Treasurer. From a judgment of the circuit court dismissing their appeal from a judgment confirming the report, the School Directors appeal. Reversed and remanded.

The report of Geo. P. Taylor, as county treasurer, was approved by the county court, and at the same term W. A. Spivey and others, as school directors of a common school district in St. Francis county, filed objections to his report on the ground that it failed to show an amount of money which he had received belonging to said school district. The treasurer filed a reply, denying the allegations of the petition. The court continued the cause until another day of the same term for further testimony. The term lapsed without the petition having been heard, and without the order confirming the treasurer's settlement having been set aside. Spivey and the other school directors filed an affidavit for appeal to the circuit court within the six months prescribed by the statute. The county treasurer made a motion in the circuit court to dismiss the appeal, which motion was by the court granted. From the judgment rendered in the circuit court, Spivey and the other directors have duly prosecuted an appeal to this court.

J. W. Morrow and Henry G. Gatling, both of Forrest City, for appellants.

Mann, Bussey & Mann, of Forrest City, for appellee.

HART, J. (after stating the facts as above). The court erred in dismissing the appeal. The county court allowed Spivey and the other directors of the common school district to file objections to the report of the county treasurer on the ground that he had failed to account in his report for certain money belonging to the school district. This was done at the same term at which the report had been filed and approved. Without opening the judgment confirming the report, the court continued the cause to a subsequent day of the same term for further testimony. The term lapsed without any further action hav-

ing been taken by the county court. Spivey and the other school directors filed an affidavit for appeal to the circuit court within the time prescribed by the statute. The circuit court should have heard and determined their appeal.

[1] In *Brandenburg et al. v. State*, 24 Ark. 50, the court held that the county court acts judicially in adjusting the accounts of an internal improvement commissioner, and has no power to set aside its judgment after the lapse of the term. In *Desha County v. Newman*, 33 Ark. 788, it was held that as a general rule county courts, like circuit courts, have no power to set aside, vacate, or modify their judgment after the close of the term at which they are rendered, unless provision is made therefor by statute. The general rule is that courts of record lose control over their judgments after the lapse of the term, and in the absence of a statute conferring such power cannot, at a subsequent term, alter or vacate them. *Malpas v. Lowenstine*, 46 Ark. 552; *Brady v. Hamlett*, 33 Ark. 105; *Kersh v. Lincoln County*, 36 Ark. 589; *Joyner v. Hall*, 36 Ark. 513; *Johnson v. Campbell*, 52 Ark. 316, 12 S. W. 578; *Terry v. Logue*, 97 Ark. 314, 133 S. W. 1135; *Corning v. Thompson*, 113 Ark. 237, 168 S. W. 128.

[2] In the present case the county court did not set aside the judgment confirming the treasurer's accounts, and its judgment became final at the close of the term. Therefore Spivey and the other directors had the right to appeal from the judgment. If the court had desired to continue the cause until a subsequent term, without the judgment becoming final, the judgment should have been set aside, so as to keep the cause within the control of the court. This view of the law was recognized in *Haley v. Thompson*, 116 Ark. 354, 172 S. W. 880. There the proceedings were had under section 7174 of Kirby's Digest, providing, in substance, that, when any error shall be discovered in the settlement of any county officer with the county court, it shall be the duty of the court at any time within two years from the date of such settlement to reconsider and adjust the same. The court held that relief under this statute did not prevent the taxpayer from being made a party to the settlement of the county officer and having his settlement corrected upon appeal to the circuit court.

It follows that the court erred in dismissing the appeal of Spivey and the other school directors, and for that error the judgment must be reversed, and the cause remanded for further proceedings according to law.

**MONETTE ROAD IMPROVEMENT DIST.
v. DUDLEY, Circuit Judge. (No. 3.)**(Supreme Court of Arkansas. May 24, 1920.
Rehearing Denied June 14, 1920.)**1. Prohibition ¶10(1)—Lies to restrain proceedings without jurisdiction.**

Where it appears that an inferior court is about to proceed in a matter over which it is entirely without jurisdiction under any state of facts which may be shown to exist, then the superior court, exercising supervisory control over the inferior court, may prevent such unauthorized proceedings by the issuance of a writ of prohibition.

2. Prohibition ¶3(5)—Lies where remedy by appeal is available, but inadequate.

Issuance of a writ of prohibition depends not on the absence, but upon the inadequacy, of the remedy by appeal.

3. Prohibition ¶17—Requirement that objection to jurisdiction be made to lower court is rule of discretion.

Objection in the lower court to its exercise of jurisdiction is not a jurisdictional fact upon which the power to issue the writ of prohibition depends, but is merely a rule of discretion, so that where obviously such objection would be futile, and would result in unnecessary or hurtful delay, it is not necessary.

4. Highways ¶121—Functions of officers as to assessments not judicial.

Under Road Laws 1919, vol. 1, p. 105, creating the Monette Road Improvement District, as amended at January, 1920, special session, the functions of the board of assessors in assessing benefits, and of the board of commissioners in adjusting them, on the complaint of the property owners, is not judicial in the ordinary sense, but is in the nature of a legislative power.

5. Certiorari ¶1—Limited to review of judicial or quasi judicial proceedings.

Certiorari is limited to review of judicial or quasi judicial proceedings.

6. Courts ¶52—Injunctive jurisdiction of circuit courts lost by establishment of chancery courts.

Under Const. art. 7, § 15, providing that "until the General Assembly shall * * * establish courts of chancery the circuit courts shall have jurisdiction in matters of equity," exercise of the power of the Legislature in establishing separate chancery courts swept away the circuit courts' jurisdiction in matters exclusively cognizable in courts of equity, which included jurisdiction to award injunctive relief; Kirby's Dig. § 3966, authorizing injunctive relief by the circuit court against illegal taxes and assessments being thereby superseded.

7. Highways ¶142—Certiorari does not lie to review assessments.

Since Road Laws 1919, vol. 1, p. 105, creating the Monette Road Improvement District, as amended at the January, 1920, special session, provides for no review of assessments by

the circuit court on appeal, but, on the contrary, provides exclusively for relief in the chancery court, there is no authority for review by the circuit court on certiorari.

Wood and Hart, JJ., dissenting in part.

Application by Monette Road Improvement District for writ of prohibition directed to the Honorable R. H. Dudley, circuit judge. Writ awarded.

Sloan & Sloan, of Jonesboro, Rose, Hemingway, Cantrell & Loughborough, of Little Rock, and A. P. Patton, of Jonesboro, for appellant.

J. F. Gautney and Lamb & Frierson, all of Jonesboro, for appellee.

McCULLOCH, C. J. Monette Road Improvement District is, as its name implies, a road improvement district formed for the purpose of improving certain roads, and was created by a special statute enacted by the General Assembly of 1919 (Act No. 68, Acts 1919, Regular Session, vol. 1, p. 105).

Application is made to this court on behalf of said district for a writ of prohibition directed to the Honorable R. H. Dudley as judge of the Second division of the circuit court of the Second judicial circuit to prevent the circuit court of Craighead county, Lake City district, from hearing and determining a certain proceeding brought up to that court on certiorari issued by said judge, and returnable to said circuit court, involving the validity of the acts of the commissioners of said district in assessing certain benefits and in attempting to construct the improvement.

It is alleged in the petition filed here that Alex McDonald and certain other persons filed their complaint in said circuit court, praying for a writ of certiorari directed to the commissioners of said district to bring up the assessment of benefits made by the commissioners and to quash the same, and to enjoin the commissioners of the district from proceeding with the construction; that the circuit court is entirely without jurisdiction in the premises, and that the petitioners appeared in court and moved to dismiss the proceedings for want of jurisdiction, but that the court overruled said motion, and proceeded to issue a writ of certiorari as prayed for by the plaintiffs in that cause, and made it returnable at the next term of that court, and that the judge also issued a restraining order to prevent the petitioner and the commissioners of the district from proceeding with the work of improvement. A copy of the complaint in the proceedings below and the other pleadings are exhibited with the petition.

The circuit judge appears here by counsel, and files a response in which he admits that he has issued the writ of certiorari, as alleged, returnable to the circuit court, but de-

nies that the writ was heard or issued by the court, or that the petitioner herein had appeared before the court for the purpose of objecting to the issuance and hearing of the writ, and alleges, on the contrary, that the petition for a writ of certiorari was presented to the circuit judge at chambers in vacation, and was heard by him, and that the writ of certiorari, and also the temporary injunction, were issued by him in vacation, returnable to the circuit court to be heard by that court in term time. The judge also alleges in his response that the matters and things set forth in the complaint in the proceedings below are within the jurisdiction of the circuit court, and he denies that he exceeded his jurisdiction in granting the certiorari and injunction.

[1] The first question which arises for our decision is whether or not prohibition is the appropriate remedy and is available to the petitioner under the circumstances of this case. The facts, when reduced to the simplest form, as bearing on this particular question, are that the plaintiffs in the action instituted in the circuit court appeared before the circuit judge in vacation for the purpose of procuring the issuance of a writ of certiorari to bring up the proceedings of the board of commissioners of the improvement district, and to obtain an injunction to restrain further proceedings by the commissioners of the district, until the cause could be heard in the circuit court; that the commissioners, as the representatives of the district, appeared by counsel before the circuit judge at the hearing, and objected to the exercise of jurisdiction by the court; and that a writ of certiorari, and also of temporary injunction, was issued by the judge over the protest of the petitioner.

The scope of the writ of prohibition is too well known to be in doubt. In the recent case of *Ferguson v. Martineau*, Chancellor, 115 Ark. 317, 171 S. W. 472, Ann. Cas. 1916E, 421, this court quoted with approval the following statement of the law from a well-known text-writer on the subject:

"The writ of prohibition is that process by which a superior court prevents an inferior court or tribunal from usurping or exercising jurisdiction with which it has not been vested by law." *Spelling on Injunctions and Extraordinary Remedies*, § 1716; *Shortt on Informations, Mandamus and Prohibition*, p. 436.

The last-named text-writer, at the place indicated, laid down the rule as follows:

"The broad governing principle is that a prohibition lies where a subordinate tribunal has no jurisdiction at all to deal with the cause or matter before it; or where, in the progress of a cause within its jurisdiction, some point arises for decision which the inferior court is incompetent to determine. But a prohibition will not lie where the inferior court has jurisdiction to deal with the cause and with all matters necessarily arising therein, however erroneous its decision may be upon any point."

In the case of *Finley v. Moose*, 74 Ark. 217, 85 S. W. 238, 109 Am. St. Rep. 74, we stated the same rule with reference to the office of the writ of prohibition, with the following qualification:

"If the existence or nonexistence of jurisdiction depends on contested facts which the inferior tribunal is competent to inquire into and determine, a prohibition will not be granted; though the superior court may be of opinion that the questions of fact have been wrongly determined by the court below, and that their correct determination would have ousted the jurisdiction."

So it is thus settled that where it appears that an inferior court is about to proceed in a matter over which it is entirely without jurisdiction under any state of facts which may be shown to exist, then the superior court exercising supervisory control over the inferior court may prevent such unauthorized proceedings by the issuance of a writ of prohibition. The essential thing is that it must be shown that the inferior court is about to proceed beyond its jurisdiction, and that fact is said to be the jurisdictional one upon which the right of the supervisory court to issue the writ of prohibition depends.

[2] It is contended by counsel for the respondent that the remedy by prohibition not being an absolute one, but discretionary, the writ should be denied where there is a remedy by appeal or otherwise, even though the court sought to be restrained was about to proceed beyond its jurisdiction. They cite in support of their contention the case of *Weaver v. Leatherman*, 68 Ark. 211, 49 S. W. 977. This contention is based upon a misconception of the effect of the ruling in the case just cited. If the absence of the right of appeal was essential to the issuance of a writ of prohibition, then that remedy would be entirely unavailable in any case; for, under our Constitution, the right of appeal is granted in all judicial proceedings. The true test is, as stated in the case already cited, whether or not the court is proceeding beyond its jurisdiction, and when that state of facts is shown to exist the remedy by prohibition is the appropriate one. A litigant is not bound to submit to the exercise of jurisdiction not authorized by law, even though he has the right of appeal after the exercise of the jurisdiction has been consummated and he has resulted in a judgment from which he can appeal. The remedy by appeal is afforded from an unjust judgment, whether it be void or merely erroneous (*Pritchett v. Road Improvement District*, 219 S. W. 21); but the remedy by prohibition is afforded as a protection against a wrongful attempt to exercise jurisdiction unauthorized by law. The two remedies are independent, and one may be invoked where the other cannot be, and prohibition may be invoked under circumstances where the remedy by appeal is available though inadequate.

Again, it is urged by counsel for respondent that this is an attempt to control the action of the circuit judge, and they invoke the doctrine that the remedy by prohibition is available only to prevent the exercise of jurisdiction by a court and not by a judge. In the case of *Reese v. Steel*, 73 Ark. 66, 83 S. W. 335, 1136, we expressly left undecided the question whether or not prohibition was the appropriate remedy against judicial or quasi judicial action of a judge in vacation, and whether or not the remedy was confined to the control of judicial action by a court. Nor is that question involved in the present case. The action of the circuit judge has in the present case completely accomplished its purpose in the issuance of the writ, and the present effort of the petitioner is to control the action of the circuit court, and to prevent it from proceeding in a matter alleged to be entirely beyond its jurisdiction. It is true that in the petition filed here it is alleged that the court issued the writ and is about to hear and determine it, and that the court also issued an injunction, and it is shown by the respondent that this allegation is not true with respect to the issuance of the two writs; but the facts, as shown by the petition and the response thereto, are that the writ of certiorari is returnable to the circuit court, and that that court is about to proceed to an adjudication of the matters and things involved in that controversy. Now this entitles the petitioner to the remedy prayed for here, unless other grounds appear for the denial of the remedy.

[3] The response raises the question of the right of the petitioner to this remedy without first appearing before the circuit court and objecting to the exercise of jurisdiction. It is conceded that the petitioner appeared before the circuit judge and made objection to the exercise of jurisdiction and that the judge overruled the objection. It appears from the exhibits to the pleadings here that the circuit judge made a written order expressing his opinion that the circuit court had jurisdiction to entertain the proceedings, and in his response here the learned judge adheres to his conclusion that the circuit court has jurisdiction of the cause. But it is insisted that the petitioner must first appear before the court itself and make the protest there in term time, notwithstanding the ineffectual protest before the judge who granted the writ and who is the presiding judge of that court. This court in many decisions has adhered to the rule that as a matter of practice a writ of prohibition will not be issued, unless objection to the exercise of jurisdiction is made to the court in which the proceedings are pending. *Reese v. Steel*, supra.

The court has never had occasion to state the exceptions to that rule, or to declare whether or not there are in fact any exceptions. It has been decided here, however, that the form of the exception is immaterial,

and that any sort of plea to the jurisdiction of the court will justify the issuance of a writ of prohibition. *State ex rel. Butler v. Williams*, 48 Ark. 227, 2 S. W. 843.

In *Ruling Case Law*, vol. 27, the following is stated to be the rule of procedure established by the authorities:

"As a general rule, a writ of prohibition will not be issued to an inferior court unless the attention of the court whose proceedings it is sought to arrest has been called to the alleged lack of jurisdiction, the foundation of the rule being the respect and consideration due to the lower court and the expediency of preventing unnecessary litigation. This requirement is made by rule of court in some jurisdictions. The objection in the lower court cannot be said to be jurisdictional, and the higher court may and will proceed without such objection in proper cases. The rule is one of discretion only, and is not in any sense rigid or arbitrary. Thus no objection in the court sought to be prohibited need be made where the proceeding is *ex parte* and there was no opportunity to object; where the applicant was prevented by artifice or fraud from making objection; where the lack of jurisdiction is apparent on the face of the proceedings; where the intention of the inferior court to act beyond its jurisdiction is made apparent in any way, and it is obvious from the whole proceedings that such an application would be futile; or where the necessary delay would be highly injurious to the interests of the applicant. The matter of judicial courtesy should yield to substantial personal rights of litigants, such as a sacrifice to their liberty."

Numerous authorities are cited in support of the rules thus stated.

Particular attention is called to that part of the foregoing statement of the law to the effect that the objection to the exercise of jurisdiction by the lower court is not a jurisdictional fact upon which the power to issue a writ of prohibition depends, but is merely a rule of discretion. This, we think, is the correct view of the matter; and it will necessarily follow, under this rule, that where it is obvious that an objection made to the court itself would be futile, and would result in unnecessary or hurtful delay, this ought to and does form an exception to the general rule of discretion that, before a writ of prohibition can be asked for, objection to the exercise of that jurisdiction must be made to the court. This exception is well sustained by the authorities. See case note to *St. Marys v. Woods*, 21 Ann. Cas. 168; *City of Charleston v. Littlepage*, 73 W. Va. 156, 80 S. E. 131, 51 L. R. A. (N. S.) 353; *State ex rel. v. Aloe*, 152 Mo. 466, 54 S. W. 491, 47 L. R. A. 393; *State ex rel. v. Bright*, 224 Mo. 514, 123 S. W. 1057, 135 Am. St. Rep. 552, 20 Ann. Cas. 955; *Harvemeier v. Superior Court*, 84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192.

In the case of *State ex rel. v. Bright*, supra, the Supreme Court of Missouri, after

having noticed the fact that it was not shown that any exceptions had been made to the lower court, said that the appearance of the judge in that court, joining with the parties to the litigation in affirming the right of the court to proceed with the case, that this rendered it unnecessary for the petitioner to appear before the court for the purpose of challenging the jurisdiction. This rule was, in effect, applied by our court in the case of *Russell v. Jacoway*, 83 Ark. 191. In that case an election contest over the removal of the county seat was involved, and the circuit judge granted in vacation a writ of certiorari to bring up the proceedings in the county court for review, and the adverse parties appeared before the circuit judge and opposed the application for want of jurisdiction of the subject-matter. It was not shown that there was any objection made in the circuit court, but this court granted the writ of prohibition and vacated the writ issued by the circuit judge. We think that this rule is founded on sound reason, for it only affects the discretion of the court, and is, at most, only a rule of practice. Why then should the petitioner be required to go before the circuit court to make an objection to the exercise of jurisdiction where it is morally certain that the objection would be unavailing? Since the circuit judge has deliberately overruled an objection to the jurisdiction, and comes into this court now maintaining that the court over which he presides and before which this cause will come on for hearing, unless restrained, has jurisdiction of the subject-matter, there is no ground for assuming that he will change his mind and sustain the objection to the jurisdiction when the circuit court convenes. Our conclusion, therefore, is that the petitioners are entitled to a writ of prohibition if, as a matter of fact, the circuit court is about to proceed beyond its jurisdiction, and that is the next question to which we will address ourselves.

The statute creating the district contains a provision in section 14 that the "construction cost of the improvements of the road herein called for, not including interest on borrowed money, shall not exceed in cost thirty per cent. of the values of all lands and real estate and real property in the district, as shown by the last county assessment"; and the question was brought to this court for decision whether or not this applied to the last county assessment preceding the passage of the statute, or to any county assessment made prior to the assessment of benefits, and we decided that it applied to the assessment preceding the passage of the statute. *Watson v. Boydston*, 216 S. W. 721. It was shown in that case that the cost of the construction would exceed 30 per cent. of the values of lands according to the county assessment, and the General Assembly at the special session in January, 1920, enacted an

amendatory statute raising the limitation to 40 per cent. of the assessed value of the property, instead of 30 per cent., and amending the statute creating the district in other respects. The statute, as a whole, describes the boundaries of the district, the route of the roads to be improved, names the commissioners and the authority to construct the improvement, to borrow money and collect assessments on the benefits accruing to the lands, and provides for a board of assessors to value the anticipated benefits, and the filing of the list of assessments with the county clerk, and the publication of notice of the time and place of the meeting of the commissioners for the purpose of hearing complaints against said assessments.

Section 13 provides that—

"any party who may have complained in writing of any of said assessment of benefits or damages, and who feels aggrieved by the action of the commissioners after the hearing herein provided for; any other person whomsoever who may have any objections to any assessment of benefits or damages, or to any other proceedings under this act or action of the commissioners, shall file his complaint thereof in the chancery court having jurisdiction within ten days after the hearing by the commissioners herein provided for, and any party not complaining within that time shall be deemed to have waived any objections that he may have to any of said assessment of benefits or damages, and shall not be heard to complain in law or equity thereafter."

The complaint in the proceedings sought to be prohibited alleges, in substance, that the assessment of benefits had been made and filed with the county clerk, and notice thereof given, and that all of the plaintiffs in that proceeding had appeared before the board of commissioners herein named, and objected to the alleged assessments on the ground that no valid assessment had been made as provided by the statute; that the assessment list was "a mere jumble of words and figures and to a great extent meaningless," and that it is unintelligible. It is further alleged that the plans adopted by the commissioners contemplate two sets of improvements, one a drainage system and the other the construction of the roads, which would require two separate assessments. Various other matters are alleged in the way of threatened proceedings by the board of commissioners not authorized by the statute. The prayer of the complaint was that the plans adopted by the commissioners and the assessment list be brought to the circuit court on certiorari, and that on final hearing the same should be quashed. The prayer of the complaint was also that the contract for the construction of the improvement and the sale of bonds be enjoined.

It is manifest, therefore, from the language of the complaint that injunctive relief is sought against the proceedings undertaken

by the commissioners of the district, and relief against the assessment list alleged to be inaccurate and unintelligible is sought. The injunction granted by the judge in vacation was temporary, and appears to have been intended only as an incident to the relief sought in the complaint to preserve the status quo until the cause could be finally heard. If the court had jurisdiction to hear and determine the cause on the facts stated and grant the relief sought, it could temporarily stay proceedings by injunction as an incident to the exercise of its jurisdiction. The real question in the case is whether or not the circuit court had jurisdiction to grant the relief sought in the complaint.

[4] The functions of the board of assessors in assessing benefits and the board of commissioners in adjusting them on complaint of the property owners is not judicial in the ordinary sense, but it is in the nature of a legislative power. *Pine Bluff Water & Light Co. v. City of Pine Bluff*, 62 Ark. 193, 35 S. W. 227; *Mo. Pac. Ry. Co. v. Icard County Highway Improvement District*, 220 S. W. 452.

[5, 6] Boards created as special tribunals for certain purposes may, and sometimes do, act in a judicial or quasi judicial capacity, and when so acting their proceedings may be reviewed on certiorari (*State ex rel. v. Railroad Commission*, 109 Ark. 100, 158 S. W. 1076; *Hall v. Bledsoe*, 128 Ark. 125, 189 S. W. 1041); but in the matter now before us the commissioners do not act in such capacity. The acts of the commissioners not being of a judicial or quasi judicial nature, they are not subject to review on certiorari, which is limited to review of judicial or quasi judicial proceedings. *Pine Bluff Water & Light Co. v. City of Pine Bluff*, supra; *State ex rel. v. Railroad Commission*, 109 Ark. 100, 158 S. W. 1076. Injunctive relief is purely a matter of equitable jurisdiction, which, under the Constitution of this state, falls within the jurisdiction of separate chancery courts as now established. Article 7, § 15, of the Constitution, provides that "until the General Assembly shall deem it expedient to establish courts of chancery the circuit courts shall have jurisdiction in matters of equity." We are of the opinion that the power of the Legislature in establishing separate chancery courts therefore swept away the jurisdiction of the circuit court in matters exclusively cognizable in courts of equity.

Counsel for respondents rely upon the statute (*Kirby's Digest*, § 3966), which provides that "the judge of the circuit court may grant injunctions and restraining orders in all cases of illegal or unauthorized taxes and assessments by county, city or other local tribunals, boards or officers." This statute, however, antedated the adoption of the Constitution of 1874, and the establishment of separate chancery courts pursuant thereto,

and it is not effective now, for the purpose of retaining in the circuit court matters exclusively cognizable in equity, for the jurisdiction transferred to courts of chancery in the establishment thereof was such jurisdiction as the courts of chancery properly exercise at the time of the adoption of the Constitution. *German National Bank v. Moore*, 116 Ark. 490, 173 S. W. 401. This transfer of equity jurisdiction to separate chancery courts was complete, and left no vestige of that jurisdiction in the circuit courts. Such was the interpretation given by this court in the case of *Merwin v. Fussell*, 93 Ark. 336, 124 S. W. 1021, where we said:

"And under these provisions of the Constitution and the statute a citizen and taxpayer has the right to obtain from a court of equity an injunction against the collection of an illegal or unauthorized tax."

See, also, *Moody v. Lowrimore*, 74 Ark. 421, 86 S. W. 400; *Harrison v. Norton*, 104 Ark. 16, 148 S. W. 497.

[7] The framers of the statute creating this improvement district might have provided, as has been done in many similar statutes, for appeals from the board of commissioners to the county court and thence to the circuit court, which would have given the circuit court the jurisdiction to review the assessments. But that was not done in the framing of this statute, which provides for proceedings in a court of equity, to be begun within a specified time. It clearly falls legitimately within the ordinary equity jurisdiction, because the assessments constitute a lien on real estate. We are of the opinion, therefore, that since the statute provides for no review of assessments by the circuit court on appeal, and, on the contrary, provides exclusively for relief in the chancery court, there is no authority for review by the circuit court on certiorari.

Counsel also rely on the decision in *Pritchett v. Road Improvement District*, supra, as sustaining their contention, but in that case it was void orders and judgments of the county court which were reviewed by the circuit court on certiorari.

In the case of *Merchants' Bank v. Fitzgerald*, 61 Ark. 607, 33 S. W. 1064, Mr. Justice Battle, speaking for the court, concisely defined the office of the writ of certiorari, as follows:

"(1) Where the tribunal to which it is issued has exceeded its jurisdiction; (2) where the party applying for it had the right of appeal, but lost it through no fault of his own; and (3) in cases where it has superintending control over a tribunal which has proceeded illegally, and no other mode has been provided for directly reviewing its proceedings."

This being true, the circuit court has no jurisdiction over the subject-matter set forth in the complaint filed in the proceedings be-

low. The court being without jurisdiction prohibition is the appropriate remedy to stop further proceedings. The writ of prohibition is therefore awarded in accordance with the prayer of the petitioner to prevent the circuit court from further proceeding in the matters under consideration.

WOOD, J. (dissenting). The authorities are practically unanimous in holding that the high prerogative writ and extraordinary remedy of prohibition "is to be used with great caution and forbearance, for the furtherance of justice, and to secure order and regularity in judicial proceedings, and should be issued only in cases of extreme necessity." 22 R. O. L. p. 5, § 4, and cases there cited.

There is no necessity, as we see it, for the issuance of the writ in this case; and, besides, the issuance at this juncture is wholly premature. The circuit court has had no opportunity to determine whether it had jurisdiction of the subject-matter set forth in the complaint of McDonald et al. Every court has the power to determine in limine whether it has the jurisdiction over the subject-matter of the controversies brought before it. To deprive the circuit court in advance of the opportunity and right to decide whether it will entertain jurisdiction is tantamount to an assumption of original jurisdiction by this court, which is contrary to article 7, § 4, of the Constitution.

It has been the doctrine of this court since 1842 that no prohibition lies from this court to an inferior court until a suggestion of its want of jurisdiction, properly verified, has first been presented to the inferior court. There has been no deviation from this rule until the present case. Williams, Ex Parte, 4 Ark. 537, 38 Am. Dec. 46; Blackburn, Ex Parte, 5 Ark. 21; McMeechen, Ex Parte, 12 Ark. 70; City of Little Rock, Ex Parte, 26 Ark. 52; State ex rel. Butler v. Williams, 48 Ark. 227, 2 S. W. 843; Reese v. Steel, 73 Ark. 66, 83 S. W. 335, 1136.

In Williams, Ex Parte, supra, this court said:

"The rule was, at common law, that no prohibition lay to an inferior court, in a cause arising out of their jurisdiction, until that matter had been pleaded in the inferior court, and the plea refused. * * * It must appear, in the suggestion [to the Supreme Court], that the plea was verified, and tendered in person, during the sitting of the inferior court."

The rule is announced in the same language in all the other cases.

This doctrine, we believe, is in accord with the great weight of authority. In an exhaustive note to State v. Superior Court, 111 Am. St. Rep. 925-965, Judge Freeman says:

"Whether any special rule of court has been promulgated on this subject or not, undoubtedly the practice generally prevailing in the United States is not to take any action until

it appears that the subordinate tribunal has in some appropriate method had its attention called to its supposed absence or excess of jurisdiction, and has nevertheless, indicated its purpose to proceed, or it in some other manner sufficiently appears that an application to that court must prove unavailing."

Among the numerous cases cited by the eminent author and annotator in support of the text are cases from our own court. Further on in the note to the case the exception recognized in the majority opinion is referred to, and some cases from other courts are cited to support it, but none from Arkansas.

Of course, the opinion of even as learned a law writer as Judge Freeman as to the effect of our former decisions is not binding on this court. But certainly his opinion is entitled to the utmost respect. If he is correct, and we believe he is, in classifying our cases in line with those holding that the writ of prohibition will not lie unless the inferior court has first had its attention directed to the matter, and if, indeed, such has been the established rule of practice in this state for three-fourths of a century, and if it is in accord with the practice generally prevailing in the United States, then why change the rule, or ingraft upon it an exception which virtually nullifies it. Stare decisis should preclude any departure or innovation here. Without stare decisis, "it would be difficult, if not impossible, to build up and preserve any valuable system of jurisprudence." Amour Hunt, Ex Parte, 10 Ark. 284.

Controversies should not be opened every time a new judge takes his seat. Coates v. State, 50 Ark. 333, 7 S. W. 305.

"It is better to let matters of practice remain settled than to disturb them." Miller v. Fraley, 21 Ark. 38.

"Public policy requires that decisions of courts of last resort, which have been followed and acted upon, shall be adhered to, unless great injury and injustice would result." Rhea v. State, 104 Ark. 162, 147 S. W. 463.

The case of Russell et al. v. Jacoway, Judge, 33 Ark. 191, is not in conflict with the other decisions of this court. In that case the issue we have here was not raised. There was no suggestion in the Supreme Court to the effect that no objection had first been made in the inferior court to the exercise of jurisdiction, and that the circuit court had not been given an opportunity to determine that question. On the contrary, the opinion in Russell et al. v. Jacoway, Judge, supra, shows that the Supreme Court disposes of the case on the theory that the plea objecting to the jurisdiction of the inferior court had been first properly presented to that court and refused. The court said: "For the circuit court to assume to determine, in the first instance," etc. Again: "But by the circuit court's assumption of jurisdiction in the case,

all further proceedings of the county court have been prevented," etc.

But the majority of the court, while recognizing the rule as above announced by the former decisions of this court, nevertheless hold that there is an exception to the rule where the circuit judge, before whom the cause must be heard when the court subsequently convenes, has in vacation overruled an objection to his jurisdiction to proceed in the matter then pending before him, and which must be heard by the court later, and where, as in this case, in this formal response to the application for writ of prohibition, he still maintains that the circuit court has jurisdiction. This holding is not correct, for the reason that the circuit judge in vacation and the circuit court are entirely different functionaries. The orders when made by the circuit judge in vacation are not final, but subject to review and change by the circuit court itself when it subsequently convenes, whereas the orders of the circuit court when final are subject to review and correction by the Supreme Court.

Application was made to the circuit judge in vacation for writ of certiorari to bring up and to quash the assessment of benefits made by the commissioners and to restrain them from further proceeding with the improvement. Conceiving that he had jurisdiction to issue the writ of certiorari reviewable by the circuit court, and in the meantime to issue a restraining order, the circuit judge proceeded to exercise such jurisdiction. He issued the writ of certiorari in April returnable to the ensuing September term of the court, and in the meantime restrained further proceedings by the commissioners of the district. Now, who can say that the circuit court when it convened at the September term would not, upon a plea to its jurisdiction, after a consideration of such plea, have held that it had no jurisdiction of the matters presented in the application for certiorari? Who can say that the circuit court, after a careful consideration, would not have quashed the writ issued by the judge in vacation? Who can say that the circuit court would not have refused to quash the assessments of benefits made by the commissioners, and that the court would have interfered in any manner with the further progress of the work of the improvement district? What prophetic ken has this court of what would be the decision of the circuit court of Craighead county several months in advance of the time when that decision was to be rendered? Who has the omniscience to foretell that the circuit court, although presided over by the same judge, would not entertain different views, and decide that it had no jurisdiction?

To show the inaccuracy of the position of the majority and the unsoundness of its log-

ic, let us suppose that before the September term of the court convenes the Hon. R. H. Dudley, the respondent herein, and the judge who issued the writ of certiorari and the temporary restraining order, dies, or that he is unavoidably detained by illness or other cause, all of which contingencies are contemplated by article 7, § 21, of our Constitution. Suppose that under this constitutional provision a different judge has been elected to preside over the court, and that such judge entertains entirely different views from his predecessor, and that his views are in harmony with the appellant's contention herein; could it then be said that the circuit court had had an opportunity to decide the issue of its jurisdiction, and had decided that issue adversely to appellant's contention? Could it then be said that there was any excuse, much less necessity, for the writ of prohibition? Could it then be decided by this court that the lower court had determined that it had jurisdiction when in fact no opportunity had been given that court to pass upon the question, and when, if the matter had been presented to it, it would itself have decided that it had no jurisdiction?

It occurs to us that the only answer to the above questions demonstrates the fallacy of ingrafting the exception, now proposed and adopted by the majority, upon the rule heretofore announced and so long adhered to by this court. A rule of practice that would not stand the test and apply to any and all cases that might arise under article 7, § 21, of our Constitution, is unsound (besides being unconstitutional), and should not be approved by this court.

The rule announced in *Williams, Ex Parte*, supra, is a sound one. It preserves the proper consideration and deference for the opinions and judgment of the inferior tribunal.

Under the so-called exception no allowance is made for a possible, or even probable, change of viewpoint upon the part of the judge himself who reviews in term time his own vacation orders. This is manifestly unjust and unfair to the inferior tribunal, which should at least be given the opportunity to first decide upon the question of whether it has jurisdiction to proceed. We are convinced that there is no exception to the rule in this state, and that the majority opinion, therefore, results in overruling the cases heretofore mentioned; and that the issuance of the writ, under the circumstances here detailed, is an exercise of original jurisdiction by this court not contemplated by our Constitution.

For the above reasons Mr. Justice HART and I dissent from that part of the opinion which holds that the writ of prohibition will lie.

UNION COTTON CO. v. BONDURANT.

(Court of Appeals of Kentucky. May 25, 1920.)

1. Damages ⇨40(2)—Speculative profits not recoverable.

Loss of profits remote, uncertain, contingent, speculative, and conjectural is not allowed as a basis for damages from breach of contract.

2. Damages ⇨23—Profits reasonably certain and within parties' contemplation are recoverable.

Where breach of contract is involved, loss of profits is a proper element of damages where they can be shown, if not with absolute, then with reasonable certainty, and when it may reasonably be considered parties had such loss in contemplation.

3. Damages ⇨40(2)—Profits from operation of cotton gin sufficiently certain to be recoverable.

Anticipated profits, from operation of cotton gin leased for a year, during the ginning season of from 60 to 90 days, held sufficiently ascertainable to be recoverable by lessee in his action for lessor's breach of contract by failing to put gin in proper repair.

4. Damages ⇨208(7)—Whether plaintiff failed to minimize damages held for jury.

In action by lessee of cotton gin for breach by lessor through having failed to put gin in proper repair, whether plaintiff lessee failed to minimize his damages by himself making any necessary repairs held for jury.

5. Attachment ⇨197—Judgment for sale of several lots improper in absence of showing sale of all necessary.

Under rule that no more of defendant's realty should be sold in satisfaction of debt than necessary for purpose, attachment on seven separate lots of defendant designated by numbers should not have been sustained and lots directed to be sold in satisfaction of judgment in absence of showing either by return of officer who levied attachment or by other evidence that lots should or must all be sold together.

Appeal from Circuit Court, Fulton County.

Action by C. T. Bondurant against the Union Cotton Company. From judgment for plaintiff for the recovery of damages, and from judgment sustaining attachment on defendant's property and adjudging sale of it to satisfy the money judgment, defendant appeals. Judgment for recovery of damages affirmed, judgment sustaining attachment reversed, and cause remanded.

Robbins & Robbins, of Mayfield, for appellant.

W. J. Webb, of Mayfield, for appellee.

HURT, J. In this action there has been an appeal from two judgments of the circuit court, one by which the appellee, C. T.

Bondurant, was adjudged to recover from appellant, Union Cotton Company, the sum of \$1,200, and the other was a judgment which sustained the attachment upon the property of the appellant and adjudged a sale of it to satisfy the judgment.

The appellee, C. T. Bondurant, brought this action against the appellant, Union Cotton Company, averring that the latter had broken a contract between him and it by which he had leased from it a cotton gin and appurtenances for a term beginning July 1, 1916, and ending June 30, 1917, and for which he had agreed to pay it the sum of \$1,200. The negotiations between the parties had commenced by parol, but were completed by an exchange of letters, and culminated in the making of a contract which was reduced to writing and subscribed by each of the parties. The writing contained a clause as follows:

"The Union Cotton Company agrees to put the cotton gin machinery and scales in good working condition, said work to be inspected and accepted by C. T. Bondurant as soon as repairs are completed, not later than August 1, 1916."

The written memorial of the contract was prepared in duplicate and subscribed by appellant and forwarded by mail to appellee, who in turn subscribed the copies, and, retaining one, returned the other to appellant, and about the same time forwarded to it three negotiable promissory notes by which he promised to pay the rental in three equal installments, October 1st, January 1st, and April 1st following. The appellant accepted the notes, and before either of them became due assigned them to another. While it is insisted by appellant upon this appeal that the contract, by reason of a letter from appellee which accompanied the return of the written contract to appellant and the reply thereto by appellant, was that the appellee should make any repairs necessary after the 1st of August, and after repairs had been made by appellant, previous to that time, and at his own cost. This contention does not appear in the pleadings, which admit the contract touching the duty of putting machinery of the gin and the scales in good working condition to be as stated in the above-quoted clause of the writing subscribed by both parties, and besides neither party appears to have ever accepted the construction placed upon this clause of the writing by the other in the letters referred to, but to have proceeded under the contract as written and subscribed.

The breach of the contract upon which appellee relied for the recovery of damages was the alleged failure by appellant to put the machinery of the gin, which was greatly in need of repair, into good working condi-

tion, either before August 1st or at any time thereafter, and hence that, under the terms of the contract, the repairs had never been in such a state of completion as to require him to accept them as having put the plant in a good working condition, and that on that account he had never done so, and that, although appellant had in the first days of July placed workmen in repairing the plant, it had never so repaired it as to put it in good working condition, and that he had so notified the agent of appellant in charge of the work that he would not accept the repairs as made as putting the plant in the condition required by the contract, and thereafter appellant never complied with its covenant to make the necessary repairs, and appellee did not know that the plant was not in good working condition until he undertook to operate it after the ginning season for 1916 had commenced, when he found that the plant was entirely unfit for ginning purposes and not in working condition, and this was at so late a period in the season that he was not able to secure or provide himself with other means of ginning during that season, nor to have repaired the appellant's gin, if he had desired to do so, and because of that fact he lost profits which he could and would have made in ginning cotton during the season which amounted, as he claimed, to the sum of \$1,800. Upon the other hand the appellant denied that it failed before August 1st, to put the plant in good working condition, and claimed affirmatively that it did put the machinery of the gin and the scales in such condition and had them in such condition by the 14th day of July, at which time the appellee accepted the plant as having been put in the condition required by the contract. The appellant denied all the averments of damages made by the appellee, and also set up a counterclaim for damages, based upon the stipulation in the contract that appellee, at the end of the term of the lease, would return the property to appellant in as good condition as he received it, ordinary wear and damages from fire excepted, and then, in violation of the stipulation, he had negligently permitted it to become greatly injured and damaged in the sum of \$1,000. The affirmative allegations of appellant's answer was by agreement, controverted upon the record.

The issues raised by the pleadings were determined by the jury under instructions which submitted the theory of each party to it, and resulted in a finding for appellee in the sum of \$1,200 and a judgment of the court accordingly.

The Union Cotton Company appeals from the judgment, and urges that the court erred in overruling its motion for a directed verdict at the close of the evidence for appellee and at the close of all the evidence upon

two grounds. The first of the grounds relied upon is that the damages sought, and for which the appellee recovered a judgment, were on account of the loss of profits, which character of recovery is not allowed, because the evidence of such recovery is uncertain, contingent, and speculative. It may be conceded that the only element of damage which appellee, by his petition, sought to recover, was the profits which he could and would have realized from the ginning of cotton during the ginning season, within the terms of the lease, if the plant had been put into good working condition by appellant, and which he lost by the failure of appellant to comply with its contract in that respect. He also averred that, when the contract was made for the lease of the property, appellant knew his purpose in procuring the lease was to operate the gin during the following season for ginning cotton. He testified upon the trial to having given appellant such information of his intention during the negotiations, and this testimony was not objected to nor the truth of the statement denied in any evidence. The court instructed the jury that, if it was contemplated by the parties when the contract was made that appellee was leasing the property for the purpose of operating the gin and realizing profits therefrom, and appellant failed to put the plant in reasonably good working condition before August 1st, and appellee was thereby deprived of the use of it for ginning purposes during the season of the fall of 1916 and the winter of 1917, and was thereby prevented from the ginning of cotton which he could and would have ginned but for such failure on the part of appellant, to find for appellee such a sum as would reasonably compensate for the loss of the profits, if any, which he could and would have realized from the ginning of cotton, less the expense incident to it. The appellant, as a ground for its motion for a directed verdict, as well as of objection to the instruction given, insists that damages are not recoverable on account of the loss of profits.

[1,2] It is true that the loss of profits which are remote, uncertain, contingent, speculative, and conjectural is not allowable as a basis for damages. Formerly damages on account of loss of profits were not allowable at all, but the principle now governing the subject is that the right to recover damages on account of loss of profits is determinable by the same principles as the recovery of other damages are. Where a breach of a contract is involved, loss of profits is a proper element of damages, where they can be shown, not with absolute, but with a reasonable, degree of certainty, and when it may be reasonably considered that when the contract was made the parties had in contemplation the loss of profits as an element for

damages which would naturally grow out of a violation of the contract. The loss of anticipated profits which can be legally ascertained—that is, which do not lack certainty on account of being too remote, conjectural, and speculative—may be recovered. *Elizabethtown & Paducah R. Co. v. Pottinger*, 10 Bush, 188; *Blood v. Herring*, etc., 61 S. W. 273, 22 Ky. Law Rep. 1725; *Bates Machine Co. v. Norton Iron Works*, 113 Ky. 372, 68 S. W. 423, 25 Ky. Law Rep. 931; *Pugh v. Jackson*, 154 Ky. 649, 157 S. W. 1082; *Cordage Co. v. Luthy*, 98 Ky. 586, 33 S. W. 835, 17 Ky. Law Rep. 1126; *New Market Co. v. Embry*, 48 S. W. 980, 20 Ky. Law Rep. 1130; *Telephone Co. v. Wisdom*, 62 S. W. 529, 23 Ky. Law Rep. 97; *Smith v. Perry*, 13 Ky. Law Rep. 683; *Long v. O'Bryan*, 91 S. W. 659, 28 Ky. Law Rep. 1062; *Gregory v. Slaughter*, 124 Ky. 345, 99 S. W. 247, 30 Ky. Law Rep. 500, 8 L. R. A. (N. S.) 1223, 124 Am. St. Rep. 402; 8 R. C. L. 501, 502, and 649; *Horn v. Carroll*, 90 S. W. 559, 28 Ky. Law Rep. 840; *Sagamore Coal Co. v. Clark*, 109 S. W. 349, 33 Ky. Law Rep. 137; *Thompson v. Jackson*, etc., 14 B. Mon. 114.

[3] In the instant case the gin was leased for one year. Unless a contrary purpose appears, it could not be assumed that one would take a lease upon a cotton gin for any other purpose than to operate it. The contract here provided that the lessor should, as one of the conditions of the lease, put it into good condition for operation, and from which it was obliged to have inferred that it was the purpose and intention of the appellee in securing the lease to operate the gin for what it would realize to him. Aside from these considerations, the appellee alleges and proves that appellant was made acquainted with the fact that his purpose in entering into the contract was to secure the gin for the purpose of operating it. In such state of case it seems that the parties must have had in contemplation, when the contract was made, that the profits which the appellee anticipated would be made from the operation of the gin would be an element of the damages if the contract was violated so that he was prevented from operating the gin and realizing the profits. The anticipated profits are capable of ascertainment with a reasonable degree of certainty. The evidence without dispute shows that the ginning season, during the term of the lease, was from 60 to 90 days. The plant, if in good working condition, would gin not less than 30 bales of cotton per day. The profit for ginning a bale of cotton, over and above the expenses of so doing, was not less than \$2.50. During the period of the lease the appellee proves that he was compelled to decline to gin not less than 500 bales of cotton because of the lack of ginning facilities arising from the appellant's failure to put the gin in good

working condition. Hence it appears that the court did not err in overruling the motion for a directed verdict, nor did it err in the measure of damages recoverable which was submitted to the jury by the instruction given.

Another ground upon which it is insisted that the motion for a directed verdict should have been sustained was that the contract provided that the appellee should make any repairs necessary for the operation of the gin the necessity of which might appear after the 1st of August, and that, when he undertook to operate the gin, it was his duty to have made the repairs necessary to have put it in good working condition, the cost of which, it is insisted, would not have exceeded the sum of \$100, and that appellee wholly failed to undertake in any way to minimize the damages which he suffered from the failure of appellant to perform its contract with him, which the appellant insists was conclusively shown by the proof. The appellant rests his contention in this respect upon the contents of the letter which appellee wrote to appellant and which accompanied the return of the written contract subscribed by him, and in this letter the appellee stated that he would pass on and give his opinion at the time the appellant had completed all repairs necessary to put the plant in good working condition, and if there were some things left to be done after the appellant's servant had left who was to do the necessary repairs, appellee was willing to do it with an experienced man of his own, but would expect the appellant to pay for the work as it had agreed to put the plant in good running condition. This proposition, if it may be so called, or addition to the contract, was distinctly rejected by the appellant in the letter which it wrote to appellee in reply. Instead of it being conceded that the evidence shows that appellant put the plant in good working condition before August 1st, and that it was accepted as such by the appellee, the evidence shows preponderatingly that the plant was not put in good working condition by appellant, nor did appellee accept it as being in such condition from the repairs made. The evidence shows without any contradiction that, when appellee did undertake to operate the gin, it was utterly unfit to be operated, and was in such condition that appellee and his witnesses deposed that it was then too late in the season to undertake to put it in working condition for that season, and the expense which would have been necessary to have put it in good working condition does not appear to have been less than the sum of \$100, because when it was put in condition the following year, without any material change in its condition, the cost amounted to \$300 to \$400. It will further be observed that the failure to put the plant in a

working condition of which appellee complains was not on account of something which happened to the machinery after the 1st of August, or some injury to it which might arise from its operation or otherwise, but the complaint which he makes is of the failure of the appellant to perform the covenant in its contract to put the plant in working condition before the 1st of August as a condition of the contract between them. Hence the evidence does not show such a state of case as would justify a peremptory direction to the jury to find a verdict for appellant.

[4] We do not consider nor pass upon the question as to what instruction, if any, would have been proper to have been given to the jury touching the appellee's duty to minimize the damages which he was about to suffer, as no such instruction was offered by the appellant, nor any instruction which required the court to give one upon that subject, as appears from the bill of exceptions. The issue which appellant made and upon which it squarely based its defense was that it had put the plant in good working condition before the 1st of August, and that appellee had so accepted the repairs then made, and had accepted the plant as in the condition required by the contract, and for that reason could not complain of the unfit condition of the plant after that time, and the court, in substance, so instructed the jury, submitting to it the issue as to whether the appellant did put the plant in the condition required by the contract before the 1st of August, and whether the appellee accepted it as such, and upon that issue the jury evidently found for the appellee.

[5] The judgment by which the attachment was sustained and seven separate lots, designating them by numbers, are directed to be sold in satisfaction of the judgment for damages, must be reversed. The return of the officer who levied the attachment issued in the action does not indicate that the lots are the property upon which he levied the attachment, and there is no evidence or pleading of any kind in the record to support the judgment to the effect that the lots should all be sold together, or the necessity for so doing. While the description of a parcel of real estate as a town lot might be sufficient upon which to rest a judgment that it was indivisible, it could not be conceded that seven separate lots constitute one indivisible parcel of real estate, without evidence to that effect, or at least a showing that they are contiguous. The rule providing that no more of a defendant's real estate should be sold in satisfaction of a debt than is necessary for that purpose should be adhered to, unless it is shown that the property is not susceptible of practical division.

The judgment for the recovery of damages is therefore affirmed, but the judgment sustaining the attachment is reversed, and the cause remanded for proceedings consistent with this opinion.

SOVEREIGN CAMP, WOODMEN OF THE WORLD, v. THOMAS.

(Court of Appeals of Kentucky. May 25, 1920.)

1. Insurance \S 819(2)—Evidence held to show insured suffered from indigestion before death.

In widow's action on husband's policy issued by benefit society, evidence held to show that husband for three or four years before his death had been suffering with attacks of indigestion, some so serious as to leave him apprehensive for his life, also showing he knew attacks were from indigestion or serious disorder of digestive system.

2. Insurance \S 723(5)—Misrepresentations of insured as to freedom from indigestion may prevent recovery.

Under Ky. St. \S 639, providing statements in application for life insurance shall be deemed representations, and shall not prevent recovery unless material or fraudulent, where applicant for certificate of insurance in a benefit society, with knowledge he was subject to indigestion, or at least that he had symptoms of serious disturbance in digestive system, stated he had never had diseases or symptoms of colic, gall stones, or indigestion, or other diseases of digestive system, his widow cannot recover on certificate.

3. Insurance \S 818(2)—Evidence that application would not have been accepted if applicant had stated truth admissible.

In action on certificate issued by benefit society, defense being that in his application insured misrepresented he had never had diseases of digestive organs, or symptoms thereof, evidence that according to usual course of life insurance business application would not have been accepted or policy issued, if insured had stated the truth, is admissible for defendant society.

Appeal from Circuit Court, Grayson County.

Suit by Susie Thomas against the Sovereign Camp, Woodmen of the World. From a judgment for plaintiff, defendant appeals. Reversed, with directions for new trial.

Robt. L. Page and L. D. Greene, both of Louisville, and Allen Cabbage, of Leitchfield, for appellant.

Haynes Carter, of Elizabethtown, for appellee.

CARROLL, O. J. This is a suit by Susie Thomas, the widow and beneficiary of A. W. Thomas, to recover from the appellant, Woodmen of the World, the amount of a

policy for \$1,000 issued to A. W. Thomas. Upon refusal to pay the policy, Mrs. Thomas brought this suit, and, after a trial in the circuit court, there was a judgment in her favor for the amount of the policy, and the company appeals.

The grounds upon which her right to recover upon the policy were contested are of such a nature as to require an extended statement of the facts.

On December 27, 1916, A. W. Thomas made application to the local camp of Woodmen, at Leitchfield, Ky., to become a member, entitled to participate in its insurance scheme, and at the time of his application he was asked the following questions and made the following answers thereto:

"Have you now or ever had any disease of the following named organs, or any of the following named diseases or symptoms: * * * Colic, gall stones, * * * indigestion, * * * or any other disease of the digestive system?" Answer: "No." "Have you consulted or been attended by a physician for any disease or injury during the past five years?" Answer: "No."

His application was accepted, and on January 13, 1917, a certificate of insurance for \$1,000 was delivered to him. On the next day he died from an attack of acute indigestion, and payment of the policy was resisted upon the ground that the answers made by Thomas to these questions were material and false. A reversal is asked, upon the ground that the court erred in refusing to direct the jury to find for the Woodmen of the World, that the verdict was flagrantly against the evidence, for error committed in rejecting competent evidence, and in the instructions of the jury.

On behalf of the Woodmen, T. F. Willis testified that he had known Thomas about two years just preceding his death, during which time he had lived at Leitchfield; that he had heard him on three different occasions speak about "spells" he had.

"Q. What did he say the spells were? A. The last morning he talked to me, the day he died, he said the doctors claimed it was acute indigestion. Q. Did he say where he suffered, what hurt or pained him, or describe his suffering? A. Yes; he told me all about it. Q. What did he tell you? A. He said it was in his stomach. Q. Did he say whether or not the spell was slight or severe, or what description did he give? A. He said it was severe, and went on to tell me he believed, if he hadn't trusted in God, it was severe enough it would have killed him, you know. Q. When did you say was the first time you had a conversation with him, that he told you something about his condition of health? A. It was some three or four months, the first conversation. Q. Three or four months before his death? A. Yes, sir. Q. Tell the jury what he told you in that conversation with reference to his condition of health, or any spell. A. He said, 'I had a spell when I was living at the fair

grounds, and thought I was going to pass away.' Then he told about the first time. Q. What sort of spell did he say that was? A. He pronounced it then, he thought it was something like bilious colic. Q. He characterized it as some sort of stomach trouble, did he? A. Yes, sir. Q. Did he say on that occasion whether he suffered much or little, whether it was serious or slight? A. Yes; he said it was serious."

W. B. Hill had several conversations with Thomas and gave evidence to the same effect as that of Willis.

Dr. J. R. Perry testified that he was a practicing physician, and had attended in a medical capacity A. W. Thomas.

"Q. Did he ever consult you personally, or did you ever attend him as a physician? A. Yes. Q. State as near as you can the time or times that you have attended him. A. I really can't say the number of visits I attended him at his home, but it was in November, and December, 1912, to the best of my knowledge. Q. He consulted you, and did you attend him during these two months you speak of more than once? A. Yes. Q. What was the trouble complained of by Mr. Thomas at the time or times you visited him? A. Gastritis. Q. What is gastritis? A. An inflammation of the stomach. G. Doctor, I will get you to state whether or not you so advised him at the time of his ailment. A. Yes. Q. At the time you speak of treating him in 1912, did he tell you what was the matter with him, or did you tell him what you thought was the matter with him? A. I told him. Q. Did you find that he had any disease of the digestive system? A. Yes. Q. What was that? A. Gastritis. Q. Did you find this trouble of Thomas' temporary or chronic? A. I would not have called it chronic at the beginning, the first time I saw the attack."

Dr. S. H. Armes testified that, about five or ten days before the death of Thomas, he was called to see him once only, and found him suffering with severe pains in the region of his stomach; that the symptoms indicated that he was suffering with a case of indigestion.

"Q. Did you advise him of his ailment, what you thought was his trouble? A. I think so; the best I remember, I did. Q. What percentage, in your judgment, of the people suffer at times temporarily from what the laity call 'indigestion'? A. I don't know what per cent., but quite a number of people. Q. Wouldn't you suggest the vast majority? A. Yes; I think the majority. Q. The fact is, 'indigestion' is a term used to cover a number of disorders and illnesses? A. Yes, sir."

W. L. Bosarth testified that he knew Thomas when he lived at the fair grounds near Leitchfield and lived close to him.

"Q. Did he ever, during the period he lived there close to you, describe or tell you of any impaired physical condition he had? A. Yes, sir; he told me that he had a stomach trouble, and there were certain things he couldn't eat,

on account of the fact that they hurt him. Q. Did he tell you what those things produced as a rule, if he ate them? A. Well, I couldn't say now that he did. He just said he couldn't eat them on that account. Q. Did he tell you at that time what they did to him, how they affected him? A. Well, as well as I remember, he said they kind of cramped him, or something of the kind, that they hurt his stomach; it hurt him so he didn't eat them at all, just left them off. Q. On how many occasions did he tell you that? A. I couldn't say; he was there at my house some several times. Q. Did he during that time, or at any time, tell you of being out on his business trips and being overtaken with some trouble of that sort? A. Yes, sir. Q. Did he say to you he suffered much or little pain? A. Yes; he said sometimes he thought he wasn't going to make it at all. Q. Now, then, did the condition he described to you at that time occur during the last two or three years of his life or not? A. Yes, sir; I don't remember just the last time he said about it, but it wasn't any great while before his death. Q. Within the last year or— A. Yes; within the last year."

Dr. J. H. Hicks said that he did not treat Thomas during his life, but was called in when he died.

"Q. What was the cause of the death? A. Acute indigestion. Q. Was it complicated with any other disease, acute or chronic? A. Not that I know of."

Dr. J. M. Berry testified that he examined Thomas when he applied for the insurance; that he asked him all the questions in the application, and wrote down the answers that Thomas made; that there was nothing in his personal appearance that would indicate that he was suffering from any form of disease or indigestion; that he appeared to be in fine health, and in making out the application, and reporting to the Woodmen, he relied entirely upon the answers made by Thomas in his application; that he was called to his house the day he died, shortly afterwards, and from information gathered from the family his conclusion was that his death was caused from acute indigestion. Asked:

"Q. Is indigestion material to the risk in an insurance application on a man's life? A. Well, I don't know, sir, that it is; I can't say that it is. Q. Assuming that Mr. Thomas had reported to you, at the time you secured this personal history from him, that he had spells of indigestion at various times? A. I would have stated on the application blank, to let the company—the chief physician—pass upon it; because people sometimes suffer from very slight indigestion, from overeating. Q. Did you, or not, have anything to do with the acceptance or rejection of this application for insurance? A. No, sir. Q. If Mr. Thomas, in making to you this personal history, had said to you in the course of that history that he had indigestion, would you in that event have inquired as to the number of spells he had, as to whether or not they were light or serious. A.

Yes, sir. Q. Would you have made a complete and detailed inquiry into his condition? A. Certainly I would. Q. If, in answer to this question, Doctor, 'Have you consulted or been attended by a physician for any disease or injury during the past five years?' had Mr. Thomas answered that question, 'Yes,' would you have gone into detail and made inquiry? A. Certainly, I would have wanted to know what it was he had been suffering with, and had a physician for, and the doctor, and how long the spell lasted, and how many days he was sick, so the chief physician could have formed a diagnosis. Q. As I understand the term, 'indigestion' is rather a lay term—that is, a term used by those who are not members of the medical profession—and it is rather a general expression covering a number of things that might or might not be diseases? A. Yes, sir. Q. What did you report in that proof of death as the cause of death? A. Acute indigestion. Q. Upon what information did you make up this death certificate? A. By seeing him there in bed, and my casual examination, and what the parties in there said. Q. Who were the parties? A. I can't call their names. I don't remember; there were several up there. His wife was there."

Dr. Charles A. Edelen testified that he was a medical examiner for several insurance companies.

"Q. Are you acquainted with the character of risk ordinarily assumed by the companies in the usual course of their business of life insurance? A. I am."

He was then asked and made these answers:

"Q. In the usual course of business in all insurance companies, would or not the insurance company accept a risk, a person who had prior to that application for insurance suffered from acute indigestion, gastritis, or disease of the digestive system? A. Any physician would hardly accept any application or recommend any application for insurance who had frequent attacks of acute indigestion or gall stone colic—which is mostly the case in those conditions; that is a gall stone colic. No physician would recommend an applicant of that kind for insurance in any of the old-line companies. They might do this; they might put it up to the company, which would in all cases be declined or referred back to the medical examiner; and in cases of gall stone colic, should the gall stone be removed, afterwards they might be recommended for life insurance, but under no circumstances would we accept a man who had frequent attacks of gall stone colic, or bilious attacks, or acute indigestion as they call it. Q. In the usual course of business, what would a company do if an applicant simply stated that he had some indigestion? A. If the applicant would say to the medical examiner that he has a slight case of indigestion, the examiner would recommend him to the insurance company; the insurance company would then take it up with the medical examiner, and have him make thorough examination, and find out to his own satisfaction that it was not gall stone colic. Q. Assuming that this applicant had had, about three months prior to his application for in-

surance, a very severe attack of indigestion, and just prior to that time, something like six months, had had an attack of gastritis, what would have been the policy of the company in a case of that sort, assuming that the applicant stated that in his application for insurance? A. He would have been declined."

Dr. F. W. Samuels, who was examiner for several insurance companies, was asked:

"Q. Please state whether or not you consider diseases of the digestive organs, including indigestion, or acute attacks of indigestion, or colic, material to the risk. A. I do. Q. In the usual course of business, would an insurance company accept as a risk an applicant who had had an acute attack of indigestion, a month or two, or perhaps a shorter time, prior to the making of his application for insurance? A. An attack of acute indigestion would not make one an unfit applicant for risk, because acute indigestion means nothing. Q. Suppose, now, a man had several attacks, and had been suffering from indigestion, what would have been the policy of the insurance company in the usual course of business? A. To defer the risk until it could be found what was the matter with him. Q. Suppose a man made an application for insurance, and he stated he had indigestion, or acute indigestion, or a disease of the digestive organs, what would the company do? A. A disease, you know, is quite different matter. Acute indigestion is purely a symptom; disease means a different thing. Any disease of the digestive tract would cause him to be at once turned down as far as any regular company is concerned, for good and forever. Q. Suppose a man, in answer to this question, 'Have you now or ever had any disease of the following named organs, or any of the following named diseases, or symptoms: Colic, or gall stone, indigestion, or other disease of the digestive system?' had answered, 'Yes'? A. Then he would be turned down or deferred indefinitely. Q. In the usual course of business, what would insurance companies do with such an applicant? A. They are declined as a rule at the home office, even though the examiner here should recommend them, they would take no stock in his statement whatever, just decline him; at least, those I have anything to do with would. Q. Would any information of the insurance company to the effect that a person had had an attack of acute indigestion have caused the company to make a complete investigation as to the duration and frequency of the attacks before issuing a policy. A. Certainly it would; they would hold as suspicious all those things such as symptoms you have enumerated. As I say, they would hold the case suspicious until his condition is proven innocent and not malignant. Q. Would your insurance company consider those diseases as material as any other disease the person might have? A. Colic is not disease, you know; it is only a symptom."

Dr. M. Phelps testified that he knew Mr. Thomas, who told him about two weeks before he died of having a bad attack of indigestion the night before.

"Q. Did he tell you it was indigestion from which he was suffering? A. Yes, sir. Q. Is

indigestion a fatal disease? A. Well, not necessarily, until it is an acute attack. Q. Are you an examiner for any insurance company? A. Yes, sir. Q. If a person states in his application for insurance that he has been suffering from indigestion, or a disease of the digestive system, what is the usual and ordinary course taken by a physician in reporting on such applicants? A. Well, if there is any gastritis or dyspepsia to amount to anything, I think he would be turned down. Q. As a matter of fact, gastritis is a disease, is it not? A. Surely, yes. Q. Now, indigestion is not a disease, is it? A. Gastritis and indigestion is the same thing."

Mrs. Susie Thomas said that Mr. Thomas was only sick about an hour before he died; that a few days before he had a similar attack; that his health had been generally good, except that he was sick in 1912, when Dr. Berry waited on him. Other witnesses testified to the same effect as Mrs. Thomas concerning the general good health of Thomas.

[1] This evidence shows beyond question that Mr. Thomas for three or four years before his death had been suffering with severe spells of indigestion, some of them so serious as to leave him apprehensive that they would result in his death, and it is also very clear that he knew that these attacks were caused from indigestion or some serious disorder of the digestive system. We say this because Thomas was an intelligent well-informed man, who had been selling for several years a patent medicine that he was in the habit of using to obtain relief from the attacks he suffered with. It is also undisputed that within five years before his death he had been treated by a physician for gastritis, which is a form of indigestion, and was advised by him of the nature of his ailment. The evidence that Mr. Thomas knew that the attacks he suffered with were caused by indigestion is conclusive; but it is earnestly insisted that he did not recognize his ailment as a disease, and never considered that his digestive organs were diseased, and, this being so, the answers made by Thomas to the questions before referred to were not false.

Much emphasis is put upon the fact that in these questions he was asked if he now or ever had "any disease," or "diseases," such as indigestion, or any other "disease of the digestive system"; that the question as to whether he had been attended by a physician also contained the word "disease"; that accordingly it must be made to appear, in order to defeat the recovery on the policy on the ground that these answers were false, that Thomas had a "disease" or a "diseased" condition of the digestive system. It will be observed, however, that the first question is not confined to "diseases," but includes "symptoms"; the question being, Had he ever had any of the following

named "diseases" or "symptoms"? and it cannot be doubted that Thomas, even if it could be said that he did not know that the indigestion from which he suffered was a "disease," must have known that he had "symptoms" sufficient to satisfy any person of reasonable intelligence that he had either diseases or symptoms of indigestion.

It is further argued that the evidence shows—and it does—that indigestion is a common ailment, and one that a large majority of people are subject to; that it is not regarded as a disease by people generally, but merely as a disordered condition of the stomach, due to some indiscretion in eating food that does not agree with the person; and if Thomas had only occasional attacks of mild indigestion, or these attacks only caused the slight indisposition that usually comes from indigestion, as commonly understood, there would be great force in the argument of counsel that he never had any diseased condition of the digestive system within the fair meaning of the question to which he answered "No." But the evidence shows conclusively that Mr. Thomas, for three or four years before his death, had frequently suffered greatly from these attacks; that some of them were so serious as to cause him to fear that he might not survive another attack. It is therefore made plain that the indigestion that he was subject to was not that harmless type that is so common; it was of an aggravated, dangerous form, and Mr. Thomas, being, as the evidence shows, a man of intelligence, must have known the serious nature of these attacks.

There is also ample evidence in the record that, if in his application he had answered correctly the question propounded as to his health, and that he had been treated by a physician within five years, and that he was subject to these attacks about which he so freely spoke to other people, the company would have made a thorough investigation for the purpose of determining whether it would be advisable to accept his application. And the evidence of the medical examiners permitted to go to the jury, as well as that improperly excluded, also makes it very clear that, if the company had been put in possession of this information by the answers of Thomas in his application, it would either have rejected him at once or have made a thorough investigation, and, if the facts developed the conditions that appear in this record, would have rejected his application.

[2] It is provided in section 639 of the Kentucky Statutes that:

"All statements or descriptions in any application for a policy of insurance shall be deemed and held representations and not warranties; nor shall any misrepresentations, unless material or fraudulent, prevent a recovery on the policy."

And under this statute it has been frequently written that false answers in an application will not avoid the policy contract, unless they are material or fraudulent. Giving to this statute its fair meaning and the construction that has been consistently applied, there seems, in the light of the evidence, no escape from the conclusion that the answers of Thomas, in his application, were material and false.

Counsel for Mrs. Thomas rely on the cases of *U. S. Casualty Co. v. Campbell*, 148 Ky. 554, 146 S. W. 1121, *Columbia Life Insurance Co. v. Tousey*, 152 Ky. 447, 153 S. W. 767, *Yeoman of America v. Rott*, 145 Ky. 604, 140 S. W. 1018, and *National Protective Legion v. Allphin*, 141 Ky. 777, 133 S. W. 788, as supporting the contention that the answers of Thomas were not so false or material as to affect the validity of the insurance contract; but the facts in these cases, and many others like them, are so different from the facts in this case that they cannot be regarded as controlling authority on the propositions asserted by counsel. On the contrary, this court, in many cases, has consistently held, under facts such as appear in this record, that there could be no recovery on the contract. *Provident Savings Life Assurance Co. v. Dees*, 120 Ky. 285, 86 S. W. 522, 27 Ky. Law Rep. 670; *Provident Savings Life Assurance Co. v. Wayne's Adm'r*, 131 Ky. 84, 93 S. W. 1049, 29 Ky. Law Rep. 160; *Illinois Life Insurance Co. v. De Lang*, 124 Ky. 569, 99 S. W. 616, 30 Ky. Law Rep. 753; *Metropolitan Life Insurance Co. v. Schmidt*, 93 S. W. 1055, 29 Ky. Law Rep. 255; *Brisou v. Metropolitan Life Insurance Co.*, 115 S. W. 785; *Supreme Lodge of Knights of Pythias v. Bradley*, 141 Ky. 334, 132 S. W. 547; *Blenke v. Citizens' Life Insurance Co.*, 145 Ky. 332, 140 S. W. 561; *Knights of Maccabees v. Shields*, 156 Ky. 270, 160 S. W. 1043, 49 L. R. A. (N. S.) 853; *Royal Neighbors of America v. Spore*, 160 Ky. 572, 169 S. W. 984.

[3] Upon the whole case, after a very thorough consideration we have reached the conclusion that the verdict of the jury was flagrantly against the evidence and contrary to the instructions of the court. We are also of the opinion that on another trial the court should permit all the evidence offered by the company tending to show that according to the usual course of life insurance business the application would not have been accepted, or the policy issued, if the truth had been stated in the answer or answers made by the insured, and if upon another trial the evidence is substantially the same as appears in this record, the court should direct the jury to return a verdict for the defendant.

Wherefore the judgment is reversed, with directions for a new trial not inconsistent with this opinion.

**WILKERSON v. CITY OF LEXINGTON
et al. CHINN v. SAME. DAVIS
v. SAME.**

(Court of Appeals of Kentucky. June 4, 1920.)

1. Municipal corporations \S 918(1) — Two-thirds vote on bond issue held to meet requirement for creating indebtedness exceeding annual income.

Under Const. \S 157, declaring that no municipality may become indebted in any year beyond the income and revenue for such year without the assent of two-thirds of the voters at an election to be held for that purpose, where a municipal bond issue in a city of the second class with a population of more than 40,000 has received the assent of more than two-thirds of those voting on the question, the requirements of the Constitution are met.

2. Municipal corporations \S 865(3)—Proposed bond issue held not to exceed constitutional limit in second-class city.

Where a city of the second class having a population of more than 15,000 has a floating indebtedness of \$108,761.46, provided for in the 1920 levy and an additional indebtedness of \$1,464,336.52, and also a bond issue of \$75,000, the total value of the taxable property being \$33,140,954, a proposed indebtedness of \$1,200,000 does not exceed 10 per cent. of the total value of the taxable property as limited in Const. \S 158.

3. Municipal corporations \S 107(3) — Mayor pro tem. may sign ordinances with same effect as regularly elected mayor.

Under Ky. St. \S 3235c, subsec. 13, providing that each resolution, measure, or ordinance shall be signed by the mayor or by two commissioners, an ordinance may be signed by a mayor pro tem. alone, notwithstanding that such mayor pro tem. is a commissioner, and it need not, in addition, be signed by another commissioner to be valid.

4. Municipal corporations \S 918(3) — Sheriff need not advertise municipal bond election.

Where a city ordinance ordering an election on a bond issue was regularly passed by the board of commissioners, under Ky. St. \S 3069, and 3235c, subsec. 12, and regularly advertised by publication for two weeks, such election was properly advertised, notwithstanding that the sheriff did not advertise it as required by the orders of the county court; there being no statute requiring the sheriff to advertise such election.

5. Municipal corporations \S 269(1)—Second-class city may extend streets and construct under or over railroad tracks.

Ky. St. \S 3094, conferring on the general council of city of the second class, and on the board of commissioners where the commission form of government has been adopted under section 3235c, subsec. 12, exclusive control and power over the streets, roadways, etc., and to establish, open, alter, widen, and extend them, a city of the second class, through its board of commissioners, has power to extend the streets of the city and to construct

subways under, or viaducts over, railroad tracks within the city, wherever it is necessary for the safety and convenience of the public, as well as consequent power to levy taxes and incur indebtedness for such improvements.

6. Municipal corporations \S 268—Second-class city held to have power to purchase site and construct auditorium.

Under Ky. St. \S 3058, subsec. 16, conferring the power to purchase, rent, or lease, within the limits of the city or elsewhere, any real or personal property for the use of the city, and to control and improve it, a city of the second class acting under the commission form of government may purchase a site for and erect a municipal auditorium, in which the citizens may exercise their right of assembling and discussing public affairs, and such power carries with it the power to incur indebtedness and levy taxes for such purpose.

Appeals from Circuit Court, Fayette County.

Consolidated suits by H. Freeman Wilkerson, by A. Coleman Chinn, and by John B. Davis against the City of Lexington and others to enjoin certain bond issues. A demurrer to the answer was overruled in each case, and judgments rendered, denying an injunction and dismissing the petition, and petitioners appeal. Affirmed in each case.

Wallace Muir, of Lexington, for appellants.

Wm. H. Townsend, Harry B. Miller, and James A. Wilmore, all of Lexington, for appellees.

CLAY, O. These three appeals have been consolidated and will be considered in one opinion.

The suit of H. Freeman Wilkerson against the city of Lexington and its officers was brought for the purpose of enjoining a bond issue of \$500,000 to provide funds for the purchase of a site or sites, and erection thereon of a building or buildings, to be used as a city hall and auditorium, and for other public purposes. The suit by A. Coleman Chinn was to enjoin a bond issue of \$300,000 to provide funds for the purpose of defraying the expenses and cost of extending Vine street, from Limestone street to Hanover avenue, and Short street, from Wilson street to Russell avenue, and to construct a subway at the intersection of West High street with the railroad of the Southern Railway System. The suit by John B. Davis was to enjoin a bond issue of \$400,000 for school purposes. In each case the city filed a comprehensive answer, setting forth all the steps leading up to each issue, and giving a complete financial statement of the city, showing in detail all the indebtedness theretofore existing, the amount of indebtedness proposed to be incurred, together with the prior tax rate and the rate that would have to be levied in order to

provide a sinking fund and pay the proposed indebtedness. In each case the demurrer to the answer was overruled, and a judgment was rendered, denying the prayer for an injunction, and dismissing the petition.

Lexington is a city of the second class, with a population of more than 40,000, and has adopted the commission form of government. Cities of the second class are given authority to issue bonds by section 3069, Kentucky Statutes, which is as follows:

"The general council shall not expend any money in excess of the amount annually levied, collected or appropriated for any special object: Provided, if, in any year, the general council shall deem it necessary to incur any indebtedness, the payment of which cannot be met without exceeding the income and revenue provided for the city for that particular year, it shall, by ordinance, order an election by the qualified electors of the city to be held, to determine whether such indebtedness shall be incurred. Such ordinance shall specify the amount of indebtedness proposed to be incurred, the purpose or purposes of the same, and the amount of money necessary to be raised annually by taxation for an interest and sinking fund, as herein provided. Such ordinance shall be published for at least two weeks just preceding the election in the official newspaper in and for such city, or by posting written or printed copies thereof at three or more public places in such city, if there be no such official newspaper. Upon filing by the city of a certified copy of an ordinance ordering such an election with the county clerk of the county in which such city is located, thirty days prior to any regular election, it shall be the duty of the county clerk to cause to be printed upon the ballots, to be used in the city precincts of such county at such election, the question of the issuance of bonds by said city as proposed by such ordinance. The expenses thereof shall be paid as other election expenses are paid. The election shall be held in the manner provided by general law for submitting public measures to a vote of the people, and shall be held at the same time and place, and in the same manner, and by the same officers as the regular election of that year. The votes on said question shall be canvassed and certified by the election officers in the same manner as votes cast in the regular election. It shall be the duty of the county board of election commissioners to canvass the returns of the election on said question, and certify the result thereof at the same time and in the same manner as the returns of the regular election.

"If, upon a canvass of the votes cast at such election, it appears that two-thirds of all the qualified voters of said city, voting on said question, shall have voted in favor of incurring such indebtedness, the general council may incur such indebtedness and issue bonds of the city in evidence thereof, and it shall be the duty of the general council to pass an ordinance providing for the mode of creating such indebtedness and of paying the same. But such indebtedness shall not, in any event, exceed the limit provided in the Constitution for cities of the second class. In such ordinances provision shall be made for the levy and collection of an annual tax upon all real and per-

sonal property subject to taxation within such city, sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within a period of not more than forty years from the time of contracting the same. It shall be the duty of the general council in each year thereafter, at the time at which other taxes are levied and collected, to levy and collect a tax sufficient for such purpose, in addition to the taxes by this chapter authorized to be levied. Such tax, when collected, shall be kept in the treasury as a separate fund, to be inviolably appropriated to the payment of the principal and interest of such indebtedness. Any member of the general council who shall knowingly vote for any appropriation of money, or for the making of any contract in violation of this act, or any officer of the city who shall knowingly do any act to impose upon the city any pecuniary liability in excess of the authority in this act limited, shall be guilty of a misdemeanor, and, upon conviction, be punished by a fine of not less than one hundred nor more than one thousand dollars, or imprisonment in the county jail not less than one month nor more than one year, or by both such fine and imprisonment."

On September 2, 1919, there was introduced Ordinance No. 1611—

"providing for submitting to the qualified voters of the city of Lexington the proposition of incurring an indebtedness of \$500,000, and issuing bonds of the city therefor, to provide funds for the purpose of the purchase of a site, or sites, and the erection of a building, or buildings thereon, for the purpose of being used as a city hall, an auditorium or for other public purposes."

This ordinance, in its completed form, remained on file for the period of one week. On September 9, 1919, it was passed by the unanimous vote of the commissioners, and was approved by W. H. McCorkle, the vice mayor; the regular mayor being so ill that he was unable to attend to business. It was then published in the official newspaper. The ordinance specified the amount of indebtedness proposed to be incurred, the purpose of same, and the amount of money necessary to be raised annually by taxation for an interest and sinking fund. It further provided for the issuing of bonds and the taking of the sense of the voters thereon at the regular election on November 4, 1919. On October 17, 1919, the ordinance was published in the Lexington Leader, the official newspaper of the city, and in each issue of the paper from said date to November 3, 1919, inclusive. A certified copy of the ordinance was delivered to the county clerk of Fayette county 30 days prior to the election. On motion of the city an order was entered by the Fayette county court on September 23, 1919, ordering and directing the sheriff of said county to open a poll at each voting precinct in the city at the regular election to be held on November 4, 1919, for the pur-

pose of ascertaining the will of the voters of said city on the issuing of said bonds, and to advertise said election for at least 15 days in some daily newspaper of the city, and also by printed handbills posted in one or more conspicuous places at each precinct of the city and at the courthouse door. The question was placed on the ballot in proper form and duly submitted at the November election. The vote in the affirmative was 2,416, while the vote in the negative was only 851. On December 8, 1919, the board of commissioners enacted Ordinance No. 1643, providing for the incurring of the indebtedness and the issuing of the bonds. This ordinance further provided for the levy and collection of an annual tax sufficient to pay the interest on the bonds, and provide a sinking fund for their retirement as they became due. This ordinance remained on file for one week for public inspection before its final passage. It was then passed by the unanimous vote of the board of commissioners, was approved by the mayor, was published in the official newspaper, and took effect on December 15, 1919.

On August 29, 1919, there was introduced Ordinance No. 1606—

"providing for submitting to the qualified voters of the city of Lexington the proposition of incurring an indebtedness of \$300,000, and issuing bonds of the city therefor, to provide funds for the purpose of defraying the expenses and costs of extending Vine street from Limestone street to Hanover avenue, and Short street from Wilson street to Russell avenue, and construct a subway at the intersection of West High street with the railroad of the Southern Railway System."

The ordinance in its completed form remained on file one week for public inspection, and was passed by unanimous vote of the commissioners on September 5, 1919. It was then approved by the vice mayor, the mayor being too ill to attend to business, and was published in the Lexington Leader, the official newspaper of the city. This ordinance also specified the amount of indebtedness proposed to be incurred, the purpose of same, and the amount of money necessary to be raised annually by taxation for interest and sinking fund. It further provided for taking the sense of the voters thereon at the regular election to be held in November. Thereafter the same steps were taken with reference to this ordinance as were taken with reference to Ordinance No. 1611. The question of incurring the indebtedness and issuing the bonds was submitted in proper form to the voters at the regular November election. The vote in the affirmative was 2,525, while the vote in the negative was 904. On December 8, 1919, there was introduced Ordinance No. 1642, authorizing the issue of the bonds. This ordinance remained on file for one week for public inspection in its

completed form, and was passed by unanimous vote of the commissioners on December 5, 1919. It was then approved by the mayor and published in the official newspaper as required by law. This ordinance levied an annual tax sufficient to pay the interest and principal as the bonds became due.

On August 28, 1919, the board of education of the city of Lexington passed a resolution setting forth the necessity of issuing bonds in the sum of \$400,000 for the purchase of sites, the erection and equipment of new school buildings, and for the improvement of the buildings already in use, and asked the board of commissioners to adopt the necessary ordinances for the purpose of submitting to the qualified voters of the city of Lexington at the regular election to be held on November 4, 1919, the question of incurring said indebtedness and issuing said bonds. Pursuant to the resolution of the board of education, there was introduced on August 29, 1919, Ordinance No. 1608—

"providing for submitting to the qualified voters of the city of Lexington the question of incurring an indebtedness of \$400,000 and issuing bonds of the city therefor, bearing five per centum interest per annum, payable semi-annually, to provide funds for the proper accommodation of the schools of said city, to acquire sites for school buildings, to erect a new junior high school building for white children, a high school building for negro children, and to improve, remodel and make additions to other public schools in said city and to enlarge the sites thereof."

This ordinance remained on file in its completed form for one week, and was passed by the unanimous vote of the commissioners on September 5, 1919. It was then approved by the vice mayor, the mayor being ill and unable to attend to business, and was published in the official newspaper as required by law. This ordinance specified the amount of indebtedness proposed to be incurred, the purpose of same, and the amount of money necessary to be raised annually by taxation for an interest and sinking fund. It also provided for taking the sense of the voters thereon at the regular election to be held on November 4, 1919. The question was duly submitted to the voters at that election. The vote in favor of the proposition was 8,003, and the vote against the proposition, 1,778. On December 8, 1919, there was introduced Ordinance No. 1,641, authorizing the issue of the bonds and providing for the levy of an annual tax sufficient to pay the interest thereon and the principal thereof as the bonds became due. This ordinance in its completed form remained on file for one week for public inspection. It was passed on December 15, 1919, by the unanimous vote of the commissioners. It was then approved by the mayor and published in the official newspaper as required by law.

[1] It is apparent from the foregoing

statement that each of the bond issues received the assent of more than two-thirds of those voting on the question, and under the repeated decisions of this court this was all that was necessary in order to meet the requirement of section 157 of the Constitution, declaring that no municipality shall become indebted in any year beyond the income and revenue for such year, without the assent of two-thirds of the voters at an election to be held for that purpose. *Logan, etc., v. Gilbert*, 151 Ky. 659, 152 S. W. 778; *Fowler v. City of Oakdale*, 158 Ky. 603, 166 S. W. 195; *City of Marion v. Haynes*, 157 Ky. 687, 164 S. W. 79.

[2] 2. Section 158 of the Constitution provides in substance that a city of the second class, having a population of more than 15,000, cannot incur an indebtedness, including existing indebtedness, in excess of 10 per centum of the value of the taxable property therein, to be estimated by the assessment next before the last assessment previous to the incurring of the indebtedness. Aside from a floating indebtedness of \$108,761.46, which was provided for in the 1920 levy, the entire indebtedness of the city is \$1,464,336.52. The proposed indebtedness herein involved is \$1,200,000 in addition to a bond issue of \$75,000 for a memorial building, the validity of which is not now before us. According to the 1918 assessment, which is controlling in these cases, the total value of the taxable property in the city was \$33,140,954. It is therefore apparent that the indebtedness proposed to be incurred, together with the existing indebtedness of the city, will not exceed 10 per centum of that amount.

[3] 3. Subsection 13, section 3235c, Kentucky Statutes, is in part as follows:

"The mayor shall preside at meetings of the board. He shall have no veto power. But each resolution, measure or ordinance shall be signed by him, or by two commissioners, and recorded before it shall take effect.

"The board of commissioners shall, at the beginning of its term of office elect, by a majority of all its members, one commissioner to act as mayor pro tem.; and the commissioner so chosen shall be invested with all the powers and shall perform all the duties of the mayor, in the event of his absence from the city or his inability to attend to the duties of his office."

In view of the requirement that each resolution, measure, or ordinance shall be signed by the mayor, or by two commissioners, it is insisted that it was essential to the validity of the ordinances signed by the mayor pro tem. that they should have been signed by another commissioner. With this contention we cannot agree. The statute invests the mayor pro tem. with all the powers of the mayor, if the latter is absent from the city or unable to attend to the duties of his office. Hence, when the mayor pro tem. approves an ordinance, he does so, not as a

commissioner, but as mayor, and his approval has the same effect as the approval of the ordinance by the mayor himself. It is admitted that at a regular meeting of the board of commissioners held on January 7, 1918, W. H. McCorkle, a commissioner, was duly and regularly elected vice mayor, or mayor pro tem., for the years 1918 and 1919. It further appears that at the time he approved the ordinances in question the mayor was suffering from a serious illness, which prevented him from attending to the duties of his office, and from which he subsequently died. Under these circumstances, McCorkle, as vice mayor, or mayor pro tem., had the right to approve the ordinances, and the approval of another commissioner was not necessary.

[4] 4. Another contention is that the election was invalid, because the sheriff did not advertise the election, as required by the orders of the county court. There is no statute requiring the sheriff to advertise the election. The power to order the election is conferred upon the general council, or the board of commissioners, where the commission form of government has been adopted. Section 3069 and subsection 12, section 3235c, Kentucky Statutes. The only advertisement required is the publication of the ordinance itself for at least two weeks just preceding the election in the official newspaper, or by posting written or printed copies thereof at three or more public places in the city, if there be no such official newspaper. Section 3069, Kentucky Statutes. The ordinances ordering the elections in question were each published in the official newspaper from October 17th to November 3d, inclusive, or for a period of more than two weeks just preceding the election. That being true, the elections were properly advertised, and the failure of the sheriff to advertise them in nowise affected their validity.

[5] 5. Section 3094, Kentucky Statutes, confers upon the general council of cities of the second class, and hence upon the board of commissioners where the commission form of government has been adopted (subsection 12, section 3235c, Kentucky Statutes)—

"exclusive control and power over the streets, roadways, sidewalks, alleys, landings, wharves, public grounds and highways of the city; to establish, open, alter, widen, extend, close, grade, pave, repave, clean and keep in repair the same."

In view of the broad authority thus conferred, it cannot be doubted that the board of commissioners has the power to extend the streets of the city, and to construct subways under, or viaducts over, railroad tracts within the city, wherever it deems it necessary for the safety and convenience of the public, as well as the consequent power to levy taxes and incur indebtedness for such improvements. 19 R. O. L. p. 782; *Argen-*

time v. Atchison, etc., R. Co., 55 Kan. 730, 41 Pac. 946, 30 L. R. A. 255.

[6] 6. Subsection 16, section 3058, Kentucky Statutes, confers upon the general council of cities of the second class, and hence upon the board of commissioners where the commission form of government has been adopted, the power—

"to purchase, rent or lease, within the limits of the city or elsewhere, any real or personal property for the use of the city, and to control, manage, improve, sell, lease or otherwise dispose of the same, for such purposes and considerations as they may deem proper for the public welfare."

Clearly the power to purchase and improve real estate for such purposes and considerations as the board of commissioners may deem proper for the public welfare is very broad and comprehensive, and carried with it full authority to purchase a site and erect thereon a suitable building to house the municipal offices, and for use as a commodious and convenient auditorium in which the citizens may exercise their right of assembling and discussing public affairs, and this power carries with it as a necessary incident the further power to incur indebtedness and levy taxes for such purpose. *Whelock v. City of Lowell*, 196 Mass. 220, 81 N. E. 977, 124 Am. St. Rep. 543, 12 Ann. Cas. 1109; *Bates v. Bassett*, 60 Vt. 530, 15 Atl. 200, 1 L. R. A. 166; *Greeley v. People*, 60 Ill. 19; *Bell v. Platteville*, 71 Wis. 139, 36 N. W. 831; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Jones v. Sanford*, 66 Me. 585; *Clarke v. Brookfield*, 81 Mo. 503, 51 Am. Rep. 243; 1 *Dillon on Municipal Corporations*, § 30.

On the whole, we perceive no reason why the chancellor's ruling in each case should not be sustained.

Judgment affirmed in each case.

SHADRACK v. BOARD OF TRUSTEES OF MADISONVILLE GRADED COMMON SCHOOL DIST.

(Court of Appeals of Kentucky. June 4, 1920.)

Schools and school districts \Leftrightarrow 46—School districts embracing Madisonville subject to act for consolidation of government.

The white graded school district embracing Madisonville and some contiguous territory, and the colored common school district, embracing the same, and certain other territory, held subject to act 1920 relative to school districts embracing cities of the fourth class and any contiguous territory, whereby, though the white and colored schools may be separately maintained, they are to be under the super-

vision and government of one board of education; such districts not being within any exception of section 18.

From Circuit Court, Hopkins County.

Suit for injunction by J. S. Shadrack against the Board of Trustees of the Madisonville Graded Common School District. Injunction refused, and plaintiff moves in Court of Appeals to grant the injunction. Motion sustained.

H. F. S. Bailey, of Madisonville, for plaintiff.

Laffoon & Waddill, of Madisonville, for defendants.

CARROLL, C. J. Madisonville is a city of the fourth class, and many years ago there was established, under the general law found in sections 4464-4500 of the Kentucky Statutes, a white graded school district, embracing all of the city, as well as some contiguous outlying territory, and from that time until now there has been conducted, under the general law, a white graded common school district under the control of a board of trustees. Many years ago there was also created a colored common school district, embracing the city of Madisonville and contiguous outlying territory, exceeding the limits of the white graded school district. This colored common school district has for some years been under the control of the board of education of Hopkins county, conducted under the general laws of the state in the same manner as other common school districts.

It will thus be seen that these two districts, all embracing the same territory, except to the extent that the colored district outside of the city takes in more territory than the white district, have been and are being conducted under the general laws of the state by separate boards; the white school being supported by a tax on the property of the white people within the graded school district, supplemented by state aid, and the colored school being supported by a tax on the property of the colored people within the colored district, supplemented by state aid, as well as funds appropriated for the use of the school by the county board of education.

In 1920 the Legislature passed an act (Acts 1920, c. 14), the title of which reads:

"An act defining boundaries for school districts embracing cities of the fourth class, and providing systems of schools in such districts, and creating boards of education for such districts, providing for election thereof, defining their powers and duties, and repealing all laws in conflict therewith."

The first section of this act provides that:

"Each city of the fourth class in this state, together with the territory now within its

limits, including any territory which has heretofore been added for school purposes outside the limits of said city and any territory which may be in the future included by any change in the limits of such cities, or such territory as may be added in the manner as hereinafter set out in section 31, shall be and constitute a single school district, and the supervision and government of common schools and common school property therein shall be vested in a board of six trustees to be called and known as the board of education of —, Kentucky.

* * * Such board of education shall be a body corporate and shall have power, by and in said name, to sue and be sued, contract and be contracted with, purchase, receive, hold and sell property, issue its bonds, and do all things necessary to accomplish the purpose for the attainment of which said school district is organized, and succeed to all the property, property rights and privileges of whatever kind or nature granted and belonging to any previous corporation, board of education, or school district in said city or in which said city was embraced, or officers thereof authorized or empowered by any enactment of the General Assembly of the state to do anything in reference to the public education provided that all pending suits to which any such previous corporation, board of education, or school district or officers thereof, as a party may be prosecuted to an end in the name of such party. The titles to property previously granted to such city by the United States or this state for common school purposes and the title to all school lands and other property of every kind shall be vested in the board of education created by this act."

Section 2 provides in part that:

"Every such board of education shall have general and supervising control, government and management of the public schools, including kindergartens, night and normal schools, vocational and high schools as hereinafter provided, and public school property in such city, with the right to use said property to promote public education in such ways as it may deem necessary and proper; shall exercise generally all powers in the administration of the public school system therein, appoint such officers, agents and employees as it may deem necessary and proper and fix their compensation and term of office."

Sections 3 to 17, inclusive, and sections 19 to 31, inclusive, relate to matters not pertinent in the consideration of the questions raised in this case. Section 18 reads:

"The board of education shall provide, maintain and support separate schools and provide for the education of all colored children who are bona fide residents of said district and entitled to free tuition in the common schools. Said colored schools or children shall be entitled to the same benefits, be governed and controlled by the same rules and regulations and be subject to the same restrictions as the school herein provided for white children: Provided, however, that where any city of the fourth class has heretofore organized a system of free graded schools for the education of both white

and colored children of said cities under and by virtue of the charter of cities of the fourth class, and managed and controlled by the board of education, and has, by ordinance, passed by its general council, separated said systems of graded free schools into graded, free, white common school for the white people of said district and into a graded, free, colored common school for the colored people of said district; or where such separate schools have existed under the general laws of the state of Kentucky or special acts under separate boards, or where the board of council of any district embracing a fourth class city shall, by ordinance, provide for a separate system of schools under this law under different boards said schools shall be governed and controlled—the white schools by a white board of education, and the colored school by a colored board of education, to be elected on separate ballots as provided under section seven of this act. But where such provision is not made by ordinance of the board of council, or where such separate boards have not heretofore existed, both of said systems of schools shall be under one board of education. In cities or districts coming under the provisions of this act, where two boards of education, white and colored, have been maintained, the board of council of the city embraced in such districts may by ordinance abolish one of said boards and by its ordinance provide for one board of education, to be elected and qualified as is herein provided, and in that event there shall be but one board of education in such district."

Section 32 reads:

"The general school laws of this state and all laws and parts of laws applicable to the general system of public schools in cities of the fourth class not inconsistent herewith shall be and remain in full force and effect in such city or district, and all laws in conflict with the provisions of this act are hereby repealed."

This act of 1920, by virtue of an emergency clause, went into effect on March 13, 1920, and on May 12, 1920, the plaintiff, Shadrack, brought this suit in the Hopkins circuit court against the defendants, the board of trustees of the Madisonville graded common school district, alleging in his petition that he was a citizen and taxpayer in the city of Madisonville; that the Madisonville graded common school district was established by a vote of the white voters of the city, and thereafter enlarged so as to take in contiguous outlying territory; that the city did not establish or maintain a graded school or any school under the provisions of its charter, either for white or colored people; that the colored school is in a colored district embracing the city and contiguous territory larger than the white district, and is a common school district under the control of the county board of education; that there are in the white district 865 children within school years and in the colored district 412 colored children within school years; that the value

of the taxable property of the colored people in the colored district is \$71,693, and the value of the taxable property of the white people in the white district is \$2,434,867; that the white school district has erected, by means of a bonded indebtedness, a school building, which bonded indebtedness is yet unpaid. He further averred that the trustees of the white school are refusing to recognize or act under the act of 1920, and are ignoring the provisions of this act by levying and collecting taxes and conducting the white school in the same manner that it was conducted before the act of 1920 went into effect. He prayed that they be compelled, by injunction, to recognize the validity of the act of 1920, and proceed thereunder.

The lower court refused to grant the injunction prayed for, upon the ground that the act of 1920 was not applicable to either of these districts, and the case comes before me on a motion to grant the injunction refused by the judge of the lower court. It was the manifest purpose of the act of 1920 to place the school system, both white and colored in cities of the fourth class, under the control of the board of education provided for in section 1 of the act. The result of this change would be to put the white graded school, now under the control of the board of trustees, under the control of the new board of education, and to put the colored common school now under the control of the county board of education under the control of the new board of education.

If these two school districts were made into one, as provided in the act of 1920, the further result would be that all the taxes collected in the district would be appropriated to the maintenance of both the white and colored schools in proportion to the number of white and colored school children, except that the tax levy for the purpose of paying the bonded indebtedness of the white graded school district would be appropriated to that purpose. In the cities of the first, second, and third class, the scheme set forth in the act of 1920 has been in operation for some years, and it was the purpose of the Legislature in this new act to place the school systems in cities of the fourth class on the same general basis as the school system in the cities of first, second, and third class.

With the wisdom of this legislation we have nothing to do, although we might say in passing that the plan proposed to be applied to cities of the fourth class has worked well in cities of the first, second, and third class, in which the number of colored school children as compared to the number of white school children, and the value of the property owned by the colored people in proportion to the value of that owned by the white people, is about the same as it is in the city of Madisonville.

It is insisted by counsel for defendants

that, as the lines of the districts outside of the city do not coincide, it would create much confusion if the two districts were combined into one and put in charge of one board; but we do not regard as serious the circumstance that the lines of the colored district outside of the city take in more territory than is embraced in the white school district, because the lines of the colored district outside of the city can be reduced to correspond with the lines of the white district, or the lines of the white district can be extended to coincide with the lines of the colored district, and either one of these plans may be under the act and should be adopted.

This brings me to a consideration of the question whether the act of 1920 is applicable to the conditions existing in the city of Madisonville. The act, with the exception of section 18, which is somewhat obscure, seems to afford a practicable and workable scheme under which colored and white schools may be separately maintained, yet be under the control and management of one board, although it is likely that when certain sections or provisions of the act are attempted to be applied to states of fact that may come upon, difference of opinion as to their meaning may arise. But this is a condition that comes up frequently and must be dealt with as it appears. It seems to have been the purpose of section 18 to except from the operation of this act certain cities of the fourth class in which the conditions described in the section exist, or rather to leave it optional with certain cities to accept the provisions of the act, or to continue schools under the system in force before this act was adopted.

We doubt very much if it would be competent for the Legislature, in an act dealing with any class of cities, or the conditions existing in any class, to arbitrarily except from the operation of the act some cities in the class dealt with, although it has been held that it may be left to the people in the cities of a class to put in effect or not, as they think proper, the legislation applicable to all the cities of the class. An example of this kind of legislation is found in the act providing for a commission form of government. This act was upheld in *Bryan v. Voss*, 143 Ky. 422, 136 S. W. 884, the court saying in effect that it was permissible for the Legislature to enact a law applicable to a class of cities, but leave to each city in the class the option of determining for itself whether it would adopt the act or continue to manage its affairs under the laws in force previous to the adoption of the act.

Under the authority of this case, it seems that it would be competent for the Legislature to enact a law applicable to all the cities in a named class, giving to each city, however, the right to elect for itself whether it would or would not adopt the provisions of

the act, and this apparently is what was attempted to be done in section 18. It is provided in this section:

"That where any city of the fourth class has heretofore organized a system of free graded schools for the education of both white and colored children of said cities under and by virtue of the charter of cities of the fourth class, and managed and controlled by the board of education, and has, by ordinance, passed by its general council, separated said system of graded free schools into graded, free, white common school for the white people of said district and into a graded, free, colored common school for the colored people of said district; * * * said schools shall be governed and controlled—the white schools by a white board of education, and the colored school by a colored board of education, to be elected on separate ballots as provided under section 7 of this act."

It is manifest that this exception does not apply to Madisonville, because neither the white nor colored schools in that city were organized under or have operated under the charter of the city or ordinances adopted by the board of council. The third exception mentioned in the section exists:

"Where the board of council of any district embracing a fourth class city shall, by ordinance, provide for a separate system of schools under this law under different boards."

But this exception is plainly not applicable, because the board of council of the city of Madisonville has never undertaken by ordinance or otherwise to organize, regulate, or control either the white or colored schools.

The third exception in this section relates to "such separate schools [as] have existed under the general laws of the state of Kentucky or special acts under separate boards." But this exception is not applicable because, as shown in other parts of section 18, it contemplates the existence of separate schools under separate boards, either of which boards the council might abolish and make provision for one board to have charge of both schools. We think this exception must be limited to separate schools operating under boards appointed by the council or elected under ordinances, and that it can have no application to a state of case such as that existing in the city of Madisonville, where the council had nothing whatever to do with the creation of the boards, or any control over them, or the schools in their charge.

I am therefore of the opinion that the act of 1920 is applicable to these districts, and that the board of trustees of the white graded school must operate under it. Therefore the motion to grant the injunction refused by Judge Henderson is sustained. The whole court, except Judge CLARKE, who

was absent, considered this matter with me, and concur in what has been written and the conclusion reached.

WHITE SEWING MACH. CO. v. SMITH et al.

(Court of Appeals of Kentucky. June 4, 1920.)

1. Contracts ~~§~~94(5)—Persons signing contract cannot rely blindly upon the statements of the other party.

Persons signing contract cannot rely upon the statements of the other party as to its contents and, failing to read the papers, void the contract, unless representations of the other party were not only untrue, but made under such circumstances as would be reasonably calculated to deceive one while exercising ordinary care for his own protection.

2. Evidence ~~§~~442(1)—Parol evidence admissible when written contract is incomplete.

Where agreement is one and entire, and a part only is reduced to writing, resort to parol evidence may be had to prove the residue, providing the writing only purports to express part of the contract, or is expressed in such incomplete terms as renders parol evidence necessary to explain what is per se unintelligible, and such evidence is not inconsistent with the terms of the writing.

3. Reformation of instruments ~~§~~45(1)—Mistake to be established by clear and convincing evidence.

To entitle one to a reformation of a written instrument upon the ground of mistake, the mistake must be established by clear and convincing evidence.

Appeal from Circuit Court, Martin County.

Action by the White Sewing Machine Company against C. Smith and others. From a judgment in favor of defendants, plaintiff moves for an appeal. Motion for appeal sustained, appeal granted, and judgment reversed.

Vaughan & Howes, of Paintsville, for appellant.

QUIN, J. By its petition in this action appellant sought judgment in the sum of \$190.50, as the balance due on 10 sewing machines sold to the appellee Smith. The other appellees were made parties by reason of the execution by them of a bond to appellant, to the effect that Smith would perform the obligations of his contract incident to the purchase of these machines.

After denying the allegations of the petition, it was alleged in the answer as amended: (a) That the machines were purchased on the representation they were superior in

workmanship, material, and quality to another make of machine; (b) the writing sued on was intended as an order merely, and not as a contract, and he did not know the contents thereof at the time he signed the paper; he was almost blind, could not read, and relied on the statement of the agent as to its contents, which were misrepresented to him; (c) the machines were purchased under a verbal agreement subsequently entered into, by the terms of which he was given the privilege of returning the machines if they failed to give satisfaction. Under this agreement the shipment was billed to Kermit, W. Va. There was a verdict for \$9.50 by a jury in favor of appellee, being the full amount of his counterclaim, less the amount sued for. By the counterclaim Smith asked judgment in the sum of \$200, which he says he would have made had the machines been as represented.

The proof as to the alleged verbal contract is not convincing, nor is the fact that the consignment was delivered at Kermit instead of Peach Orchard, as provided in the contract, satisfactorily explained by appellant. The allegation as to the condition of appellee's eyes is not borne out by the testimony. Smith admits he can read. He says the agent misread what he calls the "fine print" in the contract. Just what this consists of is not made clear by the record; the contract is not filed; a typewritten copy only appears; and the so-called fine print is not indicated. The contract is very simple, with no warranties or representations and contains the following clause:

"This order is given subject to approval of White Sewing Machine Co., and if accepted or filled in full or in part, to be settled for at the prices and terms above set forth. There is no understanding or agreement of any nature whatsoever between your company and the undersigned as to these machines except such as is embraced in this order which contains all the terms and conditions upon which the same is given."

The alleged misrepresentation is not made clear in Smith's testimony. If misleading, it must have been in its exclusions rather than its contents. Smith says the contract under which the machines were shipped was made at a subsequent date.

[1] As said by the Supreme Court in *Upton v. Tribilcock*, 91 U. S. 45, 23 L. E. 203:

"It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission."

The court, however, recognizes that a different rule prevails when the party was misled as to the nature of the paper, and signed it under circumstances amounting to fraud and deceit. The same rule has been affirmed in many decisions of this court. For example in *United Talking Machine Co. v. Metcalfe*, 174 Ky. 132, 191 S. W. 883, we said:

"One sui juris and in possession of his faculties, contracting at arm's length, and who is able to read and write, is not permitted by the law to rely exclusively upon the statements of the other contracting party as to the contents of a writing which the former signs. There must be something said or done by the party charged with the fraud which would be reasonably calculated to disarm or deceive one of ordinary prudence and to prevent him from using such diligence as an ordinarily prudent man would use in the execution of a contract under the same or similar circumstances. When, therefore, the law speaks of misrepresentations by the party charged with the fraud, it means that the representations must have been, not only untrue, but also made under such circumstances as would be reasonably calculated to deceive one while exercising ordinary care for his own protection."

To same effect, see *Western Mfg. Co. v. Cotton & Long*, 126 Ky. 749, 104 S. W. 758, 31 Ky. Law Rep. 1130, 12 L. R. A. (N. S.) 427; *Rice v. Pulliam*, 141 Ky. 10, 131 S. W. 1053; *J. I. Case Threshing Mach. Co. v. Mattingly*, 142 Ky. 581, 134 S. W. 1131; *Crawford & Gatlin v. M. Livingston & Co.*, 153 Ky. 58, 154 S. W. 407, 44 L. R. A. (N. S.) 640; *Castlemans-Blakemore Co. v. Pickrell & Craig Co.*, 163 Ky. 750, 174 S. W. 749; *Fairbanks-Morse Co. v. Manning & Combs*, 164 Ky. 478, 175 S. W. 1000; *United Talking Machine Co. v. Metcalf*, 164 Ky. 258, 175 S. W. 357.

[2] Where the agreement is one and entire and a part only is reduced to writing, resort to parol evidence may be had to prove the residue. This rule, however, is restricted in its application to cases where the writing only purports to express part of the contract, or is expressed in such incomplete terms as renders parol evidence necessary to explain what is per se unintelligible, and said evidence is not inconsistent with the terms of the writing. Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument. *Greenleaf on Evidence*, § 275.

[3] Smith asks that, in the event the writing referred to is held to be the contract, it be reformed so as to express the agreement according to his version. To entitle one to this relief the evidence by which the alleged mistake is sought to be established must be clear and convincing. There is no such evidence here.

Appellees failed by their testimony to manifest such fraud or misrepresentation on the part of appellant's agents as to relieve them of liability. The same conclusion would re-

suit were we to accept Smith's theory of the later verbal agreement. His proof wholly falls him here. There is no evidence of any defective workmanship or materials. A few of those who purchased the machines had some trouble in sewing heavy goods, and they complained of the thread breaking. Each complaint was traceable to the inexperience of the operator, especially in the use of certain attachments. All of this is satisfactorily accounted for and made plain by a witness for the company in his testimony and by a demonstration in open court before the jury on one of the machines claimed to have been defective.

Nor did Smith offer to return any of the machines until a short time before this suit was filed. It is rather significant that after he claims to have learned the machines were not as represented and were not giving satisfaction Smith sent the company a remittance on account.

Looking at the case from every angle, it is clear that appellant was entitled to a directed verdict, and upon a retrial, the evidence being substantially the same, the jury should be so instructed.

The motion for an appeal is sustained, the appeal granted, and judgment reversed for further proceedings consistent herewith.

HUNGATE v. HINES, Director General of Railroads.

(Court of Appeals of Kentucky. June 1, 1920.)

1. Railroads \S 398(1)—Evidence held insufficient to show license to use tracks.

In a pedestrian's action for injuries while attempting to cross railroad tracks, evidence held insufficient to establish license to use tracks at place in question, so that he was a trespasser, if place of injury was not in public street or sidewalk which lay along its margin.

2. Railroads \S 369(3)—Pedestrian held a trespasser not entitled to lookout and signal.

Where a pedestrian, when struck by a railroad's locomotive, was several feet from public street, and at a place on tracks where he had no right to be, and was therefore a trespasser, railroad company did not owe him duty to maintain lookout or to signal.

Appeal from Circuit Court, Mercer County.

Action by W. B. Hungate against Walker D. Hines, Director General of Railroads. From judgment for defendant, plaintiff appeals. Affirmed.

B. L. Black and J. F. Vanarsdell, both of Harrodsburg, for appellant.

M. H. Gaither, of Harrodsburg, and Humphrey Crawford, of Louisville, for appellee.

SAMPSON, J. On November 20, 1918, William B. Hungate, while attempting to cross the tracks of the Southern Railway Company in the town of Harrodsburg, was struck by an engine and suffered a very painful injury. He brought this action to recover damages alleging that the railway company and its servants in charge of the engine were guilty of negligence in failing to sound a warning signal on the approach of the train to the street crossing; and further that the injury happened at a place on the tracks of the railroad habitually used by the public as a thoroughfare, and that all pedestrians traveling in that locality constantly and as a matter of right used the tracks of the railroad at that point as a passway with the knowledge and acquiescence of the railway company, and that this had continued for many years. At the conclusion of the evidence for the plaintiff, Hungate, the court sustained the motion of the railroad company for a directed verdict in its favor, and Hungate appeals.

The accident happened on the railroad track near Office street and within about a hundred yards of the depot of the railway company, in the city of Harrodsburg. According to the evidence of the plaintiff, he was traveling along a path parallel with the railroad track until he came near Office street which runs at right angles with the railroad. Here he glanced back over the railroad track to see if a train was coming, and not seeing any he advanced, crossing Office street to the pavement on the other side, where he talked to an acquaintance and then started diagonally across the railroad track, and just as he stepped upon the ends of the ties the engine struck him, knocking him some 20 feet and inflicting the injuries aforesaid.

It is appellant's contention that he had barely crossed the street and was entering on the railroad track at a point only a few feet beyond said street when he was struck, but that the point at which he was struck was one over which the public habitually traveled in going to and from points of public interest in that vicinity with the knowledge and acquiescence of the railway company, and that the railway company as a consequence owed to him as a licensee a lookout duty and was under obligation of sounding a warning signal of the approach of the engine to that point.

The only evidence on the subject of the user of the tracks by the public is the following taken from the testimony of appellant:

"Q. How far were you from the pike, this pike, where you were hit? A. It would not be so very far from the pike, I reckon. You know the pike is tolerably close to the railroad; that is about the edge of the pike.

"Q. Did anybody holloa to you? A. Not as I heard; I never heard anybody.

"Q. Anybody call anything to you? A. No, sir.

"Q. The place where you were hurt is a place that is used by everybody that travels up and down there? (Objection; objection overruled.) A. I think so; yes, sir.

"Q. At the point where you were hurt, I will ask you to tell the jury whether or not that place is commonly used by the public? A. I have seen many a one use.

"Q. Is there a path on each side of the railroad there? A. Yes, sir.

"Q. Have you seen people passing there at that place? A. Yes, sir.

"Q. To what extent? A. I have seen a heap of them."

[1, 2] No effort was made to show that the place of the injury was within the corporate limits of Harrodsburg nor that it was and is a thickly populated community. The evidence above quoted is wholly insufficient to establish a license on the part of the appellant to use the tracks at the place in question, and he was therefore a trespasser if the place of injury was not in the public street or sidewalk which lay along its margin. From part of the evidence of appellant it vaguely appears that he turned onto the railroad track very near the margin of the street, if not exactly at it; while other parts of his evidence make it appear that he was several feet from the street at the time he attempted to cross the railroad tracks. In fact, he practically admits that he was not on the public street or walkway of the street at the time of the injury, but was some feet therefrom. Had he been on the street or on the sidewalk near the place where he was injured, the evidence would have entitled him to go to the jury; but as he was several feet from the street and at a place on the railroad tracks where he had no right to be, and therefore a trespasser, the railroad company did not owe him the duty of maintaining a lookout nor of sounding a whistle or bell, because his presence on the track at that point was not to be anticipated.

While the case is a close one upon the facts, we are of opinion that the trial court did not err to the prejudice of appellant in sustaining the motion of the railroad company for a directed verdict at the conclusion of the plaintiff's evidence.

Judgment affirmed.

HUNT et al. v. SUTTON.

(Court of Appeals of Kentucky. June 1, 1920.)

Easements §58(3)—Owner of servient estate not entitled to obstruct way with gates.

Where plaintiff had a right of way over defendants' lands which had existed without

gates for more than the prescriptive period, defendants as owners of servient estate are not entitled to obstruct the way with gates which would lessen plaintiff's use thereof, particularly where the gates were not placed at the termini but were on other portions of the way.

Appeal from Circuit Court, Christian County.

Suit by W. H. Sutton against W. O. Hunt and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Breathitt & Allensworth, of Hopkinsville, for appellants.

Thomas P. Cook, of Hopkinsville, for appellee.

SETTLE, J. This is an appeal from a judgment of the Christian circuit court whereby the appellants, W. O. and Alice M. Hunt, at the suit of the appellee, W. H. Sutton, were compelled by injunction to remove a gate from a passway running through their land and claimed as of right by the appellee, and perpetually restrained from erecting other gates across the same.

The appellee owns and resides upon a hundred acre tract of land in Christian county near Kelley, a station of the railroad of the Louisville & Nashville Railroad Company and about a half mile from a turnpike running from Hopkinsville to Madisonville. Kelley is appellee's nearest railway station, likewise his voting place; and there is located the church attended by himself and family and also the district common school attended by his children. To reach Kelley, Hopkinsville, the county seat of Christian county, or any other place to which appellee could go by any sort of conveyance from his home, his only way or route is by the passway over appellants' land in question to the Hopkinsville and Madisonville turnpike; thence over same to the desired destination. The land of appellants, consisting of 480 acres, adjoins that of appellee on the north and east and lies between it and the turnpike.

The lands now owned by appellants and appellee were once parts of a large tract owned by one John Davis, who 40 or 50 years ago by proper deeds then executed conveyed portions thereof to certain of his sons. To one of the sons, J. Webber Davis, was conveyed the tract now belonging to appellants. To another, Tom Davis, the tract now belonging to appellee; the conveyance to Tom being the first made. By successive sales and mesne conveyances the titles to the lands in question passed to and became vested in the present owners, respectively. When the land now owned by appellee was conveyed Tom Davis by his father, John Davis, the latter gave him the passway leading from the land

over and through the land then owned by him (John Davis), but later conveyed J. Webber Davis and not the property of appellants, to the Hopkinsville and Madisonville turnpike. No mention of the passway was made in the deed from John Davis to Tom Davis; but, though the grant thereof was by parol, it was undoubtedly made and the passway then defined and established substantially as it now runs and has since continuously existed.

It is alleged in the petition that the passway furnished the only way of getting from and to the land and residence of appellee, and that he and his vendors immediate and remote have had the free and uninterrupted possession, use, and enjoyment thereof, as of right, adversely to appellants and all others for more than 15 years before the institution of the action and, in fact, from and since the date of the deed from John Davis to Tom Davis, which was executed more than 40 years ago; that at no time during such existence of the passway has there been any interference with appellee's or any of his vendors' use thereof, until shortly before the institution of this action, when the appellants without right, maliciously, and with the object of obstructing appellee's use of the passway, erected a gate across the same which is unconnected with a fence on either side and can serve no purpose of effecting an inclosure of any field or other part of appellants' land. It is further alleged in the petition that the gate in question is so heavy of frame and the appliance for fastening it so difficult to move that appellee's little children in traveling the passway going to and from school will have neither the skill nor the strength to open it; and, in addition, that appellants were threatening to further obstruct the passway by the erection of other gates thereon, which threats they would certainly execute unless enjoined by the court from doing so.

Although the averments of the petition are traversed by the answer, considered as a whole the real defense it attempts to interpose is as to appellants' alleged right to erect and maintain gates upon and across the passway in as great number and at such points as they may see proper to place them. Indeed, it is frankly admitted by their able counsel that appellee has established by the weight of the evidence a prescriptive right to the passway as claimed, but argued that such right in the latter is not inconsistent with that of appellants to erect gates across it for the convenient operation of their farm. Looking to the evidence, we find that it overwhelmingly establishes the right of appellee to the passway as an easement, and that such right has existed in him and his vendors for more than 40 years, not merely by reason of his and their adverse user of the passway for more than the period required

by the statute of limitations to bar the right of any owner of the servient estate to now deprive him of it, but also because of the express recognition by the servient owners of such right in him and his vendors during all the 40 years of their enjoyment of it. We may therefore, in entering upon the consideration of appellants' claim of right to maintain gates upon the passway, assume that appellee's right to the continued use of the passway by prescription is free of doubt.

This view of the case throws on appellants the burden of showing by a preponderance of the evidence that such right of appellee to the passway as an easement has not deprived them, as owners of the servient estate, of the right to erect and maintain gates thereon. While the grant of a right of way, whether made by deed or arising by prescription from adverse user for the statutory period, does not necessarily imply that the owner of the land may not maintain gates thereon, in the absence of express reservation of such right, whether he should be permitted to exercise it must depend upon the intention of the parties as shown by the circumstances of the case, the nature and situation of the property subject to the easement, and the manner in which it has been used and occupied. An elaborate discussion of this doctrine, together with a review of the numerous authorities bearing thereon, may be found in the opinion in *Raisor v. Lyons*, 172 Ky. 314, 189 S. W. 234. In *Miller v. Pettit*, 127 Ky. 419, 105 S. W. 892, 32 Ky. Law Rep. 337, quoted in the opinion, *supra*, and the facts of which are much like those of the instant case, we said:

"It has been held that the owner of the land may ordinarily erect gates where the passway enters and where it leaves his land. *Maxwell v. McAtee*, 9 B. Mon. 20, 48 Am. Dec. 409; *Bland v. Smith*, 23 Am. & Eng. Ency. of Law, 34. On the other hand, it has been held that, where the way is acquired by prescription and is used as a lane free from gates during the period necessary for perfecting the title, none can be erected afterward. *Frankbner v. Corder*, 127 Ind. 164, 28 N. E. 766; *Shivers v. Shivers*, 32 N. J. Eq. 578. The passway in question was established in 1843. It has been used since that time as far back as the witnesses can remember. Until recent years there was a fence on both sides of it and no gate except where the passway began at Miller's line. If the right to a passway may be acquired by prescription, we can see no reason why a passway free from gates may not be acquired in like manner; and where the passway is fenced off as a lane, and is used as such for 30 or 40 years, it must be presumed after such a great length of time, when the parties are all dead, that the persons using the passway were the owners of a right of way, as they held it and used it. On the facts shown, the court should have required the defendant to remove the gate at the pike from the passway, and to take the poles out of the branch. He should also adjudge the plaintiff

\$50 as reasonable compensation for the obstruction of her way."

If the appellants had only attempted to erect gates at the termini of the passway (i. e., where it enters and leaves their land), we might have here had a different question to deal with. But the points selected for erecting them are elsewhere than the termini and at places where they would materially interfere with appellee's proper enjoyment of the passway. In *Evans v. Cook*, 111 S. W. 326, 33 Ky. Law Rep. 788, another case cited with approval in *Raisor v. Lyons*, supra, it was held that the appellant was properly convicted under an indictment for obstructing a passway, established as such by 15 years' adverse user, by erecting gates across same at points other than where it entered and left his premises. Testing its facts by the rule announced by the authorities, supra, the instant case does not seem to be one authorizing the erection of the gates contemplated to be maintained across the passway by appellants. According to the evidence, the passway was established by John Davis when he deeded to his son Tom the land now owned by appellee without mention of the erection of gates thereon or reservation of the right to do so. In fact, the passway was then and for more than 15 years thereafter inclosed as a lane as far as the land was cleared, and yet remains largely so inclosed. It is true that more than 15 years after it was opened, for a year or so a gate was maintained at one place across the passway by J. Webber Davis while he owned appellants' land, but he obtained the consent of the then owner of appellee's land to erect it and soon removed it.

When appellants purchased their land, the passway ran through it unobstructed by gates; and, when appellee purchased his land, it was with knowledge of the existence of the passway through appellants' land and with the right to enjoy its use as then conditioned. It is our conclusion that appellants have no right to obstruct the passway with gates as done and threatened.

Wherefore the judgment is affirmed.

ROCHE v. ROCHE.

(Court of Appeals of Kentucky. May 28, 1920.)

1. Trusts §72—Grantee in deed trustee of party furnishing consideration at common law.

At common law all that was necessary in order to convert a grantee in a deed into a trustee for another was to establish the fact that the latter furnished the consideration.

2. Trusts §72—Grantee in deed when trustee for another furnishing consideration under statute.

Under Ky. St. § 2353, it is only where vendee takes a deed in his own name without the consent of the person paying the consideration, or where the grantee, in violation of some trust, purchases the lands with the effects of another person, a trust results in favor of the person furnishing the consideration.

3. Trusts §110—Deception as basis of trust must be established by clear and convincing evidence.

Evidence of deception, authorizing the establishment of a trust in land, must be clear and convincing.

4. Appeal and error §1009(4)—Finding of chancellor not disturbed unless against preponderance of evidence.

The finding by a chancellor will not be disturbed on appeal, unless it is against the preponderance of the evidence.

5. Trusts §110—Evidence of deception sufficient to establish trust in land.

In an action by a widow against heirs of her husband to have established a trust in land deeded to the husband and paid for by the wife, evidence held to support a finding of the chancellor that plaintiff was deceived as to how the deed had been executed, and that husband was trustee for plaintiff.

Appeal from Circuit Court, Kenton County.

Action by Maria J. Roche against Malachi Roche. Judgment for plaintiff, and defendant appeals. Affirmed.

John T. Murphy, of Covington, and R. J. Colbert, of Lexington, for appellant.

James C. Wright and C. W. Youngblut, both of Newport, for appellee.

THOMAS, J. On June 15, 1893, the appellee and plaintiff below, Maria J. Roche, and John Roche were married in Kenton county, Ky. At the time of their marriage the plaintiff was between 45 and 50 years of age, while her husband was perhaps a few years younger. Neither of them owned any property at the time, and the husband worked at different jobs in the neighborhood, sometimes on the farm, and sometimes at other employment as a common laborer. It is not shown that he ever accumulated anything, or owned any property, except perhaps a few articles of personal apparel.

The undisputed proof shows that some time prior to 1906 the plaintiff inherited from her father, John Singleton, \$2,050, and that a short while thereafter she inherited from her uncle \$1,926.77. On March 31, 1906, the parties purchased a small farm in Kenton county, containing about 60 acres, from John W. Stephens. The agreement to purchase seems to have been effected through A. E. Foster, a real estate agent having the land in charge

for the purpose of selling, and plaintiff's husband, John Roche. The deed was prepared so as to convey the land absolutely to the husband, but the evidence shows conclusively that the consideration was paid entirely by the wife, some of which was in cash at the time, and the last payment was the discharge of a mortgage lien debt on the land, which perhaps had been placed on it by Stephens. After the purchase of the farm the plaintiff and her husband resided upon it until the latter's death, which occurred near the end of the year 1917. The husband left no will, nor did he leave surviving him any descendants or any collateral heirs except the appellant and defendant, who is a brother.

On March 8, 1918, plaintiff brought this suit against the brother (appellant, Malachi Roche), alleging that he was claiming to own the land by inheritance from her deceased husband; that the latter held title to the land as the trustee of plaintiff, because she furnished the consideration for its purchase, and that the deed was taken to him without her knowledge or consent, and that under the provisions of section 2353 of the Kentucky Statutes a trust resulted in her favor, whereby her husband held the legal title as her trustee, she being the beneficial owner. She prayed that the deed be so construed, and that the defendant be required to convey the land to her, and upon his failure to do so that the court direct its master commissioner to make such conveyance.

The answer consisted of a general denial of the averments of the petition, and upon submission the court sustained plaintiff's petition and granted her the relief prayed for, and to reverse that judgment the defendant prosecuted this appeal.

In addition to the above-recited facts, it also appears without contradiction that plaintiff paid all the taxes due on the land after the deed was obtained, and looked after, attended to, and paid for all improvements thereon, as well as purchased all of the farming tools and stock necessary to run the farm. She was industrious and energetic, and sold vegetables, butter, eggs, and other products from the farm, and seems to have been the moving spirit in its operation. On numerous occasions the husband stated to neighbors and others not related to plaintiff that he had no interest in the farm, or anything upon it; that his wife had paid for all of it, that she owned it, and in substance that he had nothing to do with it. In his last illness he was confined to his bed some days, and he was very much concerned about the execution of a will; but no one was present who could write it, and his neighbors who were in attendance upon him, at the request of his wife, did not encourage him in the desire, because she stated at the time that it made no difference, since everything belonged to her anyway.

Plaintiff testified that she had no knowledge as to how the deed was executed, but under the provisions of section 606 she was perhaps incompetent to give such testimony. The grantor, Stephens, attempts to say in his examination in chief that plaintiff did know to whom the deed was executed, but on cross-examination he contradicts himself, and he is also contradicted as to how and the person by whom the deed was prepared. All of the other witnesses present at the time, including the clerk who took the acknowledgment, state that the deed had been previously prepared with the name of the husband as grantee therein, but how this came to be done, or who prepared it, does not clearly appear. Other facts and circumstances are testified to going to establish the fact that the husband did not claim any interest in the property, but that the wife did, and that she did not know to whom the deed was executed.

[1] It is earnestly insisted that the demurrer filed to the petition should have been sustained because it contains no allegation that it was executed through fraud or mistake, and the case of Fitzpatrick v. Roark, 179 Ky. 504, 200 S. W. 920, and cases therein referred to, are relied on in support of this contention. We have carefully read those cases, and do not find them applicable to the facts of this case. The general rule is that a writing may not be reformed without allegation and clear proof of fraud or mistake in its execution, but even this rule does not apply where a deed absolute on its face is sought to be converted into a mortgage. *Vaughn v. Smith*, 148 Ky. 531, 146 S. W. 1094; *Leibel v. Tandy*, 146 Ky. 101, 141 S. W. 1183; *Stone v. Middleton*, 144 Ky. 284, 137 S. W. 1047; *Hobbs v. Rowland*, 136 Ky. 197, 123 S. W. 1185; *Eastern Gulf Oil Co. v. Lovelace*, 188 Ky. 238, 221 S. W. 544. But the petition in this case does not seek to reform a deed for fraud or mistake. Its only purpose is to show that the nominal grantor was in fact only a trustee for the person who furnished the consideration for the deed. At common law all that was necessary in order to convert the grantee into a trustee for another was to establish the fact that the latter furnished the consideration. *Neel v. Noland*, 166 Ky. 455, 179 S. W. 430; *May v. May*, 161 Ky. 114, 170 S. W. 537; *Foushee v. Foushee*, 163 Ky. 524, 173 S. W. 1115. Section 2353, *supra*, changed this rule of the common law so as to prevent a resulting trust in favor of the one furnishing the consideration, except: (a) Where the vendee takes the deed "in his own name without the consent of the person paying the consideration"; or (b) "where the grantee, in violation of some trust, shall have purchased the lands deeded with the effects of another person."

[2-5] This court, as will be seen from the cases, *supra*, and others referred to in them,

has uniformly held that when either of the conditions (a) or (b) exist, a trust will result, notwithstanding the statute. It is true that the cases hold that the evidence authorizing the establishment of a trust must be clear and convincing. The facts in the cases supra relied on by appellant are so entirely different from those in this case that we hardly deem it necessary to point them out. Suffice it to say that in some of them the absolute deed sought to be declared a trust had been executed for as much as 70 years, and in all of them it was shown that the wife who sought to establish the trust was fully acquainted with the fact that the deed conveyed the land to the grantee. In some of the cases there were contradictions in the testimony upon the issues involved, and the trial court found against the one seeking to establish the trust, and, under the well-recognized rule that the findings by the chancellor will not be disturbed unless they are against the preponderance of the evidence, this court affirmed the judgment. In this case we have an opposite finding by the chancellor, and the testimony, as well as the circumstances in the case, very clearly indicates that plaintiff was deceived as to how the deed from Stephens had been executed. The learned judge who tried the case filed an opinion in which a concise as well as correct summary of the evidence appears, and, recognizing our inability to improve upon it, we have concluded to adopt a portion of his statement as a part of this opinion. After finding that plaintiff had furnished and paid the entire consideration for the land, the court adds:

"While this is not sufficient to establish the trust, it is further testified by Maria J. Roche that it was understood that the property was to be conveyed to her, and that she believed it had been until after the death of her husband, when she then ascertained that the husband, while acting as her agent, had taken the title to himself, which, if true, constituted a breach of trust, and by reason of which he would be deemed a trustee for her in the land. The plaintiff was not a competent witness to testify to that fact. Aside, however, from her own evidence to that effect, the deposition of witness after witness is without controversy that the husband always and repeatedly stated that the land was his wife's; that in matters pertaining to it, with reference to selling it, or removing from it, recognized her dominion as to it, declaring that he could not do it because his wife owned the place. I have no doubt but that the husband knew and understood that the title to the farm was in him, for it is uncontroverted in the evidence that for several days preceding his death he was appealing to his neighbors who visited him to get some one to write his will, saying that everything belonged to his wife, and he wanted her to have it; and, as it appears that he had little, if any, property other than the title to this land, it would seem evident that he knew both of the fact and effect of the property being in his name. But that very evidence introduced a fact

which is very convincing that the plaintiff did not know it, for it is shown that, when being appealed to to have some one procured to write his will, which was done in the presence of plaintiff, the neighbor, who from repeated statements of the husband believed and thought that the land belonged to the wife, asked the wife if that (the making of the will) was necessary, to which the wife responded no, and not to bother about it. If the wife had known that the title to the property was in her husband, it would seem to be greatly contrary to the nature of people under such circumstances, knowing that her husband was desiring to make a will giving her all the property, for her to have treated the matter so lightly and have declared it to be unnecessary, when the effect of her husband's death without such will would be to leave her at an advanced age without any estate with which to support herself. The only reasonable explanation of that act upon her part is that she believed that the property was hers, that the making of such a will would be for that reason the doing of a vain and useless thing, and therefore declared it unnecessary two or three days prior to his death, when he was desirous of procuring his will to be made.

"The entire evidence in the record tending in any way to show that the plaintiff knew that the title had been conveyed to her husband consists of the statement of Mr. Stephens, from whom the property was purchased, who stated that at the time of the transfer of the property the deputy county clerk who took the acknowledgment of himself and wife to the deed asked both the plaintiff and her husband to whom they desired the deed made, and that the plaintiff said she desired it made to her husband. It is evident in the opinion of the court that the witness' recollection about that matter is somewhat at fault. He started out by saying that he understood that it was to be made that way, and in his statement of his recollection about the matter transpiring there seems uncertain and hazy. He testified that the clerk drew the deed. The plaintiff in rebuttal stated that the conversation did not take place. The deputy clerk who took the acknowledgment testified that he did not draw the deed, and never drew one in his life; that the deed was fully prepared when presented to him for acknowledgment; that there were no blanks in the deed for the name of the grantee or grantees to be filled; that it was already filled just as the deed appears now; that he has no recollection of asking either of the persons there how they wanted the deed made; that there would be no occasion for him asking such a question; and that he is convinced that he did not make such inquiry, or that the plaintiff answered as stated. The sale of the property was made through a real estate agent, and he testified that the deed was fully prepared before it was taken to the clerk's office to be acknowledged, and that there was no uncertainty about who the deed was made to that would cause the clerk to make such inquiry; that he has no recollection about the matter of the sale, except that he sold the property; that he does not recollect any inquiry about the deed at all; that all the clerk did was to take the acknowledgment; that the clerk did not make the deed, or fill any blanks

in the deed; that he did not know who made the deed, but that Mr. Roetkin was the attorney in the matter. Mr. Roetkin was not introduced as a witness.

"The court is of the opinion from the evidence that the husband did hold the property in trust for the plaintiff, and that she paid the purchase money, and that the title was taken by her husband without her knowledge and consent, and a trust results under such circumstances under the express provisions of the statute."

The testimony being sufficient to support the judgment of the court, it is therefore affirmed.

MOODY et al. v. BARKER.

(Court of Appeals of Kentucky. June 4, 1920.)

1. Appeal and error \S 1040(16)—Overruling demurrer based on defective certificate cured by filing of new certificate.

Any error in overruling demurrer to petition based on the copy of the foreign judgment sued on being certified by deputy clerk was cured by a copy certified by the clerk being filed.

2. Contracts \S 101(1)—Will not be enforced if void where made.

A contract, if void under the law of the state of contract, will not be enforced in another state, though it would be valid if executed there.

3. Contracts \S 101(2)—If valid where made, will be enforced unless violative of public policy of forum.

It is the general rule that, if the party sought to be held on a contract had legal capacity to enter into it where it was made, or where it was to be performed, and if it is transitory or concerns movable property, it will be enforced, because of comity, in another state, though the party was incapacitated under its laws to make it, unless its enforcement would violate some established rule of public policy prevailing in the jurisdiction of the forum.

4. Contracts \S 325—Matters of procedure and remedy governed by *lex fori*.

The rules with reference to the procedure and matters pertaining exclusively to the remedy, relative to enforcing a contract of another state, are governed by the *lex fori*.

5. Husband and wife \S 146½ — Property of married woman liable on contract of suretyship where liable in state where contract made.

Notwithstanding Ky. St. \S 2127, providing that no part of a married woman's estate shall be subjected to payment or satisfaction of any liability on a contract made after marriage to answer for the debt or default of another, unless she shall have set apart the estate for such purpose by mortgage or other conveyance, her property in Kentucky, though not so set

apart, can be subjected to payment of her liability on her contract of suretyship made in another state, where she then resided, and where her property could be so subjected without any setting apart thereof by her for such purpose.

6. Courts \S 90(6)—Earlier decisions as to liability of married woman followed under rule of stare decisis.

Whatever might be said as to the soundness of the doctrine of decisions of this court that property in the state of a married woman is liable to satisfaction of her obligation contracted in another state, where her property would be so liable in the state of the contract, though it would not be if the contract was made in Kentucky, the rule of stare decisis would require this court to follow them.

7. Homestead \S 87 — Exemption may be claimed by married woman owning the property.

The exemption provided by Ky. St. \S 1702, of homestead owned by resident debtors, actual bona fide housekeepers with a family, may be claimed by a married woman owning the property in her own name, though she be not the head of the family.

8. Homestead \S 94—Exempt, though purchased after liability, where purchased with subsequent bequest.

The exception in Ky. St. \S 1702, withholding the homestead exemption as against a liability existing prior to purchase of the homestead, does not extend to a homestead purchased with a bequest made after the liability was contracted.

9. Homestead \S 90 — Exemption enforced against liability contracted in another state.

The homestead exemption, being part of the remedy, will be enforced against a liability contracted in another state.

Appeal from Circuit Court, Warren County.

Action by G. W. Barker against Susie E. Moody and another. Judgment for plaintiff, and defendants appeal. Reversed, with directions.

Bradburn & Harlin and Sims, Rodes & Sims, all of Bowling Green, for appellants.

T. W. & R. O. P. Thomas and W. R. Gardner, all of Bowling Green, for appellee.

THOMAS, J. The appellee and plaintiff below, G. W. Barker, obtained a judgment in the district court of Sumner county, Kan., against the appellants and defendants below, Susie E. Moody and her husband, J. W. Moody, for the sum of \$597.38, with interest and costs. He obtained a duly certified copy of that judgment, and filed suit on it against the same defendants in the Warren circuit court, in which he obtained an attachment which was levied upon a small piece of real estate in that county containing about 11 acres, and upon which the defendants and their family resided.

[1] A demurrer was filed to the petition upon the ground that the Kansas judgment was certified by the deputy clerk of the Kansas court instead of the clerk himself, but the demurrer was overruled and a corrected copy of that judgment was filed, which was certified to by the clerk; so that this error, if one, was cured.

An answer was filed consisting of a denial, which denial was refuted by the properly certified copy of the Kansas judgment. Another defense made was that the defendants were husband and wife, and that the note upon which the Kansas judgment was rendered was the debt of the husband alone, he being principal therein, and that it was signed by the wife as his surety only, that the attached property was her separate estate, and that she at no time had set it apart for the purpose of paying the note or the judgment, by deed, mortgage, or other conveyance, as required by section 2127 of the Kentucky Statutes. It was further averred in this connection that under the laws of the state of Kansas it was competent for a married woman to obligate herself personally as surety for another, including her husband, and to render her property liable therefor as though she were entirely free from the disabilities of coverture. Another defense was that the husband and wife, after the rendition of the Kansas judgment, moved from Kansas to Warren county, Ky.; that Mrs. Moody received, through a bequest from a deceased aunt, the sum of \$900 in cash, with which she purchased the 11 acres sought to be subjected by the attachment; that the deed to the land was executed to her, and that she and her family resided on it as a homestead; that the homestead laws of Kansas are the same as in Kentucky, with the exception that a housekeeper in Kansas who would otherwise be entitled to the homestead exemption could claim it, although the homestead was purchased after the creation of the debt which was sought to be realized by its subjection.

A demurrer filed to the answer was sustained, and, defendants declining to plead further, judgment was rendered in favor of plaintiff, in which the attachment was sustained, and the property ordered sold for the satisfaction of the debt, and, complaining of that judgment, the defendants prosecute this appeal.

[2-4] The defense, relying upon the wife's noncompliance with section 2127 of the Statutes, so as to subject her property to the payment of the debt, presents a question upon which there is a great diversity of opinion among the various courts. It may be stated without exception that, if under the *lex loci contractus* the contract for any reason is void, it will be invalid everywhere, and will not be enforced by the *lex fori*, although it would be valid if executed in that jurisdic-

tion. It is likewise practically universally held that, if the one sought to be held had legal capacity to enter into the contract at the place where it was made, or where it was to be performed, and if it was transitory or concerned movable property, it will be upheld and enforced by the *lex fori*, although the defendant was incapacitated under its laws to make the contract. The enforcement of such a contract by the *lex fori* is because of comity between the different states and countries. It cannot be claimed as a right, since under it the recognition by the forum of foreign laws is by virtue of a species of favor or courtesy toward the other sovereignty; hence it will be denied when to do so would violate some established rule of public policy prevailing in the jurisdiction of the forum. In all cases the rules with reference to procedure and matters pertaining exclusively to the remedy are governed by the *lex fori*. These general rules will be found stated and extensively discussed in the annotations to the cases of *Union National Bank v. Chapman*, 57 L. R. A. 513; *Mayer v. Roche*, 26 L. R. A. (N. S.) 763; *International Harvester Co. v. Gertrude McAdam*, 26 L. R. A. (N. S.) 774; *Wharton's Conflict of Laws*, vol. 2, § 428a; and *Elliott on Contracts*, vol. 1, § 432. In stating the above general principles, we have assumed that the domicile of the contracting parties was identical with the place of the contract, since such is the fact in this case.

[5] It is insisted by defendants that it is the public policy of this state, as declared by the section of the Statute *supra*, that a married woman's property shall not be subjected to a debt for which she was surety only, except in the manner pointed out in the statute, which statute it is claimed, was enacted in furtherance of such public policy, for her benefit, and in order to protect her from some supposed domination of her husband. But, if it should be conceded that the opportunities for such domination once existed because of inequalities in the legal status of the parties with reference to capacity to contract, to own and control property, etc., later modifications of the law have largely removed those opportunities, since to-day the wife stands on almost an equality with her husband before the law with reference to property and property rights, as well as contractual capacity and political privilege, and his only superior power through which he might exercise domination is physical strength, which, happily, he is likewise prevented from employing. But, however this may be, this court, in the cases of *Gibson v. Sublett*, 82 Ky. 596, and *Young's Trustee v. Bullen*, 43 S. W. 687, 19 Ky. Law Rep. 1561, held that the wife, as well as her property, was liable to the payment of a debt contracted by her in a state under whose laws the contract was valid, and where her property could be subjected to the discharge

of its obligations, although neither she nor her property would be liable if the contract had been entered into here, and in each of the cases the separate property of the wife was held liable for her debt contracted in the foreign state.

At the time of the rendition of the opinion in the Gibson Case, section 2127, *supra*, had not been enacted; but at that time, under the provisions of section 2, art. 2, c. 52, General Statutes 1888, a married woman's real estate could be subjected to her debts only when they were contracted by her before marriage or for necessities for herself and family after marriage, but in the latter case the debt must have been evidenced by writing signed by her. The debt involved in that case was not contracted by the wife before marriage, nor for necessities after marriage. It was made in the state of Louisiana, where both she and her property were liable for the particular character of debt, and this court held that her real estate in this state, under the law of comity, could be subjected to the payment of that debt.

The debt involved in the Young Case grew out of a note executed by the wife in Missouri before the enactment of section 2127 of the Statutes, but the debt was contracted after marriage, and was not for necessities for the wife or any member of her family, but this court subjected to its payment her real property situated in this state, as was done in the Gibson Case. We find no cases from this court in conflict with the doctrines announced by the cases referred to.

The case of *Brown v. Dalton*, 105 Ky. 669, 49 S. W. 443, 20 Ky. Law Rep. 1484, 88 Am. St. Rep. 325, relied on by defendants, is not so, nor is the case of *Griswold v. Golding*, 3 S. W. 535, 8 Ky. Law Rep. 777 (reported only in abstract). The only question in the *Brown Case* was whether Kentucky courts would enforce a contract between husband and wife entered into in Virginia, where such contract was valid. It was held that it was so patently against the public policy of this state that it would not be enforced.

In the *Griswold Case* the contract of the wife was executed in Missouri, under whose laws it was invalid as to her, although the same contract would have been valid here, and the court, for the reason above announced, declined to enforce it here.

[6] Whatever might be said as to the soundness of the doctrine of the Gibson and Young Cases, the rule of stare decisis would compel us to recognize and follow them. We therefore conclude that the court properly sustained the demurrer to the defense now under consideration.

[7] That portion of the answer relying on the homestead exemption presents to our minds a valid pro tanto defense, and the demurrer thereto was improperly sustained. Section 1702 of the Kentucky Statutes ex-

empts from sale for the satisfaction of a debt the homestead, not exceeding in value the sum of \$1,000 "owned by debtors who are actual bona fide housekeepers with a family, resident in this commonwealth." This court, in the cases of *Herring v. Johnston*, 72 S. W. 793, 24 Ky. Law Rep. 1944, *Lee & Hester v. Hughes*, 77 S. W. 386, 25 Ky. Law Rep. 1201, and *American National Bank v. Mathews*, 124 S. W. 811, held that a married woman could claim the benefit of the homestead exemption when she owned the homestead in her own name. So that, if the right otherwise exists, Mrs. Moody is not deprived of it from the fact that she may not be regarded as the head of the family.

[8] In the cases of *Meador v. Meador*, 88 Ky. 217, 10 S. W. 651, 10 Ky. Law Rep. 783, *Jewell v. Clark*, 78 Ky. 398, *Spratt v. Allen*, 106 Ky. 274, 50 S. W. 270, 20 Ky. Law Rep. 1822, *Miller v. Bennett*, 12 S. W. 194, 11 Ky. Law Rep. 391, *Burrow v. Maxon*, 129 Ky. 578, 112 S. W. 661, *Frizzell v. Rozzell*, 155 Ky. 631, 160 S. W. 244, *Staun v. Procter*, 152 Ky. 142, 153 S. W. 196, and *Roberts v. Adams*, 96 S. W. 554, 29 Ky. Law Rep. 848, this court held that the debtor could claim his homestead right in land which was inherited by him after the creation of the debt if he was in the occupancy of it at the time it was sought to be subjected, and in a number of cases it has been held that the proceeds of a homestead may be invested in another one, if done within a reasonable time after the sale, and the newly acquired one will be exempt, though purchased after the creation of the debt.

In the cases of *Burrow v. Maxon*, 129 Ky. 578, 112 S. W. 661, *Holcomb v. Hood*, 1 S. W. 401, 8 Ky. Law Rep. 255, and *Staun v. Procter*, *supra*, it was held that the homestead exemption would prevail against a prior debt where the homestead was acquired by gift, and in the case of *Hester v. Lynn*, 49 S. W. 431, 20 Ky. Law Rep. 1460, it was held that the debtor was entitled to the homestead exemptions in land purchased with money inherited from his son as against a prior debt when he was occupying the homestead at the time it was sought to be subjected.

In all of the cases referred to the reason for upholding the homestead exemption as against prior debts was that "the creditor has not been prejudiced, because the debtor has not converted any debt-paying part of his estate into exempt property" (*Roark v. Bach*, 116 Ky. 457, 76 S. W. 340, 25 Ky. Law Rep. 699), and its allowance was not forbidden by the exception in section 1702 withholding the exemption as against debts or liabilities existing prior to the purchase of the homestead.

The same reason for upholding the exemption as against prior existing debts is thus stated in the case of *Jewell v. Clarke*, *supra*,

and quoted with approval in the case of *Burrow v. Maxon*, supra:

"The object of this provision was to prevent debtors from purchasing homesteads after creating debts or liabilities, and then claiming the exemption against such debts. The means with which a homestead was purchased might be the very means to which the creditor looked for payment, and gave the debtor the credit which enabled him to create the debt; and it would be unjust to the creditor to allow the debtor, by thus investing in a homestead, the means on the faith of which he obtained credit to defeat the collection of the debt. But, when the debtor derives title to the homestead by descent, no injury is done to the creditor in exempting the homestead so acquired. The means upon the faith of which he gave credit have not been diverted, and the case does not, therefore, come within the reason of the statute, and the rule that a case not coming within the reason of a remedial statute is not affected by it applies."

[9] We are convinced that the facts of this case, which are admitted by the demurrer, bring it strictly within the principle of the cases referred to, and that Mrs. Moody manifested her right to the homestead exemption as against plaintiff's debt, although it was created before the acquisition of defendant's homestead. The exemption laws of Kentucky, being a part of the remedy (*Barker v. Brown*, 33 S. W. 833, 17 Ky. Law Rep. 1172, and *Minor on Conflict of Laws*, § 209), will be enforced here under the rules heretofore referred to.

The court therefore erred in sustaining the demurrer to that portion of the answer relying upon the homestead exemption, and the judgment is reversed, with directions to overrule the demurrer to that part of the answer, and to proceed in accordance with this opinion.

MIDKIFF et al. v. CARTER et al.

(Court of Appeals of Kentucky. May 28, 1920.)

1. Drains \S 60—Establishment of drainage district does not preclude assertion of damage to land outside its area.

A judgment establishing a drainage area or district will in no wise bar or estop persons whose lands lie without the district, and who were refused permission to become parties from asserting injury to their lands as the result of the establishment of the district.

2. Drains \S 14(1)—Persons whose lands lay outside of drainage area are not entitled to become parties to proceedings.

As Acts 1912, c. 132, § 4 (Ky. St. 1915, § 2380, subsec. 4), provides that if a petition for a ditch be not dismissed process shall issue against the landowners named in the petition and viewers' report, landowners whose

premises were outside the proposed drainage district are not, though they asserted that its establishment would injure their property, entitled to become parties, for the establishment of the ditch would not prevent them from recovering such damages.

3. Drains \S 14(3)—On appeal from county court, issues should be confined to those raised therein.

As Drainage Act of 1912, under which it was proposed to organize a district, provides in section 5 that the issues shall be confined on reaching the circuit court to those raised in the lower court, landowners not parties to the proceedings in the county court, and whose premises lay outside the drainage district, are not entitled to come in and file objections on the ground that the establishment of the ditch would injure their property.

4. Evidence \S 535—Opinion as to injury which might result from drainage district can be given only by qualified person.

Only qualified persons can give opinion testimony as to the practicability of constructing a drainage ditch, and as to whether, if established, it would be beneficial to public health and conducive to general welfare, and other witnesses may merely testify to the facts.

5. Appeal and error \S 1026—Only those errors which injuriously affect party's rights are ground for reversal.

Only those errors which injuriously affect a party's rights are ground for reversal.

6. Trial \S 296(1)—Deficiency in one instruction may be cured by subsequent instruction.

Though the first instruction was insufficient, standing alone, yet, where the second referred back to and made the first instruction part of it, and the two, taken together, properly submitted the issues, the insufficiency of the first is no ground for objection.

7. Drains \S 14(3)—Objectors to establishment of drainage district have burden of proof, viewers' approval making out prima facie case.

The viewers' report, recommending the establishment of a drainage ditch, makes out a prima facie case, under Acts 1918, c. 64 (Ky. St. Supp. 1918, § 2380b9), for petitioners, and the exceptors have the burden of proof, so the exceptors, having accepted such burden without complaint, cannot complain.

Appeal from Circuit Court, Ohio County

Petition by Finley Carter and others for the establishment of a drainage district, begun in county court and appealed to the circuit court. From a judgment in favor of petitioners, which also denied the petition of J. J. Midkiff and others, who sought to intervene, J. J. Midkiff and others appeal. Affirmed.

J. S. Glenn and Barnes & Smith, all of Hartford, for appellants.

Heavrin & Martin and Woodward & Kirk, all of Hartford, for appellees.

QUIN, J. In June, 1913, appellee Carter and others petitioned the county court for the establishment of a public drainage ditch or drain. Upon a trial of said proceedings in the county court there was a judgment adverse to the establishment of the ditch, and a like result followed a trial in the circuit court. Petitioners appealed to this court, and in an opinion reported in 179 Ky. 164, 200 S. W. 369, Carter et al. v. Griffith et al., the judgment of the lower court was reversed because of erroneous instructions and the admission and rejection of testimony.

After the mandate of reversal was filed in the court below, the case was assigned to the September, 1913, term for trial, and during said term J. J. Midkiff and 18 others, in two separate pleadings, petitioned the court to be made parties defendant to the proceedings. It was alleged that they (Midkiff and others, hereinafter referred to as petitioners) owned land bordering on the banks of Panther creek, and below the mouth of the proposed improvement, and that their lands would be materially affected and injured by the establishment of said ditch. It was further alleged that water flowing into the ditch would be collected in greater quantity and reach the channel of the creek in a much shorter period of time, thereby causing the banks of Panther creek to overflow and be discharged on petitioners' lands, wash the soil therefrom, deposit sand and other debris thereon, destroy their crops, and otherwise injure their land.

The petitions were ordered filed, but later, on motion of appellees, they were stricken from the record. The case was heard on exceptions filed by the remaining appellants, and from a verdict favorable to the establishment of the ditch the exceptors and petitioners have appealed. A reversal is asked on three grounds. These we will discuss in the order named:

[1, 2] 1. Alleged error in refusing to permit Midkiff and others to be made parties.

This proceeding had been pending for something over five years at the time these petitions were filed. In the petition seeking the organization of the drainage district and the establishment of the ditch, some of the petitioners were named as persons whose land would be affected by the improvement. The viewers, however, did not report favorably upon the ditch as proposed by appellees. Had the viewers followed the route outlined in the petition, the lands of many of the petitioners would have been included; but they reported in favor of a more restricted district than that sought, thus eliminating the land of some of the petitioners.

Summons was issued only against those included in the viewer's report, and this is assigned as error. These proceedings were instituted under Acts 1912, c. 132 (Ky. Stats. 1915, § 2380), in the fourth section of which it is provided that, if the petition for the

ditch be not dismissed, process shall issue against the landowners named in the petition and in the viewer's report. This, it seems, was done. No process was issued against any one whose land was not included in the viewers' report. It is said that, though petitioners were not included in the district as recommended by the viewers, inasmuch as their lands are immediately below the mouth of the proposed ditch, they will be damaged for the reasons heretofore given, and hence were necessary parties. The statute supra provides that, after notice to all persons whose lands are shown to be affected by the proposed improvement, the action on the viewers' preliminary report shall stand for exceptions as to each and every party brought before the court at the next regular term of the county court, after process shall have been executed for the requisite time. It was the evident intention of the lawmakers to limit the inquiry and the right to file exceptions to those included in the viewers' report.

The effect of the proposed ditch upon those owning land below the mouth thereof is problematical, and if damage results from the construction of said ditch the failure to make petitioners parties would in no wise bar or estop them from the prosecution of any action available to them. The statute was not intended, nor will it be construed, as depriving petitioners of any rights or remedies to which they were entitled. Williams v. Wedding, 105 Ky. 361, 176 S. W. 1176. Petitioners were not assessed for any portion of the improvement. They are not within the drainage area or district as approved by the viewers; therefore the court was not compelled to permit them to be made parties. 19 C. J. 940. In Latham v. Chicago, B. & Q. R. Co., 100 Neb. 173, 158 N. W. 923, construing a statute similar to ours, the court says:

"The statute does not contemplate that the question of the rights and liabilities of the district to third persons shall be determined in such proceeding. It is not intended that landowners without the district, who will not be assessed for the cost of the improvements, shall prevent the organization of a drainage district by landowners consenting to be assessed for the cost of the improvements."

In said opinion it was also held that the Drainage Act did not contemplate that the question of damages raised by third persons would be decided at the hearing upon the application for the formation of a district.

[3] Then, too, the petitioners raised an issue not before the county court, a proceeding prohibited by statute. In subsection 5 of the Drainage Act of 1912, it is provided:

"Said proceeding shall be docketed and tried in the circuit court, as other civil cases are tried, except that the issues shall be confined to those raised in the lower court, and no new issues not so raised shall be considered, and no summons need issue on the appeal."

While not necessary parties, it would not have been improper, had the court, upon motion reasonably made, permitted petitioners to be made parties; but the petitions were not tendered until more than five years after the proceedings were instituted. To permit petitioners at so late a date to file these pleadings might lead to almost endless delay and defeat the construction of the ditch. If accorded the relief sought, what would prevent other landowners bordering on Panther creek, further distant from the mouth of the ditch, from later coming in, asking leave to be made parties, and to file exceptions? Then, perhaps, after these had been disposed of, others would make a like request, and so on *ad infinitum*. We do not think it was ever contemplated that persons below or outside of the proposed district should be made parties to the proceedings.

[4] 2. It is urged the court erred in the admission and rejection of evidence. Because of the conclusion above reached, it follows the court did not err in refusing to allow appellants to introduce evidence as to the effect of the proposed improvements on the lands below the mouth of the ditch.

It is complained the court refused to permit four witnesses, "after they had testified to facts," using the language of appellants' brief, to testify that it was not practicable to construct the proposed ditch. This very point was decided in the first opinion, wherein, referring to certain witnesses, it is said:

"It was error to permit Dr. Carter and Sam Neal, who had not qualified as experts by showing any scientific or practical knowledge on the subject, to give it as their opinion that it was not practicable to drain the proposed district by a public ditch. They should have been permitted to testify only to the facts, thus leaving to the jury the right to draw its own deduction from the facts so stated and the other evidence in the case."

The same rule is applicable to the testimony of certain witnesses as to whether in their opinion the establishment of the improvement would be beneficial to the general health or conducive to the general welfare. They were permitted to state the facts, as conceded in counsel's brief; further than this they were not qualified to testify. The testimony on the two trials is substantially the same.

The ditch involved in the present proceeding is known as the "Finley-Carter ditch," and parallels the "Rhodes ditch" in the Panther creek valley. It is claimed witnesses for appellee were allowed to testify as to the advantages accruing from the construction of the Rhodes ditch, but that appellants' witnesses were denied the right to testify as to the disadvantages resulting therefrom. We have examined the evidence in this connection and we fail to find wherein the court has ruled prejudicially to appellants. It is true the court sustained appellees' objection to certain questions propounded appellants'

witnesses, but much evidence relating to the effect of the Rhodes ditch was admitted. On the other hand, appellants' objections to similar questions propounded appellees' witnesses were sustained. Altogether it seems the advantage in this respect is with appellants.

[5] It is but natural, in a trial like this, with so many witnesses before the court, and so many questions of law and practice raised, that the court might err at times in passing upon the competency and incompetency of testimony. There are few contested cases where the record is free from error. The question is whether the ruling was prejudicial. We find no such errors in the record.

Refusal of the court to permit Dr. Barnett to answer a hypothetical question is likewise urged as error; but the question, covering, as it does, three pages of the transcript, is much involved, and is one that should more properly have been addressed to an engineer. The ruling of the court in refusing to permit the witness to answer was not error.

[6] 3. It is said the court erroneously instructed the jury. No useful purpose would be served in copying these instructions into the opinion. Standing alone, the first instruction did not properly submit the case to the jury; but its insufficiency was cured by the second instruction, which referred back to and made the first instruction a part of the second, the same as if copied therein, and, taking the two as one instruction, as must be done, under the wording of the second instruction, they properly submitted the issue to the jury. Certainly appellants have no cause to complain thereof. The third was but the converse of the second instruction. The fourth instruction given was tendered by appellants. Appellants were not entitled to have other tendered instructions given.

[7] It is also urged in the brief that the court erred in holding that the burden of proof was with appellants. Appellants, without objection, introduced their evidence first, which gave them the concluding argument. There was no objection on their part to thus assuming the burden, nor was this alleged error made a ground for a new trial. The aforesaid statute provides that, if the report shows the proposed improvement is not practicable, or will not benefit the public health, or any public highway, or be conducive to the community's general welfare, the petition for the ditch shall be dismissed. If a contrary condition is shown, the proceeding shall be continued for process and for further orders. The burden was on the exceptors, as the viewers' report makes out a *prima facie* case for the appellants. *Katterhenry v. Arensman*, 183 Ind. 347, 108 N. E. 101; *Mapel v. Calhoun County*, 179 Iowa, 981, 162 N. W. 198; *Hall v. Polk*, 181 Iowa, 828, 165 N. W. 119. It is so provided in the 1918 act. 3 Ky. Stats. § 2380b9.

Finding no grounds justifying a reversal, the judgment is affirmed.

ADAMS et al. v. HORN et al.

(Court of Appeals of Kentucky. May 28, 1920.)

1. Drains \S 14(3)—Where evidence to support statutory requirements for a ditch is contradicted, the question is for the jury.

Where the evidence in support of the statutory requirements for a proposed drainage ditch was contradicted, the question is for the jury, and a peremptory instruction in favor of the improvement is erroneous.

2. Drains \S 14(2)—Petition for a drainage district, filed under the act of 1912, need not be signed by 25 per cent. of owners, as required by amendment.

A petition to establish a drainage district, filed under Acts 1912, c. 182, need not be signed by 25 per cent. of the landowners, as required by the amendment of 1918 (Ky. St. Supp. 1918, \S 2380—49) because the amendment expressly validates all prior proceedings had under the act.

3. Drains \S 14(3)—On appeal to the circuit court, amended exceptions to establishment of district pertaining to issue raised below may be filed.

While the Drainage Act of 1912 provides that on appeal to the circuit court the issue shall be heard de novo, but shall be confined to those raised in the lower court, exceptors to the establishment of a drainage district may file amended exceptions pertaining to the same subjects raised below, and so the amended exceptions, merely diminishing the territory sought to be excluded, were improperly rejected.

Appeal from Circuit Court, Daviess County.

Petition by J. B. Horn for the establishment of a drainage district, opposed by E. N. Adams and others. The proceeding was begun in the county court, and appealed to the circuit court. From a judgment in favor of the improvement, the exceptors appeal. Reversed for further proceedings.

And & Higdon and T. F. Birkhead, all of Owensboro, for appellants.

J. R. Hays and R. Miller Holland, both of Owensboro, for appellees.

QUIN, J. This is an action under the Drainage Act of 1912 (Ky. Stats. [Ed. 1915] \S 2380), instituted by appellee, Horn, and others for the establishment of a drainage ditch for the improvement of what is known as Burnett's creek, a tributary of Panther creek. Viewers were appointed, made their report, exceptions were filed, and a trial had. During the trial in the county court exceptors tendered amended exceptions raising the question as to the right to establish a separate drainage district within the district already established. The court refused to allow said exceptions to be filed, and

peremptorily instructed the jury to find in favor of the construction of the ditch. An appeal was taken to the circuit court, which ordered the exceptions filed, and the petition was dismissed. The circuit court was reversed in an opinion reported in 184 Ky. 424, 212 S. W. 108, Horn v. Adams et al.; the only question on that appeal being whether a drainage district could be organized within the limits of an established district. This court held that such could be done. After the return of the case to the circuit court, and before trial, further amended exceptions were tendered; but the circuit court refused to allow these to be filed. There was a verdict at the hands of a jury in favor of petitioners, and this appeal is to reverse that judgment.

[1] The court in its first instruction peremptorily told the jury to find in favor of the improvement. This was error. Many witnesses were introduced by the respective parties. Those testifying for the petitioners set forth the insufficient drainage in the vicinity, and the benefits that would accrue from the construction of the ditch, as well as its needs, its practicability, propriety, and other statutory requirements. This evidence was contradicted by witnesses introduced by the exceptors; thus the question was for the jury.

It is provided in subsection 3, Ky. Stats. \S 2380 (Ed. of 1915), that the viewers shall report whether the proposed improvement is practicable and the route the proper one; whether it will benefit the public health, comfort, or convenience, or any public highway, or be conducive to the general welfare of the community; the accruing benefits to the lands, and whether the lands affected are included in the proposed district. It is also provided:

"If the board of viewers shall find the improvement practicable, but the route named in the petition improper or impracticable, they may so state, showing therein the proper and practicable route," and "if the viewers report that the improvement is practicable, and will benefit the public health or any highway, or will be conducive to the general welfare of the community affected, then the proceeding shall be continued, for process and for further orders."

The practicability and propriety of the route selected, as well as the needs or accruing benefits, were not submitted to the jury. In instruction No. 2 the jury was told to find against the exceptors, unless they believed their land would not be benefited by the proposed improvement, in which event the jury should find in favor of any exceptors not deriving benefits from the improvements against the other. This was the only question submitted to the jury.

Instruction No. 3 tendered by appellant is not complained of. The substance of instruc-

tions B and C, tendered by appellant, was included in instruction No. 2 given by the court. Appellant was not entitled to have instruction D given to the jury but the theory sought to be included therein should be embodied in an instruction given upon the next trial.

[2] There was no foundation for instruction E. In this instruction it was sought to have the jury told that it was necessary that 25 per cent. of the landowners petitioned for the ditch. It is true by an amendment of March, 1918 (Acts 1918, c. 114) it is provided that a petition for a ditch shall be signed by not less than 25 per cent. of the landowners in a proposed district; but by a later section of the amendatory act it is expressly provided that—

"All proceedings heretofore had under the act, and all steps taken to organize districts thereunder, and all districts heretofore organized, all assessments heretofore made, all contracts heretofore entered into, and all bonds heretofore issued, or ordered or directed by the board of drainage commissioners to be issued under the said act are hereby validated and made valid; and all such districts heretofore organized are declared to be valid and existing districts, and all acts and proceedings heretofore done, had and performed by each of said districts and the board of drainage commissioners acting for them, and for each of them, and all acts of the viewers and of the board of drainage commissioners and of the court in respect thereto, are hereby declared to be legal and valid in all respects." Ky. St. Supp. 1918, § 2380—49.

Thus the court did not err in refusing to give instruction E.

[3] It is provided by statute that trials in the circuit court shall be de novo, and the cases shall be tried and docketed as other cases are tried; that the issues shall be confined to those raised in the lower court, no new issues shall be considered. This language of the statute is cited in support of the court's refusal to permit exceptors to file amended exceptions upon the return of the case to the circuit court. The tendered amendments did not raise new issues, but pertained to issues raised by the original exceptions filed in the county court. In the original exceptions objections were made to the inclusion in the drainage district of any land north of the Leitchfield public road. By the amendment the territory sought to be excluded, instead of being enlarged, was diminished, and the exceptions limited to so much of the territory as was situated more than 50 yards north of said Leitchfield public road. The court should have permitted the amended exceptions to be filed.

In *Midkiff et al. v. Carter et al.* (this day decided) 188 Ky. 339, 222 S. W. 92, which was an appeal from the same judicial district as the present case, we approved as substantially

correct the instructions given by the lower court. These instructions might be followed on the next trial in so far as applicable to the facts of this case.

For the reasons given, the judgment will be reversed, for further proceedings consistent herewith.

MILLER et ux. v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 8, 1920.)

1. Criminal law §1159(3)—Verdict on conflicting evidence will not be set aside on appeal.

A verdict on conflicting evidence will not be set aside upon appeal on the ground of insufficiency of the evidence, though testimony of numerous witnesses was made incredible.

2. Homicide §300(3) — Danger should be submitted from standpoint of defendants relying on self-defense.

An instruction on the subject of self-defense is erroneous, where it leaves to the jury the question whether defendants were in danger of death or great harm was likely, and the question which should be submitted is whether defendants believed, or had reasonable grounds to believe, that they were in danger.

3. Criminal law §823(6)—Error in instructions on self-defense cured by other instructions.

Error in an instruction on self-defense, which submitted to the jury the question whether defendants were in peril instead of whether they believed or had reasonable grounds to believe that they were in peril, was harmless where other instructions clearly presented the correct rule.

4. Homicide §300(2)—Instruction that defendants could not use more force than actually necessary not objectionable.

An instruction in a homicide case that defendants had no right to use "more force than was actually necessary" or reasonably appeared to be necessary to repel deceased's assault held not objectionable in the use of the quoted words.

5. Homicide §123—A person cannot kill because another is forcing a trespass upon his premises.

A person cannot kill one forcibly trespassing on his premises, and, though one of the defendants testified that she shot deceased when he attempted to force an entrance into her house, it was not error for the court to refuse an instruction that she had the right to kill to protect her home from such attack.

6. Witnesses §246(1, 5)—A juror may cause a witness to be recalled to propound proper question to him.

Any member of the jury has the right, during the examination of a witness, to ask any competent, pertinent question, and, after the jury has retired, jurors have the right to return to the courtroom and ask that a witness,

who has testified, be recalled if he is present or so convenient as to be quickly secured, and in the presence of the parties and their attorneys ask proper questions.

7. Criminal law §689—Witnesses §246(5)
Recalling a witness for examination by juror after submission held not reversible error.

In a homicide case it was not error for the court, after submission of the case, at the request of a juror to recall a witness whose son had also been indicted and allow the juror to examine her as to whether she received threats that her son would be sent to the penitentiary unless she produced evidence against one of the defendants; it being the theory of the defense that the principal witness against him, who was a sister of the one indicted, was coerced.

Appeal from Circuit Court, Perry County.

Allen Miller and wife were convicted of manslaughter, and they appeal. Affirmed.

Hogg & Johnson and F. J. Eversole, all of Hazard, for appellants.

Chas. I. Dawson, Atty. Gen., and Thomas B. McGregor, Asst. Atty. Gen., for the Commonwealth.

CARROLL, O. J. The appellants, Allen Miller and Delilah Miller, under an indictment charging them with the murder of Sam Combs, were found guilty of manslaughter and the punishment of each assessed at a term in the penitentiary for 21 years.

[1] The evidence in the record leaves in considerable doubt the circumstances surrounding the death of Combs, who one evening after supper left his home and the next morning was found dead at the house of the Millers, who are husband and wife. The only person who testified as to the manner in which Combs came to his death was Delilah Miller, and she said: That Sam Combs, who lived in the same neighborhood, was well known to her. That on the night he was killed she and a little girl about six years old were occupying alone the cabin in which she and her husband lived. That her husband about 3 or 4 o'clock on the afternoon of that day went to the house of his brother, John Miller, where he stayed all night, leaving no person at his home except herself and the little girl. That she was awakened about 2 or 3 o'clock in the morning by a "pounding" on the door of the room in which she and the child were sleeping. That she did not know who it was until she asked, and the person said: "'Bad Sam Combs, by God, the worst God d— s— of a b— ever seed this place,' and I says 'Get away from here; you have no business here,' and he says, 'By G—d, I make business wherever I go,' and he pounded on the door, and I got up and got the gun and held the gun in my hand, and the door flew open,

and I heard something burst in the floor, and, as quick as I discovered him, I shot, and I dropped the gun down on the bed and grabbed the little girl up and went out the door barefooted and in my nightclothes, as quick as I could get out, and went down to Sallie Miller's."

She further said that he prized the door open, and while there was no light or fire in the room, there was enough light from the door and window to enable her to discover that it was a man, but she only knew who it was from what he said; that as soon as he came in the door she shot as quick as she could with a single-barrel shotgun.

This is all the evidence as to the circumstances surrounding the death of Combs, nor does the record disclose why or how he happened to be at the house of Miller at the time he was killed. The fact is that the evidence is so confusing and contradictory as to leave involved in doubt every material fact connected with the case, except that Sam Combs was shot and killed during the night at the house of Miller.

Allen Miller testified that he was not at home during the night and did not know anything about the tragedy until late the next morning, when he was told what happened by some people that he met.

Nancy Miller, a girl about 14 years old and a niece of Allen Miller, testifying for the commonwealth, said that she went to Allen Miller's house in the afternoon of the day before Combs was killed and remained in the house all night; that she retired early and went to sleep, but about 10 or 11 o'clock was awakened by a noise in the room in which she was sleeping, and saw Delilah Miller, who was sleeping in the bed with her, get up and open the door and let Sam Combs in the room; that Allen Miller was at home and in the room where they were sleeping, and when Sam Combs came in he and Allen Miller sat in the room, and she saw them drinking whisky; that presently she went to sleep and was next aroused by the firing of a gun and saw Allen Miller standing near the door holding Sam Combs; that Delilah Miller was standing over in one corner of the room; that she did not hear anything said at this time, but got up at once and went out of the house to Sallie Miller's, a neighbor, who lived near by.

This girl was the principal witness for the commonwealth, in connection with two or three other witnesses, who testified to threats made by Allen Miller that he would kill Combs.

It will be noticed that Delilah Miller testified that she shot and killed Sam Combs, but it appears probable that the jury may have believed that he was killed by Allen Miller and that his wife, Delilah, assumed the blame in order to exonerate her husband

from liability for the crime. We may further assume that the jury believed the story told by Nancy Miller, and inferred from the circumstances of the case that Combs, while drunk, was shot and killed by Allen Miller with the advice and assistance of his wife. But however this may be, the direct and circumstantial evidence in the case was, as we think, sufficient to justify the jury in returning the verdict, although, as we have said, the evidence is so contradictory and confusing as to leave us in great doubt as to the truth of the case. The jury, however, saw and heard the witnesses testify and were doubtless acquainted with them, and we do not feel warranted in holding, on the record before us, that their finding should be set aside and a new trial ordered on the ground that there was not sufficient evidence to support it.

On this appeal, it is urged that the court committed error in the instructions given to the jury and in permitting Sallie Ann Miller to be recalled at the request of the jury and examined by one of the jurors after the case had been argued and submitted.

[2, 3] There is no objection to the instructions on the subject of murder and manslaughter; but instruction No. 6, on the subject of self-defense, is criticized because it is said that this instruction left to the jury to say whether the Millers, or either of them, at the time Combs was killed, were in danger of death or great harm at his hands, in place of telling the jury that they should acquit if they believed that the Millers, or either of them, had reasonable grounds to believe that they or either of them were in danger of death or great harm at the hands of Combs.

It is true that an acquittal on the ground of self-defense rests on what the defendant believes and has reasonable grounds to believe, and not on what the jury may believe. In other words, this instruction, in place of reading as it does;

"If the jury shall believe from the evidence that the deceased, Sam Combs, had unlawfully and forcibly assaulted the home of the defendants, and if the jury shall further believe from the evidence that the defendants, or either of them, or any member of the family, were in danger of death or the infliction of some great bodily harm at the hands of the deceased at and before the time of the shooting, then in such event the defendants, or either of them, had the right to use such force"

—should have read:

"If the jury shall further believe from the evidence that the defendants, or either of them, believed or had reasonable grounds to believe that they, or either of them, or any member of the family, were in danger of death or the infliction of some great bodily harm at the hands of the deceased at and before the time of the shooting, then the defendants, or either of them, had the right to use such force at their

command as was necessary or believed by them to be necessary in the exercise of reasonable judgment to repel the assault."

This instruction would have been in better form if the words we have indicated had been inserted. But the omission from this instruction at the place mentioned of the words, "they or either of them believed or had reasonable grounds to believe that they," etc., did not prejudice the substantial rights of the accused, because in other instructions the jury were distinctly told that they should acquit the Millers, and each of them, if they or either of them believed that they, or either of them, was in danger of death or the infliction of some great bodily harm at the hands of said Combs, and that it was necessary, or was believed by either of them, in the exercise of a reasonable judgment, to be necessary, to shoot and kill him.

[4] It is further argued that the court committed error in telling the jury in instruction No. 6 that the defendants "had no right to use more force than was actually necessary or reasonably appeared to be necessary for that purpose, and, if the jury shall believe from the evidence that the defendants did not use any more force than was necessary in the exercise of reasonable judgment to repel such assault," they should acquit.

The particular objection to this part of the instruction is the use of the words "more force than was actually necessary," but we do not find any substantial error in the use of the words criticized.

[5] It is further insisted that as Delilah Miller, the only witness who gave direct evidence of the circumstances under which Combs was shot and killed, testified that he violently and forcibly broke into the room in which she was sleeping, and that she shot him because she believed she was in danger and to protect her home, the jury should have been told in substance that she had the right to shoot and kill to protect her home from the violent and forcible attack of the intruder.

But we think the court properly instructed the jury on this subject. The law does not authorize a person to take the life of another merely because such other is forcibly trespassing on his premises. To excuse the homicide, under circumstances like this, it is essential that the shooting and killing should be believed by the person accused necessary or reasonably necessary to protect himself or his family from danger.

[6, 7] It appears that, after the jury had taken the case, they returned to the courtroom and requested the court to permit them to question Sallie Ann Miller, who had testified as a witness for the accused. In response to this request, the court recalled Mrs. Miller to the witness stand, and Mr. Hayes, one of the jurors, in the presence of

the court, the counsel for the defendant and the commonwealth, and the defendants, asked her the following questions, to which she made the following answers:

"Q. We want to ask you if counsel for the defendant asked you on the trial if App Eversole and Andy Williams threatened to put your son in the penitentiary unless you produced evidence against Allen Miller? A. They was talking to me, said I had better know something against Allen; they said it would be a heap better for me if I knowed something. Q. The point we were after was whether the witness was threatened that, unless she produced evidence against Allen Miller, her son would be sent to the penitentiary? A. They said it would be better. That's the way I stated it at the first start. They said it would be better if I did know something against Allen Miller; it would be better on my boy if I did know something against Allen Miller. I think that's the way I stated it the first time. I don't think I have forgot. The Court, to the Jury: Is that all you wanted to ask her? The Jury: Yes."

Counsel for the defendants objected and excepted to this evidence, and moved the court to have the stenographer's notes of the evidence given by the witness read to the jury upon the point she was inquired about, which motion was overruled.

In order to understand the purpose of the jury in asking these questions, it should be stated that Cager Miller, a son of Sallie Ann, was indicted in connection with Allen and Delliha Miller, but the indictment against him was either dismissed or the case continued as to him; it does not appear which. At any rate, he was not put upon his trial with Allen and Delliha Miller; and counsel for the defendants endeavored to show that the prosecution procured the indictment of Cager Miller in order to force his sister, Nancy Miller, the principal witness for the commonwealth, to give the evidence that she did by the threat made to her mother, Sallie Ann Miller, as well as herself, that unless she did connect Delliha and Allen Miller with the murder her brother, Cager, could be prosecuted and sent to the penitentiary; and on the examination of Nancy and her mother, Sallie Ann Miller, counsel for the defendants endeavored to show by them the state of facts stated, but failed to do so, except that Sallie Ann Miller, when first introduced as a witness, testified substantially as she did when recalled by the jury.

We do not find any objection to the course pursued by the trial judge in permitting Sallie Ann Miller to be recalled and examined by the jury in the presence of the accused and their counsel. Any member of the jury has the right, during the examination of a witness, to ask any competent, pertinent question, and, after the jury has retired to consider their verdict, they have the right to re-

turn to the courtroom and ask that a witness, who has testified, be recalled if he is present or so convenient as to be quickly secured and in the presence of the court, the parties to the case and their attorneys ask the witness any pertinent, competent questions relating to matter brought out on the examination of the witness.

After a careful consideration of the case, we have reached the conclusion that no error prejudicial to the substantial rights of the defendants was committed during the trial, and the judgment is affirmed.

CHESAPEAKE & O. RY. CO. v. BLACKBURN.

(Court of Appeals of Kentucky. June 11, 1920.)

1. Damages $\$138-\700 held excessive for injury to property by fire.

In an action against a railroad company for damages from fire, where there was no satisfactory evidence as to the value of the standing timber burned, objections being sustained to questions as to the injury to the property per acre and to the timber destroyed, and there being no evidence as to the value of the timber before and after the fire, a verdict for \$700 was excessive, notwithstanding testimony that the injury to fences was \$500, where the damages for that item were laid at less than \$200.

2. Damages $\$157(1)$, $216(1)$ — Instructions limiting recovery to damages itemized in petition necessary.

Where the petition itemizes the amounts of the various damages, recovery is limited to the amounts specified, notwithstanding the evidence shows greater damage, and the jury should be so instructed.

Appeal from Circuit Court, Floyd County.

Action by Rufus Blackburn against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Worthington, Cochran, Browning & Reed, of Maysville, and Kirk & Kirk, of Paintsville, for appellant.

A. J. May, of Prestonsburg, for appellee.

CLAY, C. Rufus Blackburn, who owned a tract of land in Floyd county, adjoining the right of way of the Chesapeake & Ohio Railway Company, brought suit against the company to recover damages for injury to his property caused by fire. The acts of negligence relied on were defective spark arresters, negligent operation, and permitting combustible material to accumulate on the right of way. In his petition the damages were itemized as follows: Injury to timber, \$720; burning about 200 panels of rails, \$100;

burning 25 panels of partnership fence, \$12.50; burning and injuring 500 yards of wire fence, \$50. The company filed an answer, denying the allegation of the petition. A trial before a jury resulted in a verdict and judgment for plaintiff for \$700. The company appeals.

[1] The first contention of the company is that the verdict is excessive. Plaintiff testified that he owned 90 acres of young timber, consisting of black oak, white oak, chestnut, yellow locust, beech, and hickory. A large amount of the timber was completely destroyed, while a considerable portion of it was burned enough to kill it. After stating that he had handled timber for a number of years, and was familiar with the value and price of growing timber in that community, and that he was well enough acquainted with the timber in question to state what it was worth per acre, and how much of it had been injured, he was asked the following question:

"What, in your opinion, Mr. Blackburn, was the reasonable amount of injury to the property per acre, to the timber that was growing there, that was burned, destroyed, or injured?"

An objection was sustained to this question. Two other witnesses were also asked to state the extent of the damage to the timber, but a similar objection was sustained to their testimony. The result was that no witness gave the value of the timber before and after the fire, or stated any facts from which the jury could find the extent of the damage. True, there was evidence by plaintiff tending to show that the reasonable cost of replacing the 200 panels of rail fence was \$500; yet plaintiff fixed his damages on this item at \$100 and the entire damage to the fencing at \$162.50. On the item of fencing, therefore, his recovery was limited to that amount of damages asked, or \$162.50, and there being no satisfactory evidence tending to show the extent of the damage to the timber, it is clear that the verdict for \$700 is excessive. *O. & O. Railroad Co. v. Coleman*, 184 Ky. 9, 210 S. W. 947.

[2] Another contention is that the recovery on each item of damage should have been limited by the instruction. The point is well taken. Since there was evidence tending to show that the damage to the fencing was largely in excess of the amount claimed in the petition, the jury had the right under the given instruction to exceed that amount, and it is altogether probable that they did so. Clearly, where the damages are itemized, and the amount of each item is fixed in the petition, the instruction should limit the recovery on each item to the amount claimed.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

HAZEL v. McCULLOUGH et al.

(Court of Appeals of Kentucky. June 8, 1920.)

1. Limitation of actions \S 25(3)—Action on note must be commenced within five years.

Under Ky. St. \S 2515, an action on a promissory note placed on the footing of a bill of exchange must be commenced within five years next after the cause of action accrues.

2. Limitation of actions \S 25(3)—Notes negotiated before maturity become bills of exchange within five-year statute.

Notes which were not only negotiable, but were actually negotiated before maturity, were placed on the footing of a bill of exchange to bring them within the five-year statute of limitations, Ky. St. \S 2515.

3. Limitation of actions \S 167(1)—Lien securing notes barred with them.

Where notes were barred by limitations, the lien by which they were secured also was barred.

4. Limitation of actions \S 172—Defense of statute, though personal, can be set up by grantees or mortgagees.

The grantees or mortgagees of property subjected to liens by the owner with respect to the property, and notes secured by liens thereon, stand in his shoes, and can set up any defense, as the statute of limitations, that he might himself have set up, either to defeat recovery of the property or its sale on foreclosure.

Appeal from Circuit Court, Logan County.

Action by W. S. Hazel against J. W. McCullough and others. From an adverse judgment, plaintiff appeals. Affirmed.

Browder & Browder and Miriam O. Stevenson, both of Russellville, for appellant.

S. R. Crewdson, of Russellville, and J. J. Sweeney, of Owensboro, for appellees.

CLAY, C. On June 8, 1906, J. W. Cottrell and wife, by deed which was recorded on June 19, 1906, conveyed to D. N. Combs certain land located in Logan county. The consideration was \$500 cash and three notes of D. N. Combs for \$291.66% each, payable to the order of J. W. Cottrell and due in two, four, and six months after date, and secured by a lien on the land conveyed. In due course, for value and before their maturity, the notes were sold and transferred to the Owensboro Savings Bank & Trust Company, and were afterwards purchased by W. S. Hazel.

On July 29, 1907, D. N. Combs and wife conveyed the land to J. S. Cottrell, who in turn sold the land to J. W. McCullough on January 24, 1913, for a consideration then paid in full. Neither Cottrell nor McCullough assumed the payment of the notes in question, and since its purchase, McCullough has been in possession of the land.

Hazel brought suit against D. N. Combs, the

maker of the notes, to recover on the notes and to enforce his vendor's lien. Combs made no defense. In addition to a personal judgment against Combs, plaintiff was awarded a lien on the land, and the land was ordered sold. The judgment directing a sale of the property was afterwards set aside, and an amended petition filed, making J. W. McCullough a party defendant. McCullough answered, and pleaded the five-year statute of limitations. His plea was sustained, and it was adjudged that plaintiff has no lien on the land. Plaintiff appeals.

[1-3] Under our statute, an action upon a promissory note, placed upon the footing of a bill of exchange, must be commenced within five years next after the cause of action accrued. Section 2515, Kentucky Statutes; Southern National Bank v. Schimpeler, 160 Ky. 813, 170 S. W. 178. The notes in question were not only negotiable, but were actually negotiated before their maturity, and were therefore placed upon the footing of a bill of exchange. As the suit was not brought within five years after the notes matured, they were barred by limitation, and, that being true, the lien by which they were secured was also barred. Tate v. Hawkins, 81 Ky. 577, 50 Am. Rep. 181; McCracken County v. Mercantile Trust Co., 84 Ky. 344, 1 S. W. 585, 8 Ky. Law Rep. 314; Ewell v. Daggs, 108 U. S. 143, 2 Sup. Ct. 408, 27 L. Ed. 682. Indeed, the foregoing rules are conceded by counsel for appellant, but it is insisted that they are not applicable to the facts of this case, because the plea of limitation is a personal one, and as Combs, the debtor, did not rely on the statute, McCullough, his vendee, cannot rely on it. In the case of Lord v. Morris, 18 Cal. 482, Chief Justice Field used the following language:

"But it is said that the plea of the statute is a personal privilege of the party, and cannot be set up by a stranger. This, as a general rule, is undoubtedly correct with respect to personal obligations, which concern only the party himself, or with respect to property which the party possesses the power to charge or dispose of. But with respect to property placed by him beyond his control, or subjected by him to liens, he has no such personal privilege. He cannot at his pleasure affect the interests of other parties. His grantees or mortgagees, with respect to the property stand in his shoes, and can set up any defense that he might himself have set up to the action, either to defeat a recovery of the property or its sale."

[4] This view has been generally adopted by the courts (17 R. C. L. § 331, p. 963), and prevails in this state. Tate v. Hawkins, supra; Duvall v. Parepoint, 168 Ky. 11, 181 S. W. 653. It follows that the court did not err in sustaining McCullough's plea of limitation.

Judgment affirmed.

HOPKINS et al. v. DICKENS et al.

(Court of Appeals of Kentucky. June 1, 1920.)

1. Statutes \S 181(1)—In interpreting a statute, intention of the Legislature should be ascertained.

To interpret a statute, it must be ascertained and determined what the Legislature meant and intended, as the intention of the Legislature is what statute law is.

2. Statutes \S 190—Where the language is plain and unambiguous, there is no room for judicial construction.

Where the language of a statute is plain and unambiguous and only one meaning can fairly be deduced from it, there is nothing for the courts to do but to give it such meaning, and there is no room for judicial construction.

3. Statutes \S 181(1)—Where ambiguous intent ascertained from entire act and objects to be accomplished.

Where a statute is ambiguous and uncertain, the legislative intentment may be ascertained from a consideration of all of the provisions of the act, and in ascertaining such intent the objects to be accomplished, the occasion of the enactment of the statute, as well as other existing legislation upon the subject may be considered.

4. Statutes \S 183—Not given a literal construction defeating intent.

A statute will not be given a literal construction, where such construction will defeat the intention of the Legislature or lead to an absurdity, and in such cases the real purpose of the Legislature will prevail over the literal import of the words.

5. Schools and school districts \S 42(2)—Petition for graded school district need not be signed by twenty-five per cent. of voters.

Ky. St. Supp. 1918, § 4464, declaring that it shall be the duty of the county judge in each county, on the written petition signed by at least 25 per cent. of the legal voters who are taxpayers in the justice's district, town, or city, etc., to make an order fixing the boundaries of any proposed graded common school district, etc., a petition for establishment of a graded common school district in a justice's district need not, in view of section 4168a3, providing for the establishment of graded common schools in cities of the first, second, third, and fourth classes, be signed by 25 per cent. of the voters of the entire justice's district, but the requirement should be construed as merely prescribing qualification of the petitioners, and the article "the," preceding justice's district, may be construed as "a."

6. Schools and school districts \S 42(2)—Petitioners for graded school district may sign separate petitions.

Where four petitions for a graded common school district, which were exact copies of each other, were circulated, and more than 25 per cent. of the legal voters who were taxpay-

ers within the boundaries of the district signed some one of the petitions, those petitions may be treated as a single petition, sufficient basis for an election to establish the district.

7. Schools and school districts \S 42(2)—Approval of board and superintendent of graded common school district must be secured before county judge can act.

The written approval of the county board of education and the county superintendent of schools of a petition for the establishment of a common graded school district must be secured before the county judge can act on the petition and order an election.

8. Schools and school districts \S 48(6)—County board of education is corporation and must act as such.

The county board of education is a corporation as the trustees of a school district are a corporation, and must act as such, or else its acts are ineffectual.

9. Schools and school districts \S 48(6)—To act, quorum of county board must be present, and all members must have notice.

To act, the county board of education must have present a quorum of its members, and all must have had notice and opportunity to be present.

10. Schools and school districts \S 42(2)—Approval of petition for school district sufficient, though members of county board signed as individuals.

Where the county board of education adopted a resolution approving a petition for the creation of a common graded school district, which was duly entered upon its records and was subscribed by chairman and secretary, and each member of the county board indorsed on petition for establishment his approval, held that, as the board had adopted a resolution of approval, the written approval will be deemed sufficient; the matter being only one of intellectual approval.

Appeal from Circuit Court, Clinton County.

Suit by G. D. Hopkins and others against W. A. Dickens and others, trustees of a graded common school district. From a judgment for defendants, plaintiffs appeal. Affirmed.

Bertram & Bertram, of Monticello, for appellants.

Duncan & Bell, of Monticello, and J. G. Smith, of Albany, for appellees.

HURT, J. This appeal involves the validity of a proceeding which was instituted and terminated in the year 1919 under the provisions of section 4464, Ky. Stats. Supp. 1918, to establish a graded common school district, which includes within its boundaries the town of Albany, which is of the sixth class, and a certain portion of the adjacent territory, but all of the territory included in the proposed graded common school dis-

trict is situated within the bounds of the same justice's district. The pleadings admit that the election, held within the proposed graded common school district by the legal voters thereof, to determine whether they would vote an annual tax upon the property and polls of white persons and corporations within the district for the purpose of maintaining a graded common school and for the erection, purchasing, or repairing of suitable buildings therefor, if necessary, and for the selection of trustees, was held on April 19, 1919, and resulted in a majority in favor of the imposition of the tax and the establishment of the district. Thereafter another election was held in the district upon the proposition whether or not the trustees should be authorized to issue bonds of the district in an amount not exceeding the limit provided by sections 157 and 158 of the present Constitution of this state, for the purpose of providing suitable grounds, school buildings, furnishing, and apparatus for the district, and that at such election two-thirds of the voters voting at the election voted in favor of the issue of the bonds. The latter election, as we presume, was held under the provisions of section 4481, Ky. Stats., and in accordance with the requirements of that statute. At least there is no complaint made of any irregularity touching that election. The appellants, who were the plaintiffs below, however, assail the validity of both elections upon the grounds that the district was not established in accordance with the law, and that the county court had not jurisdiction of the subject-matter when it entered its order defining the boundary of the district and directing the sheriff to open a poll and hold an election in the district as provided in section 4464, supra, the appellants alleging that both of the elections were void, and that the trustees, or pretended trustees, of the district were proceeding to levy and collect taxes as though the establishment of the district was valid, and sought to have them restrained from any further levies or collection of taxes upon the property or polls of the district, and to declare the entire proceedings null and void. A statement of facts was agreed upon by the parties to the following effect: (1) That the proposed graded common school district is within the boundaries of the First justice's district of Clinton county, and that the boundaries of the school district includes the whole of the town of Albany, which is a town of the sixth class; (2) that two-thirds of the territory included in the proposed graded common school district is without the corporate limits of the town of Albany; (3) that less than 25 per centum of the legal voters and taxpayers residing in the First justice's district subscribed the pe-

tion asking for the establishment of a graded common school district, but that more than 25 per centum of the legal voters and taxpayers, within the boundary of the proposed graded common school district, subscribed the petition asking for the establishment of the district.

Upon the record made the cause was submitted, and the court adjudged that the plaintiffs, who were voters and taxpayers within the proposed graded common school district, had failed to manifest any right to the relief sought, and dismissed the petition, and furthermore adjudged that the bonds proposed to be issued were valid obligations of the district, and that in the levying and collection of the taxes the trustees in the district were within their authority. The plaintiffs have appealed from that judgment, and insist that the judgment of the circuit court was erroneous, in that the county court, when it made the order fixing the boundary of the district and ordered the sheriff to hold an election as provided by section 4464, supra, was without jurisdiction to do so, and hence that all the proceedings thereafter were invalid. The jurisdiction exercised by the county court is assailed upon three grounds: (1) The petition, upon which the board of education and the county superintendent of schools indorsed their approval, was subscribed by only three petitioners, which was admittedly an insufficient number to give the court jurisdiction of the subject-matter; (2) the county board of education did not indorse its approval of the establishment of the district and its boundaries upon the petition in writing; (3) the petition upon which the court acted was not subscribed by 25 per centum of the legal voters who were taxpayers in the justice's district within the boundaries of which the graded common school district was proposed to be established.

[1-5] (a) The determination of the merits of the third ground upon which the jurisdiction of the county court is denied depends upon the construction to be placed and the interpretation made of section 4464, supra. The section in part reads as follows:

"It shall be the duty of the county judge in each county of this commonwealth, upon a written petition signed by at least twenty-five per cent. of legal voters who are taxpayers in the justice's district, town or city of the fifth or sixth class in his county to make an order on his order book, at the next regular term of his court after he receives said petition, fixing the boundary of any proposed graded common school district, as agreed on by the county judge and the petitioners, and directing the sheriff or other officers, whose duty it may be to hold the election, to open a poll in said proposed graded common school district, at the next regular state, town or city election to be held therein, or on any other day fixed by said judge in said order, not in either case ear-

lier than forty days from the date of said order, for the purpose of taking the sense of the legal white voters in said proposed graded common school district upon the proposition whether or not they will vote an annual tax, in any sum named in said order, not exceeding fifty cents on each one hundred dollars of property assessed in said proposed graded common school district, town or city belonging to said white voters or corporations, or a poll tax in any sum named in said order not exceeding one dollar and fifty cents per capita on each white male inhabitant over twenty-one years of age residing in said proposed graded common school district, or both an ad valorem and a poll tax, if so stated in the order, for the purpose of maintaining a graded common school in said proposed graded common school district, and for erecting, purchasing or repairing suitable buildings therefor if necessary."

A proviso in the section is to the following effect:

"Provided, that the proposition to establish any graded common school, as provided for in this section, * * * that no point on the boundary of any proposed graded common school district be more than two and one-half miles from the site of the school building," etc.

It must necessarily be conceded that the county court is without authority to fix the boundaries of a proposed graded common school district, or order an election held therein, as provided, in the statute, supra, until the county judge shall have received a petition signed by the number of persons and with the qualifications required. The qualifications prescribed for the persons who sign the petition are that they must be legal voters, and also taxpayers, in a justice's district, or in a town or city of the fifth or sixth class, in the county. The number of the signers must be "twenty-five per cent. of the legal voters, who are taxpayers," etc., and the point about which the contention here arises is whether they must constitute 25 per centum of the legal voters who are taxpayers in the proposed graded common school district, or whether they must be 25 per cent. of all the legal voters who are taxpayers in the justice's district, or town, in which the district is proposed to be established. If the statute requires the signers of the petition to amount in number to 25 per centum of the legal voters who are taxpayers in the proposed district, it is conceded that the petition in the instant case was amply sufficient. If it requires the signatures of 25 per centum of the legal voters who are taxpayers in the town of Albany, or in the magisterial district, within the boundaries of which the proposed district is situated, the petition was not sufficiently signed, and the county court was without jurisdiction to order the election, or to do anything, except to deny the application. To interpret the statute,

John W. Sherrill

It must be ascertained and determined what the Legislature meant and intended, touching the requirement in issue, as the intention of the Legislature is what statute law is. *Com. v. International Harvester Co.*, 131 Ky. 551, 115 S. W. 703, 133 Am. St. Rep. 256; *Maysville, etc., R. R. Co. v. Herrick*, 13 Bush, 122; *Bailey v. Com.*, 11 Bush, 688. Of course, if the language of a statute is plain and unambiguous, and only one meaning can be fairly deduced from it, there is nothing for the courts to do but to give it such meaning, and there is no room for any judicial construction. *Gains v. Gains*, 2 A. K. Marsh, 190, 12 Am. Dec. 375; *Adams Express Co. v. Ky.*, 238 U. S. 190, 35 Sup. Ct. 824, 59 L. Ed. 1267, L. R. A. 1916C, 273, Ann. Cas. 1915D, 1167; *Deposit Bank v. Davelss County*, 102 Ky. 174, 39 S. W. 1030, 19 Ky. Law Rep. 248, 44 L. R. A. 825. If, however, there is ambiguity and uncertainty of the legislative meaning from the literal meaning of the language or other reason, the legislative intentment may be ascertained from a consideration of all the provisions of the act together, as well as the objects intended to be accomplished by it, the occasion of its enactment, other existing legislation upon the same subject at the time of the enactment, the legislative policy and previous legislation upon the subject, and the result, if a construction contended for is upheld; and from all these sources, if necessary, the true legislative intention may be gathered, and any construction which is contrary to the obvious intention of the Legislature, or which will lead to an absurdity, rejected.

A well-known rule of construction of an ambiguous statute is that when the intention of the Legislature is obvious, but the language used, if given its literal meaning, will defeat the intention, the real purpose of the Legislature should be allowed to prevail over the literal import of the words. *Brown v. Thompson*, 14 Bush, 538, 29 Am. Rep. 416; *Lanferman v. Vanzile*, 150 Ky. 751, 150 S. W. 1008, Ann. Cas. 1914D, 563. Hence the courts have often substituted the word "and" for "or," and "or" for "of," and have disregarded words when the context showed that the use of the word employed was a manifest error or inadvertence.

It will be observed that the language of the statute in question is "upon a written petition signed by at least twenty-five per cent. of the legal voters who are taxpayers in the justice's district, town or city of the fifth or sixth class in his county," etc. This language, if allowed its literal signification, would imply that the Legislature was under the impression that only one justice's district, or only one town of the fifth or sixth class, was in a county, and it is manifest at once that the article "the" preceding the words "justice's district" was inadvertently used for the article "a." Substituting the

article "a" for the article "the," it at once becomes apparent that the intention of the makers of the statute in the use of the words "legal voters, who are taxpayers in a justice's district, town or city of the fifth or sixth class, in his county," was not to prescribe a unit beyond the boundaries of which a proposed graded common school district should not go, or that the voters in such a unit should control the establishment of such a district, but the purpose was to prescribe a qualification for the petitioners; that is, in addition to being a legal voter and a taxpayer, he must reside in a justice's district, or in a town of the fifth or sixth class. This construction is fortified by the fact that at the legislative session of 1916, when section 4464, supra, was amended, and re-enacted, in its present form, section 4468a3 was also enacted, and which provides a method different from that provided by section 4464, supra, for the establishment of graded common schools in cities of the first, second, third, and fourth classes. The language above quoted from section 4464, supra, has been in such statute in its present form since its amendment in 1914, and both before and since that time its provisions by reason of other existing legislation have not applied to cities of the first, second, third, and fourth classes. *Bailey v. Gigely*, 106 Ky. 725, 51 S. W. 424, 21 Ky. Law Rep. 341; *Trustees v. Stone*, 142 Ky. 715, 135 S. W. 307; *Read v. Smith*, 106 S. W. 1182, 32 Ky. Law Rep. 116. The only voters and taxpayers, except those residing in cities of the first four classes, are those who reside in justice's districts, in the county, and in cities of the fifth and sixth classes, and, this statute not applying to citizens of cities of the first four classes, it was necessary to refer to the ones to whom the latter statute applied, in that statute, as persons who were legal voters and taxpayers, and therefore residents in a justice's district, or in a town of the fifth or sixth class. A reference to other provisions of section 4464, supra, shows indisputably that it was not the intention of the statute that the boundaries of a graded common school district should be confined within the limits of any one justice's district, or a town of the fifth or sixth class, exclusive of territory in a justice district, since the limits provided for by the act for such a school district was not the boundary line of a magisterial district, but it might extend to the distance of $2\frac{1}{2}$ miles from the site of the school building proposed for the district. The boundaries of the graded common school district is a subject of agreement between the county judge and the petitioners, with the approval of the board of education and the county superintendent of schools. There is no provision of the statutes which limits a graded common school district to the boundaries of a magis-

terial district, or of a town of the fifth or sixth class, and the uniform construction which has been given to section 4464, supra, by the officers and patrons of such schools, and in a number of cases assumed by this court, has been that a graded common school district may be established which includes towns of the fifth or sixth classes, and also adjoining territory, in one or more magisterial districts beyond the limits of the town. When the election is held to determine whether the proposed district shall be established, the only persons permitted to vote at such election are, if a white district, not the voters, within the justice's district or town, in which the proposed school district, or a part of it is situated, but the legal white voters residing within the boundaries of the proposed district. After the establishment of the school district, it is only the residents of it who are required to bear the taxation necessary to maintain its buildings and school, and to control the district. Hence we conclude that it is 25 per centum of the legal voters who are taxpayers within the boundaries of the proposed graded common school district only who must be signers of the petition, to give the county court jurisdiction of the matter. A different conclusion as to the persons necessary to be signers of the petition would lead to the following results: If the number of voters in a justice's district, or a town of the fifth or sixth class, were held to be units by which to determine, when a sufficient number of signers was secured to give the county court jurisdiction, the applicants would have to first elect where a town of the fifth or sixth class was situated, whether the proposed school district should be in the town, or should include territory outside of it, and if the town was selected as the unit, then to secure the signatures of 25 per centum of the voters and taxpayers of the town would be necessary to the petition whether they were all included in the proposed school district or not. If the justice's district was selected as the unit, then it would take 25 per centum of the voters and taxpayers within the magisterial district, although 75 per centum of them might reside without the limits of the proposed school district, and if the latter included portions of several magisterial districts, as it might, then it would require the signatures of 25 per centum of the voters and taxpayers of each of the magisterial districts to give the court jurisdiction, although a very small per centum of all would be in the proposed school district, or would be permitted to vote on the question of its establishment, or would ever have any interest in or control of it. Twenty-five per centum of the voters and taxpayers in a magisterial district could, under such a construction of the statute, require an election

to be held for the establishment of a school district in a portion of the magisterial district wherein no one of the signers resided or was a taxpayer, and all the voters and taxpayers within the proposed school district be opposed to it. Applying to the words "twenty-five per cent. of the legal voters, who are taxpayers in the justice's district," etc., without reference to other provisions of the statute, their literal import would make it necessary to give the county court jurisdiction of the subject, to include in the computation to be made to determine when 25 per centum of the legal voters and taxpayers had signed the petition, the persons of color, as well as the white voters, which, in the view of all the legislation touching schools, no one would suppose that the Legislature contemplated. In view of the foregoing it seems very clear that the Legislature intended by the statute that to give the county court jurisdiction of the subject a petition signed by 25 per centum of the legal white voters who are taxpayers within the boundary of the proposed graded common school district only was necessary, where a white graded common school is desired, as in the present instance.

[8] The other two contentions of appellants will be considered together. Four petitions, which were exact copies of each other, were circulated, and more than 25 per centum of the legal white voters who were taxpayers, and who resided within the proposed school district signed one or the other of the petitions, but neither of the petitions alone had a sufficient number of signers. These petitions were treated as one petition, and were together presented to the board of education for its indorsement, and to the county judge. The statute requires that 25 per centum of the legal voters who are taxpayers within the proposed school district must petition for its establishment before the costs and trouble of an election are resorted to, and the names of the petitioners upon whose request the county court bases its actions must appear that the people of the proposed district may determine whether they are legal voters and taxpayers within the district, and two or more petitions identical in terms, and together signed by the requisite number, satisfies the requirements of the statute. Under the local option law, which required a petition subscribed by 25 per centum of the voters in a district to be affected to be presented to the county judge, requesting the holding of an election upon the subject of the sale of spirituous liquors, in order to authorize the county judge to order the election to be held, it was held that two or more petitions, which together were subscribed by the requisite number of persons, satisfied the requirements of the statute. The same reasons would satisfy the statute, in ordering an election for

the establishment of a graded common school district. *Sith v. Patton*, 103 Ky. 444, 45 S. W. 459, 20 Ky. Law Rep. 165; *Tousey v. De Huy*, 62 S. W. 1118, 23 Ky. Law Rep. 458.

[7] The statute requires the petition to be approved in writing by the county board of education and the county superintendent of schools before the county judge is authorized to act upon it. That such approval must exist to give the county court jurisdiction there is no doubt. Under a former statute, when the approval of a school trustee whose district was affected by the proposed creation of a graded common school district was necessary, it was held that the failure of the applicants to secure such approval was fatal to the proceedings, and the same has been held with reference to the approval of the county board of education under the present statute. *Kattawa Common School District v. Trustee, etc.*, 99 S. W. 905, 30 Ky. Law Rep. 839; *Mullins v. Andrews*, 45 S. W. 231, 20 Ky. Law Rep. 20; *Conrad v. Poole*, 184 Ky. 348, 211 S. W. 874.

[8-10] In the instant case, the board of education at a meeting held for the purpose adopted a resolution approving the creation of the proposed graded common school and the boundaries of it, which was duly entered upon its records, and was subscribed by its chairman and secretary, but at the same time the approval, which it placed in writing upon the petition, was written upon one of the petitions only, and was signed by each of the members of the board with his name, followed by a statement that he was a member by reason of being the chairman of a designated educational division. It is insisted that, the board of education being a corporation, it could act only as such, and that the approval indorsed upon the petition was not the act of the board, but the separate act of each of its individual members, and that the approval should have been subscribed by the board by its chairman and attested by its secretary. True the board is a corporation, and so declared by statute, as the trustees of a school district are a corporation, and must act as such, or else its acts are ineffectual. The board to act must have present a quorum of its members, and all must have had notice or opportunity to be present. *Shore v. Langston*, 125 Ky. 816, 102 S. W. 236, 31 Ky. Law Rep. 388; *Scott v. Pendley*, 114 Ky. 606, 71 S. W. 647, 24 Ky. Law Rep. 1431; *Shepherd v. Gambill*, 75 S. W. 223, 25 Ky. Law Rep. 333; *Creech v. Trustees*, 102 S. W. 804, 31 Ky. Law Rep. 379. A distinction must, however, be drawn between the manner required of the board when transacting its business touching contracts and performing its fiscal duties and such an act as approving the creation of a graded common school district. In the latter instance it is only its intellectual ap-

proval that is required in order that it may maintain a proper control over the schools and educational interests of the county. In such case a substantial compliance with the statute satisfies it. In *De Haven v. Hardinsburg, etc.*, 164 Ky. 515, 175 S. W. 994, which involved the sufficiency of an indorsement of approval by a school trustee of the petition for the creation of a graded common school district, this court said:

"We are not disposed to hold that the same formalities should attend the approval of such a petition as are held to be necessary in the execution of ordinary legal documents."

The members of the board of education in the instant case, acting as the board, at a meeting held for the purpose, indorsed its approval in writing upon one of the petitions, therein referring to the other as copies of it, and extending its approval to all, and then each member of the board signed the writing. The superintendent of schools also indorsed his approval at the same time, and thus the written approval was subscribed by not only the chairman and secretary, but each member, of the board, though the signatures of the chairman and secretary did not purport to be subscribed as such, but as members of the board, which they were. This was a compliance with the statute, for all the purposes for which the approval of the board of education is required. The judgment is therefore affirmed.

JOHNSON v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 4, 1920.)

1. Criminal law §938(1)—New trial will be granted for material new evidence probably affecting result.

While courts are somewhat reluctant to grant a new trial for newly discovered evidence, they will grant a new trial for such evidence if its materiality and probable effect are such that a manifest injustice would be committed to disallow the new trial.

2. Criminal law §938(1)—Cumulative evidence which probably would change verdict requires new trial.

While a new trial will not be granted as a general rule to accused for newly discovered evidence which is cumulative only, it will be granted where the evidence, though somewhat cumulative, is of so controlling a character that it would possibly change the verdict.

3. Homicide §319—Newly discovered evidence which would reduce degree of homicide requires new trial.

Where the newly discovered evidence, though insufficient to establish a possibility that accused would be acquitted on a new trial, is sufficient to make it probable that a verdict for

a lesser degree of homicide than murder in the first degree would be rendered, it is sufficient to require a new trial after verdict of first degree murder fixing the penalty at death.

4. Homicide \S 319—Newly discovered evidence cumulative to defendant's testimony held sufficient to require new trial.

Where defendant was convicted of first degree murder and sentenced to death, newly discovered evidence by two witnesses that they heard the conversation to which defendant testified and in which deceased made scurrilous remarks about defendant's sister would be sufficient, if true, to reduce the offense to manslaughter and requires the granting of a new trial.

5. Criminal law \S 944—Credibility of witnesses not determined on motion for new trial for new evidence.

On a motion for a new trial of a criminal prosecution for newly discovered evidence, where the affidavits of both sides as to the character of the new witnesses was about equal in volume and weight, the credibility of their testimony will not be determined in deciding the motion, but will be left for the jury at the new trial.

6. Criminal law \S 722 $\frac{1}{2}$ —Prosecuting attorney cannot charge accused with degrading offense not supported by record.

It is misconduct for the prosecuting attorney in his argument to charge the accused with an independent degrading offense which is not supported by the testimony.

7. Criminal law \S 304(4), 722 $\frac{1}{2}$ —Court judicially knows that "bootlegger" is unlawful liquor seller, and prosecutor should not refer to defendant in such terms in absence of evidence.

The Court of Appeals may take judicial notice that the term "bootlegger" refers to one engaged in the unlawful sale of intoxicating liquor, and that in some communities would cause the jury to regard the person so engaged with contempt and prejudice, so that it was prejudicial error for prosecuting attorney to state without evidence that defendant accused of murder was a bootlegger.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Bootlegger.]

Appeal from Circuit Court, Bourbon County.

Oscar N. Johnson was convicted of murder in the first degree and his punishment fixed at death, and he appeals. Reversed, with directions to grant a new trial.

Edwin P. Morrow, of Somerset, and O. T. Hinton, of Paris, for appellant.

Charles I. Dawson, Atty. Gen., and T. B. McGregor, Asst. Atty. Gen., for the Commonwealth.

THOMAS, J. The grand jury of Bourbon county returned an indictment against the appellant, Oscar N. Johnson, charging him

with murdering Walter Rice, which occurred at about 7 p. m. on January 29, 1918, in the restaurant of A'Hern & Burton, located at the corner of Tenth and Pleasant streets in the city of Paris, Ky. Appellant entered a plea of not guilty, but upon his trial the jury convicted him and fixed his punishment at death. His motion for a new trial having been overruled, he prosecutes this appeal, relying upon three grounds for a reversal: (1) Error of the court in failing to grant him a new trial because of newly discovered material evidence which he did not and could not discover before the trial by the use of ordinary diligence; (2) misconduct of the commonwealth's attorney in his closing argument to the jury; and (3) actual bias of two of the jurors who sat in the case, as shown by the affidavits of witnesses discovered after the trial that the two jurors had formed and expressed an opinion adverse to the appellant before being accepted on the jury.

A disposition of ground 1 requires a brief statement of the substantial facts as shown by the record. Appellant was about 30 years of age and unmarried, while the deceased was 36 years of age, married, and resided at Livingston, Ky. They were both employed by the railroad company, appellant as a brakeman, and the deceased as a fireman. They were and had been acquainted with each other for some 4 or 5 years. They frequently met, and there is nothing in the testimony showing that there was any ill feeling between them, or that they sustained to each other anything less than the most cordial relations.

There appears to be some kind of division railroad office located at Paris, where the appellant resided, and the deceased was on the fatal day consulting with some of the railroad officers relative to being promoted from the position of fireman to that of engineer, and was in Paris on that day for that purpose. The appellant was not at work, because he was to be examined on that day for acceptance or rejection as a member of the army under the draft law.

About 8 o'clock in the morning, appellant being as he says more or less disturbed over the prospects of being taken into the army, took one drink of whisky given him in a barber shop, and later in the day he bought some from a bootlegger and took several drinks of that. About 4 o'clock in the afternoon he and the deceased met at the restaurant where the homicide occurred, and according to the testimony of some five or six witnesses introduced by the commonwealth they were talking pleasantly together, and in the language of the witnesses were "going in and out frequently," when about 7 o'clock, while the deceased was talking to a drummer and was eating some pea-

nuts, the appellant came into the restaurant and shot him twice, without any words passing between them. Immediately Mr. Burton, one of the proprietors of the restaurant, and as soon as he could, grabbed the appellant, who still had his pistol in his hand, and the latter said, "This man has said enough for me to kill him." Burton asked for a surrender of the pistol, but appellant said to him, "No, I am not going to shoot any more." He then left the restaurant and went to the barber shop, about one square distant, and inquired if his nephew, a young Mr. York, was there, or had been there. He then came back to the restaurant with his pistol in his hand and requested that the police be telephoned for because he wanted to surrender. He was taken to the jail, where he has remained since.

In explanation of this apparent premeditated murder, the appellant testified: That he had known the deceased as above stated. That he was the youngest of a family of 13 children, the most of whom were girls, and that he was very much attached to his brothers and sisters, particularly to the latter. That about four years prior to the homicide the deceased had worked as an engineer at the plant of the Bond Lumber Company at Bonds, Ky., in the neighborhood of which the appellant, his brothers and sisters, were born and reared. One of his sisters married a man by the name of Dave York, and he says that some three or four years prior to the homicide the deceased got into a conversation with him in which the former asked him if he knew Mrs. Dave York, and the deceased stated that she was running a disorderly house at Bonds, and in substance that she was unchaste and without virtue, using in the conversation, as testified to by appellant, language which we will not copy in this opinion. The appellant says that he did not then state to the deceased that Mrs. York was his sister, because he was somewhat wrought up and he thought it would be necessarily embarrassing, but he denied the charge and asserted that Mrs. York was a virtuous woman and he could prove it. He afterward got affidavits denying the charges made by deceased, including one from the man with whom he particularly charged Mrs. York with being familiar, and brought that information to the knowledge of the deceased, who, according to the appellant, accepted it as true, and there was never afterward anything said between the parties concerning the matter until a few minutes or seconds preceding the shooting. He said that he entertained no malice nor any unkind feeling toward the deceased until the conversation immediately preceding the killing, which conversation was to this effect: That he walked out of the restaurant intending to telephone his boarding house that he perhaps would not be there for supper, and that de-

ceased followed him out on the pavement and asked him what he (appellant) thought of his (deceased's) chances to be promoted from fireman to engineer, in answer to which appellant said in substance, "I don't see why you wouldn't stand a good chance for promotion, since you have been a good fireman, and had experience as an engineer down at Bonds," and that upon the mention of the name "Bonds" the conversation turned to the subject as to when either of them had been up there, deceased saying that he had not been there for some time, but was intending to go soon; that there was a woman up there, Mrs. Dave York, that he wanted to see, and used language describing the cheapness of her virtue, saying that he had the price, etc., and used with reference to her such scurrilous and slanderous language that we will not here incorporate it, whereupon the defendant replied, "You are a damn liar, you are drunk," when the deceased said, "Go home," and turned and went into the restaurant. Appellant said that he became so enraged that he did not remember what happened after that until he fired the second shot, but he went almost immediately thereafter into the restaurant and committed the homicide. His explanation of his conduct is that he was so shocked and enraged at the accusation against his sister by the deceased after what had occurred some years before that he lost consciousness, and his attorneys insist that this, coupled with his partially intoxicated condition, produced emotional insanity sufficient to excuse him from the guilty consequences of his deed.

While some few witnesses, who are shown not to be on the best terms with appellant, testified to his bad character for peace and order, the greater weight of the testimony is that he was both peaceable and orderly in his association with his fellows; that he was industrious and energetic; that he possessed an excitable nature, was very much attached to his sisters, and would naturally become angry when their reputations were assailed.

In support of his motion for a new trial upon the ground of newly discovered evidence, appellant filed the affidavits of Thomas Gregory and J. B. Barrett, both of whom were unacquainted with either the appellant or deceased, and in which affidavits they state in substance that they were both in the city of Paris on the day in question, and that they were on their way to the depot, when, between 6 and 7 o'clock, they passed the restaurant in question and saw two men standing in front of it near a telephone pole, and that in passing they heard the substance of the conversation testified to by appellant as having occurred between him and the deceased just in front of the restaurant, with reference to Mrs. York. The two affiants, after getting to the depot, and before the arrival of the train upon which they expected to depart, heard of a shooting down in

town; but they did not connect it with the conversation they had heard, and went away. With these affidavits there was also filed that of the appellant, as well as one by his attorney in which it appears that appellant had stated to his attorney that persons passed on the pavement at the time of that conversation, but that appellant did not know any of them, and the attorney had made a number of visits to surrounding towns and had exercised extraordinary diligence to discover some one who might have passed and heard the whole or a part of that conversation, but without avail.

After appellant was convicted, he addressed a pamphlet to the public in which he depicted his unfortunate situation and appealed for sympathy, as well as financial aid in prosecuting his defense, and one of these pamphlets seems to have come to the notice of Thomas Gregory, and from the statements made in it Gregory said that he became convinced that the conversation which he and Barrett heard in front of the restaurant was the one mentioned by appellant, and he afterwards divulged it, and in that manner his and Barrett's testimony was discovered, and all of which occurred after the trial. So that there neither can be nor is there any complaint concerning the question of diligence in the discovery of that testimony. The only questions are: Is it relevant and material, and, if so, is it to be rejected because it might be considered cumulative?

[1, 2] As a general proposition, courts are somewhat reluctant to grant a new trial upon this ground, because it is one which opens a ready door, not only for the commission of perjury, but for the perpetration of fraud by the party relying upon it. Notwithstanding, however, such reluctance, the courts will unhesitatingly grant a new trial for newly discovered evidence, when on account of its materiality and probable effect a manifest injustice would be committed to disallow it, and it may also here be stated that while this court, as well as others, announce and apply the general rule that a new trial will not be granted for newly discovered evidence which is cumulative only, still that rule is not of universal application, and where the newly discovered evidence, although to some extent cumulative in its nature, is of so controlling a character as that it would possibly change the verdict, it would be prejudicial error to refuse a new trial based on this ground. For authorities sustaining these general propositions, we refer to 16 Corpus Juris, 1191-1201; 20 R. C. L. 289, 296, 297; *Gravitt v. Commonwealth*, 184 Ky. 429, 212 S. W. 430; *Crouch v. Commonwealth*, 172 Ky. 463, 189 S. W. 698; *C. N. O. & T. P. Ry. Co. v. Cecil*, 164 Ky. 377, 175 S. W. 654; and other Kentucky cases cited in the notes of the publications referred to.

The defendant in the Crouch Case was

convicted for killing a man by the name of Wills. The shooting occurred near the depot, and when it was practically dark. The son of deceased had been arrested by officers for some misdemeanor, and the father was making demonstrations to take him away from the officers, when the defendant Crouch, according to his testimony, asked the deceased to stay back and not interfere with the officers who arrested the boy, when the deceased cursed and drew a pistol and was about to fire when defendant shot him. After the trial he discovered a witness by the name of Ferguson, who it seems was a prospective passenger waiting for the train and was standing close enough to see what occurred, and his affidavit corroborated the testimony of the defendant Crouch. A new trial was sought, and among the grounds relied on was the newly discovered testimony of Ferguson. There was no question of want of diligence in that case, as there is none in this case; but the judgment of conviction was reversed solely upon the ground of newly discovered testimony, although it was in its nature cumulative to that given by the defendant. The court in commenting upon the newly discovered testimony, its nature, materiality, and probable effect, said:

"The testimony, which Ferguson proposes to give, bears upon the decisive facts of the homicide and from them the guilt or innocence of appellant can be most certainly determined. It is not cumulative or for the purpose of impeaching any witness, who testified upon the trial. The witnesses who testified upon the trial, with the exception of Freeman Wills, deposed that they either did not or could not, at the time the mortal wounds were given, see the appellant and the deceased, and it is reasonable to conclude that other persons, if any there were, who may have been about the depot, did not and could not see what transpired. The testimony of Ferguson will strongly corroborate that of appellant."

In the Cecil Case, this court, quoting from the case of *Torain v. Terrell*, 122 Ky. 745, 93 S. W. 10, said:

"The rule that newly discovered evidence which is merely cumulative is not ground for a new trial allows of some exceptions. For instance, the rule does not apply if the newly discovered evidence, though cumulative, is sufficient to render clear that which was before a doubtful case, or if it is of a conclusive or decisive character, or of so controlling a character it would probably change the verdict. * * * Applications for new trials are addressed to the sound discretion of the court, to be exercised according to the rules and usages of law, and the court should regard the substantial justice of the case, equally remote from favoring negligence or exacting unreasonable diligence."

To the same effect are the cases of *I. C. R. R. Co. v. Wilson*, 103 S. W. 364, 31 Ky. Law Rep. 789; *Adams Oil Co. v. Stout*, 41 S. W. 563, 19 Ky. Law Rep. 758; *Johnson v. Stiv-*

ers, 95 Ky. 128, 23 S. W. 957, 15 Ky. Law Rep. 477; *Berberich v. Louisville Bridge Co.*, 46 S. W. 691, 20 Ky. Law Rep. 487; and *Owsley v. Owsley*, 77 S. W. 397, 25 Ky. Law Rep. 1186.

[3] If the newly discovered testimony is material upon any vital issue in the case, and it is otherwise admissible, the fact that it is not directed to the establishment of the defendant's innocence of all crime will not cure the error in refusing to sustain the motion for a new trial therefor if the newly discovered evidence is directed to an issue which, if established, would reduce the degree of the crime as well as lessen the punishment inflicted. The question of supreme interest to a defendant in a criminal prosecution is, first, to establish his innocence of any crime, but, if he should be unable to do that, he is next interested in reducing his offense to the lowest one for which he could be convicted under the indictment, and in capital cases the one is about of as much importance to him as the other. Thus, in 16 *Corpus Juris*, 1208, the text says:

"Where newly discovered evidence will probably change the result to a verdict more favorable to defendant, a new trial should be granted." *Crouch v. Commonwealth*, supra, and *Brooks v. Commonwealth*, 144 Ky. 107, 137 S. W. 867.

In the same volume of *Corpus Juris*, on page 1209, in speaking of the rule with reference to capital cases, it is said:

"In a capital case even a grave doubt created by the newly discovered evidence may, in the interest of justice, require a new trial. Where the new evidence is not alone sufficient to require a new trial, nevertheless it may be considered in connection with other errors and irregularities on the trial as bearing on a defendant's right to a new trial."

[4] Whether the effect of the conversation immediately preceding the killing testified to by appellant alone, but which he seeks to corroborate by the discovered witnesses, would be sufficient to authorize a verdict of acquittal, is a question with which we are not concerned; it being exclusively for the determination of the jury. But can we say that the establishment of that conversation would not affect the verdict in either reducing the severity of the punishment or the degree of guilt? Manifestly not. To do so would plainly ignore our knowledge of human nature obtained from observation and experience. That knowledge teaches us that the conversation with reference to appellant's sister, if it occurred in the manner and at the time testified to by him, would have a tendency at least to provoke and anger the deceased to such an extent as to authorize the jury to find that he did not commit the deed with which he is charged with that degree of maliciousness and premeditation essential to the crime of murder, but that, on the contrary, he

acted under sudden heat and passion, which, if true, would reduce his offense to that of voluntary manslaughter. Out of the frailties of our nature grows the distinction between the two grades of homicide, which distinction, from the dictates of reason and justice, has long been recognized and established as a part of the criminal law. Without further discussion, we conclude that a new trial should have been granted on this ground.

[5] Much evidence in the way of affidavits was introduced by both sides touching the character of the affiants Gregory and Barrett, and we might say that it was about equal in volume and weight; but whether their testimony is or not credible will be a question for the jury upon another trial, and not one for us to determine at this time.

[6] To sustain ground 2 urged for a reversal, the bill of evidence shows a number of remarks made by the commonwealth's attorney in his closing argument to the jury, of which complaint is made; but the only one we deem necessary to notice is that one charging defendant with being a "bootlegger." He also charged appellant with being a "pistol toter," and there was some evidence introduced to establish his reputation for that offense. This, however, was given by witnesses who were not on friendly terms with him. He admitted having the pistol on the occasion complained of, but explains that in finishing his run, which was Paris, on the evening before, he left his pistol in his overcoat pocket, and which he carried for the purpose of protecting himself in going from the railroad yards to his boarding house against waylayers and robbers with which the community was infested at that time. It is doubtful whether it is competent to prove one's reputation for a specific offense; but, waiving that, we are convinced that there was absolutely no testimony in the record, direct or circumstantial, supporting the charge made by the commonwealth's attorney that appellant was a bootlegger. This court has time and again prescribed the limits within which counsel in their argument to the jury should be confined, and the general rule gathered from all the cases is that the proper bounds are overstepped when counsel goes outside of the record for the purpose of abusing and vilifying the opposing client and transgresses his rights and duties when he accuses such client of being guilty of a degrading offense to support which there is no testimony of any character in the record. Some of the cases from this court dealing with this question are *Gilbert v. Commonwealth*, 106 Ky. 919, 51 S. W. 804, 21 Ky. Law Rep. 544; *Wilson v. Commonwealth*, 54 S. W. 946, 21 Ky. Law Rep. 1333; *Allen v. Commonwealth*, 145 Ky. 409, 140 S. W. 527; *Slaughter v. Commonwealth*, 149 Ky. 5, 147 S. W. 751; *Turpin v. Commonwealth*, 140 Ky. 294, 130 S. W. 1086, 30 L. R. A. (N. S.) 794, 140 Am.

St. Rep. 378; Howerton v. Commonwealth, 129 Ky. 482, 112 S. W. 606, 33 Ky. Law Rep. 1008; Rhodes v. Commonwealth, 107 Ky. 534, 54 S. W. 170, 21 Ky. Law Rep. 1070, 92 Am. St. Rep. 360; Stroud v. Commonwealth, 160 Ky. 503, 169 S. W. 1021; and Stearns Coal & Lbr. Co. v. Williams, 177 Ky. 698, 198 S. W. 54.

[7] The general tenor of all the cases cited, and others which might be, is that an attorney in his argument has no right to go outside of the record for the purpose of influencing the passions or prejudices of the jury, nor has he the right to assert as a material fact that which the testimony does not support, or which asserted fact is not to be deduced from other facts or circumstances proven, especially so if the statement consists in the unsupported charge that the one referred to is guilty of an independent offense calculated to render him obnoxious to the jury. It is a fact of which we may take judicial notice that the term "bootlegger" refers to one who engages in the unlawful sale of intoxicating liquors. We likewise know that in some communities, and with some people, scarcely any more opprobrious epithet could be applied to one than to call him a "bootlegger." In such communities and before such people it is not difficult to see that the accusation would be calculated to cause the jury to regard the defendant with contempt and prejudice and to cause them to render a verdict against him which they might not otherwise do. At any rate, it is impossible for us to say that such a charge would not so affect the verdict of the jury. It is sufficient for the purpose that the charge might produce upon the minds of the jury such adverse effect, and the objection to the statement should have been sustained and the jury admonished to not regard it. The court should have at least done this much, there having been no motion to discharge the jury and continue the case.

What has been said renders it unnecessary to discuss or determine the questions relied on by ground 3.

For the reasons stated, the judgment is reversed, with directions to grant the defendant a new trial, and for proceedings consistent with this opinion.

CASEY v. HART WALLACE & CO.

(Court of Appeals of Kentucky. June 8, 1920.)

1. Brokers \Leftrightarrow 60—Entitled to commission on obtaining binding contract which party refused to carry out.

Where customer was presented by brokers, and was accepted by landowner, and parties executed a valid and enforceable contract, bro-

kers were entitled to their commission, even though the parties, through the fault of one or the other, afterwards refused to carry out the contract.

2. Appeal and error \Leftrightarrow 1033(6)—Refusal to instruct harmless, where given instruction was more favorable.

Where the given instruction is more favorable to the defendant than the one requested, appellant cannot complain that the request was refused.

3. New trial \Leftrightarrow 42(4)—Remote relationship of party to juror not ground.

Court did not err in denying a new trial on the ground that one juror was a second cousin to the wife of one of the prevailing parties and to the mother of another prevailing party, where it was shown that there was an estrangement between the families, and that one of the prevailing parties had never been in the juror's home, and the other had been there only once in 20 years.

Appeal from Circuit Court, Shelby County.

Action by Hart Wallace & Co. against F. M. Casey. Judgment for plaintiffs, and defendant appeals. Affirmed.

E. B. Beard and George L. Pickett, of Shelbyville, for appellant.

Beckham & Gilbert, of Shelbyville, for appellees.

CLAY, C. F. M. Casey owned a farm in Shelby county, which he placed in the hands of Hart Wallace & Co. for sale at the price of \$165 an acre. The agents showed the farm to R. S. and J. A. Scobee, who thereupon entered into a written contract with Casey and wife for the purchase of the farm. The agents claimed that the agreed commission was 5 per cent. on the first \$10,000 and 3 per cent. on the balance of the purchase price. When the trade was consummated, Casey gave the agents a check for \$500, saying that he would see about the balance of the commission. The check was lost, but the agents say that it showed that the agreed commission was as claimed by the agents, and that the \$500 was a payment on account. Casey says that the \$500 payment was made on condition that it would be returned if the Scobees did not take the farm. After the contract was executed, some question arose as to one of the lines of the survey, and after some discussion of the matter the trade was rescinded. Hart Wallace & Co. brought this suit to recover \$239, the balance of the commission. Casey not only resisted the claim of plaintiffs, but counterclaimed for the \$500 which he paid to them. A trial before a jury resulted in a verdict and judgment for plaintiffs. Casey appeals.

[1] The point is made that defendant's motion for a peremptory instruction should have been sustained, because the sale was never

consummated. In support of this position it is argued that plaintiffs were not entitled to a commission until they produced a customer ready, able, and willing to take and pay for the property, which they failed to do. This contention overlooks the rule that a real estate broker may earn his commission, either by producing a person who is not only then, but at all times, ready, able, and willing to purchase the property on the prescribed terms, or by obtaining from the customer a binding contract which the landowner himself may enforce, in case of a breach or default in its terms. 4 R. C. L. p. 307; *Randle v. Bloomfield*, 146 Ky. 421, 142 S. W. 677; *Coleman's Ex'r v. Meade*, 13 Bush, 358; *Watters v. Dancey*, 23 S. D. 481, 122 N. W. 430, 139 Am. St. Rep. 1071. Here the customers presented by plaintiffs were accepted by defendant, and the parties executed a valid and enforceable contract. That being true, plaintiffs were entitled to their commission, even though the parties, through the fault of one or the other, afterwards refused to carry out the trade. 4 R. C. L. p. 310; *Moore v. Irwin*, 89 Ark. 289, 116 S. W. 662, 20 L. R. A. (N. S.) 1168, 131 Am. St. Rep. 97; *Richardson v. Olanthe Milling Elevator Co.*, 167 Ala. 411, 52 South. 659, 140 Am. St. Rep. 45. It follows that the court did not err in refusing the peremptory asked for by defendant.

It being immaterial whether the failure to consummate the trade was due to the fault of defendant, or to the Scobeys, the court did not err in refusing to permit defendant to tell what took place between him and the Scobeys with reference to their refusal to accept the deed.

Only two instructions were given to the jury. In instruction No. 1, the only question submitted was whether the agreed commission was 5 per cent. on the first \$10,000 of the purchase price and 3 per cent. on the balance of the purchase price. The jury were told that, if they so believed from the evidence, they should find for plaintiffs, but, unless they so believed they should find for defendant. The second instruction submitted to the jury the question whether plaintiffs agreed with the defendant, at the time the defendant delivered the check for \$500, that if the purchaser did not take the farm they would return the \$500 to him. Instruction No. 1 is attacked on the ground that it assumed that plaintiffs had earned their commission. For the reasons given above, there was no error in this.

[2] Another contention is that the court erred in refusing to give the following instruction:

"If the jury believe from the evidence that plaintiff agreed to sell the farm of defendant at \$165 per acre, and no specified commission was

agreed on, then they should find for plaintiff such a sum as would reasonably compensate plaintiff for his services."

Since instruction No. 1 authorized a finding for plaintiffs only in the event the jury believed from the evidence that the agreed commission was 5 per cent. on the first \$10,000 of the purchase price and 3 per cent. on the balance, the necessary effect of the instruction was to require a finding for defendant in every other case. That being true, the given instruction not only included the defense presented by the offered instruction, but was much more favorable to the defendant, since, if the commission had not been agreed on, there might have been finding for plaintiffs under the offered instruction, but not under the given instruction.

[3] Another ground urged for reversal is the relationship of one of the jurors to plaintiffs. It appears that the wife of one of the jurors was a second cousin to the wife of one of the plaintiffs and to the mother of another plaintiff. It was shown, however, that there was an estrangement between the families, and that one of the plaintiffs had never been in the juror's home, and the other had been there only once in 20 years. In view of these circumstances, and the remoteness of the relationship, we conclude that the court did not err in refusing defendant a new trial because of such relationship.

Judgment affirmed.

REED et al. v. ROSE, Judge.

(Court of Appeals of Kentucky. June 15, 1920.)

Courts \Leftarrow 74—Circuit court will not divide its time between county seat and third-class city not wholly within the county.

The circuit court of the county of Whitley will not divide its time between the city of Corbin and the county seat, though Corbin is a city of the third class; notwithstanding Ky. St. § 963d, requiring circuit court of counties having a city of third class to divide its time between such city and county seat; such statute being applicable only where the city of the third class is entirely within the borders of the county, and the city of Corbin not being wholly within Whitley county.

Prohibition by M. D. Reed and others against R. S. Rose, Judge, to prohibit defendant from holding any part of the Whitley county circuit court in the city of Corbin. Writ made permanent, and defendant permanently enjoined from holding any terms or parts of terms of the Whitley circuit court in the city of Corbin.

Henry C. Gillis and Tye & Siler, all of Williamsburg, for petitioners.

J. B. Snyder, of Williamsburg, and M. A. Gray, of Corbin, for respondent.

M. A. Gray, of Corbin, and Hazelrigg & Hazelrigg, of Frankfort, for city of Corbin.

CARROLL, C. J. In 1910 the Legislature enacted a law, that may be found in section 963d of the Kentucky Statutes, providing in part "that, any county of this commonwealth having therein, or that may hereafter have therein, a city of the third class, not a county seat, and being more than ten miles from the county seat" the circuit court of such counties should be held alternately, so as to divide the time between the county seat and the third-class city. The Legislature of 1920 (Acts 1920, c. 164) put Corbin in cities of the third class, and therefore, if the city of Corbin was wholly within the county of Whitley, the section of the statute would require that the Whitley circuit court should be held in part in the city of Corbin.

After this act of 1920 became effective, the city of Corbin having complied with all of the other requirements of the act of 1910 necessary to enable it to secure terms of court, petitioned in the proper manner the respondent, Hon. R. S. Rose, judge of the Whitley circuit court, to hold terms of the Whitley circuit court, as required by the statute, in the city of Corbin, and Judge Rose, who was at the time holding a term of court in Williamsburg, the county seat of Whitley county, thereupon entered an order directing that parts of each term of the Whitley circuit court should be held at Corbin.

After this order was made, the plaintiffs, M. D. Reed and S. P. Petrey, respectively jailer and circuit clerk of Whitley county, filed their petition in this court asking that a writ of prohibition issue, prohibiting Judge Rose from holding any part of the Whitley circuit court in Corbin. To this petition Judge Rose filed a response, setting forth in substance that he conceived it to be his duty, under the law, to hold parts of the terms of the Whitley circuit court in the city of Corbin; and the city of Corbin also filed its petition to be made a party, setting up that,

under the law and facts, parts of the term of the Whitley circuit court should be held in the city of Corbin and asking that the petition for a writ of prohibition be dismissed.

When the petition for a writ of prohibition was filed, a temporary restraining order was issued by this court, enjoining Judge Rose from holding any part of the terms of the Whitley circuit court in the city of Corbin until the case could be disposed of on its merits, and this we will now do.

It will be observed that the statute provides that courts shall be held in two places only in counties "having therein, or that may hereafter have therein," a city of the third class. It is therefore a condition precedent that the county in which it is sought to have terms of court held in two places must have therein a city of the third class, and so we will confine this opinion to the single question of whether Whitley county has therein a city of the third class, namely, the city of Corbin.

It is admitted of record that the city of Corbin has a population of 10,000; that the territorial limits of the city are partly in the counties of Whitley, Knox, and Laurel; that approximately one-third of the territory and population of the city is located in the county of Knox; that only a small part of the territory embraced in the city and a few hundred of its population is in the county of Laurel; that about two-thirds of the population and practically all of the business part of the city, including the public buildings, is in the county of Whitley.

On these facts we hold that the county of Whitley has not therein a city of the third class, and therefore Corbin is not entitled to terms of court. It is only when a county has entirely within its borders a city of the third class that such a city will be entitled under the statute to have held there at terms of the circuit court.

Wherefore the writ of prohibition is made permanent, and Judge Rose is permanently enjoined from holding any terms or parts of terms of the Whitley circuit court in the city of Corbin.

SAMPSON and CLARKE, JJ., not sitting.

**WOLF v. TERMINAL R. ASS'N OF
ST. LOUIS.**

(Supreme Court of Missouri, Division No. 1.
April 10, 1920. Motion for Rehearing De-
nied June 2, 1920.)

**1. Master and servant ⇨302(1)—Scope of
employment defined.**

Whether a servant's act causing injury to a stranger was within the scope of his employment is not determined by the time nor his motive, but the question is whether the act was done by virtue of his employment and in furtherance of his master's business.

**2. Master and servant ⇨302(2)—Switchmen
lowering car gate to accommodate third per-
son held not within scope of employment.**

Where one unloading a box car placed a crate upon a gondola car on a parallel track and was injured by the fall of the tailgate of such car, which had been lowered by switchmen to facilitate the unloading of the gondola before they moved it, their act in lowering the gate was not within the scope of their employment; it operating to retard railroad's business rather than to aid it.

Appeal from St. Louis Circuit Court; Benjamin J. Klene, Judge.

Action by Herman Wolf against the Terminal Railroad Association of St. Louis. From an order overruling a motion to set aside an involuntary nonsuit, plaintiff appeals. Affirmed.

Brownrigg, Mason & Altman, of St. Louis, for appellant.

J. L. Howell and W. M. Hezel, both of St. Louis, for respondent.

• BLAIR, P. J. This is an appeal from an order overruling a motion to set aside an involuntary nonsuit taken by appellant in an action he brought for damages he alleges he received when a tailgate, or end gate, in one of respondent's cars fell upon his feet while he was moving a piece of furniture out of the car.

Appellant testified he was a furniture mover in the employ of Lammert Furniture Company, and was sent, with a helper, to remove the furniture from one of respondent's box cars which stood upon a track in its yards. The team track was on the south side of the car. When the south car door was opened it was disclosed that the furniture car had been loaded from the other side and some of the furniture on that side would have to be moved before the crates next the south door could be loosened and taken out. Appellant's helper opened the north door of the car, and he and appellant lifted two crates of furniture out of that door and placed

them on a gondola, or flat car, which stood immediately north of the furniture car on a track parallel to that on which the furniture car stood. This enabled appellant and his helper to "loosen up" other crates in the furniture car so they could load their wagon at the south door. This they did, but left room on the wagon for the two crates they had transferred to the gondola car. They then went to the gondola car and were about to unload from it the two crates they had placed upon it, when one of respondent's switching crews came up, and one of them said, "We are going to cut out those cars." Appellant replied, "All right, we have got two crates in there and we will take them out and put them on the end gate of my wagon;" and then lifted the lighter crate over the side of the car and "slid it down" the side to the ground. One of the switching crew then said, "Wait a minute, I'll show you an easier and faster way than that; you won't have to leave it off that end;" and he then pulled some pins or hooks out of the end of the car and "kicked it over and let this end down, but they didn't come all the way;" and the switchman then stepped upon the end and on into the car and said, "That is as far as it will go; let's go in and throw it over." This car end or tailgate was as wide as the car and as high as its sides (3½ or 4 feet), about 3 inches thick and iron bound. The gate was not down on the car floor, but lacked about 12 or 18 inches of it. Appellant saw it was lying at an angle. He and his helper and one of the switchmen then "tipped" a 200-pound crated table over on this gate. Appellant stood very near to it. When the weight of the table came upon the gate it fell and injured appellant. No one made any investigation to see whether the door would go down nearer the floor. Appellant had never seen one of these tailgates put down before. It was "just a gate on hinges" which "folded" to the inside of the car to which it was attached. Appellant contends the act of the switchman was within the scope of his employment and was negligent. Respondent contends otherwise, and also insists appellant was guilty of negligence as a matter of law.

[1, 2] The fact that the act was done during the time of the servant's employment is not conclusive, nor is the motive of the servant so. The question is, Was the act done by virtue of the employment and in furtherance of the master's business? *Hinkle v. Railroad*, 199 S. W. 227. "Whose business was being done and whose general purposes were being promoted?" *Maniaci v. Express Co.*, 266 Mo. 633, 182 S. W. 981. Was the servant acting in the line of his employment about his master's business and seeking to accomplish his master's purpose? *Whiteaker*

v. Railroad, 252 Mo. 438, 160 S. W. 1009. These and other cases cited by appellant announce the general rule as heretofore expressed in this state, but the facts of the cited cases are not such as to shed much light upon the question whether the rule is applicable to the facts of this case; and that is the only question the briefs present in this connection.

It is not contended the switchmen were charged with any general duty relating to the unloading of cars. Appellant's contention is that the evidence tended to show that they undertook to aid him in order to hasten the accomplishment of their purpose, and duty, to take out a car which stood back of the gondola car upon which he and his helper had placed the two crates of furniture, in the unloading of which the injury was inflicted. Appellant placed the crates upon the gondola car without authority and at his own risk. The switchmen were under no obligation to aid him in their removal and owed him no duty to wait for their removal before moving out the car they sought at the time. They were free to proceed with their switching and allow appellant to wait until they returned the gondola car before removing the crates therefrom. The presence of the crates constituted no obstacle to the switching operations. In this situation they determined to delay the master's business until appellant could accomplish his purpose of removing the crates. They were in fact not performing their work in so doing but were merely accommodating appellant. The effect of this was not the furtherance of the master's business but the temporary suspension of it for the accommodation of appellant. It is true, after the switching crew suspended their operation to await appellant's removal of the crates from the gondola car, that the quicker the crates were removed the quicker the crew could resume the master's business; but the fact that they did temporarily suspend the performance of that business for appellant's benefit makes it clear that the switchmen were not at the time, and in the act done, serving the master, but had stepped aside therefrom, and their acts in aiding appellant were therefore not acts for which the master was responsible. 1 Thompson on Negligence, § 526; 1 Shearman & Redfield on Negligence, § 147. To bind the master it was necessary that the acts "pertain to the duties of the employment." Snyder v. Railroad, 60 Mo. 413; Walker v. Railroad, 121 Mo. 575, 28 S. W. 360, 24 L. R. A. 363, 42 Am. St. Rep. 547. This disposes of the case, and other questions need not be discussed.

The judgment is affirmed.

All concur, except WOODSON, J., absent.

SCOTT et al. v. THOMPSON.
(Nos. 20159, 20160.)

(Supreme Court of Missouri, Division No. 1.
April 10, 1920. Rehearing Denied June 2,
1920.)

1. Partnership ¶92—Partner not entitled to participate in profits of individual transaction.

Where partners constructed a railroad under a contract, plaintiff to oversee the work and defendant to furnish capital, plaintiff had no right to participate in the profits of a transaction, whether he assented to it or not, whereby defendant loaned money to the railroad outside the construction contract, but was entitled to participate in the profits if the transaction was a partnership affair, and he did not waive any right by assenting to the transaction as being one outside the contract, where he was never told the true facts.

2. Partnership ¶336(3)—Transaction not shown to be outside partnership business.

In an action by a partner in a construction firm for an accounting, held under the evidence that a certain amount of money paid for property to be used in the construction of a railroad was not in fact a loan by defendant partner outside of the partnership business, but was a partnership transaction, and profits arising therefrom were profits of the partnership.

3. Partnership ¶336(3)—Transaction held one within partnership business, entitling plaintiff partner to participate in profits.

A furnishing of money for tanks and pumps on a railroad line under construction by a partner in a construction firm, a certain percentage being allowed by the railroad as compensation for the advance, held, under the evidence, a partnership transaction, and the profits belonged to the partnership.

4. Partnership ¶336(3)—Evidence held to show partner did not waive profits arising out of railroad construction contract.

In an action by partners for an accounting, evidence held to sustain a finding that plaintiffs did not waive right to profits arising out of a certain railroad construction job.

5. Partnership ¶308—Interest allowed partner in accounting on items due on termination of different jobs.

In an action for an accounting, where the partnership was not a general partnership, and each contract was a separate undertaking, profits to be divided at the completion of the work on each contract, court did not err in allowing interest on one-half of profits in defendant's hands on the completion of each contract until the date of dissolution of the partnership, in view of defendant's failure to make settlements on the completion of the separate contracts.

6. Partnership ¶308—Interest properly allowed in an accounting.

In an action by a partner for an accounting, where plaintiff was entitled to interest on certain amounts due at various times under separate contracts up to date of dissolution of the partnership, held, in view of the fiduciary rela-

tions between the parties and equitable features arising out of the facts of the case, that court did not err in striking a balance as of date of dissolution, including interest, and then allowing interest on the whole amount until the date of judgment.

7. Partnership ⚡333—Partner donated money by third person entitled to same on accounting.

Where it was defendant partner's duty, as between the partners, to keep the books and do the office work, and contract of the partnership with a railroad for which it was constructing a road did not obligate it to pay any of the bookkeeping or office expenses, and for some reason it saw fit to pay defendant a certain amount to cover the expense incumbent on him alone, the other partners were entitled to no part of such money, in an action for an accounting after dissolution.

8. Partnership ⚡333—Partner on accounting allowed value of services of accountant.

In a partner's action for an accounting after dissolution of a partnership under which it was defendant's duty to keep the books and pay therefor, plaintiff was entitled to an allowance for one-half the reasonable value of the services of an accountant employed by him to bring the books up to date; defendant having failed to do so.

9. Partnership ⚡336(3)—Defendant partner entitled under evidence to interest on vouchers for capital advanced under firm agreement.

In an action by a partner for an accounting, *held*, under the evidence, that defendant was entitled, under the firm agreement to interest on vouchers given to the partnership in consideration of his advancing all the capital.

10. Partnership ⚡308—Partner allowed legal interest on accounting not entitled to interest earned by money.

In an action by a partner for an accounting, where court allowed plaintiff legal interest at 6 per cent. to cover his loss or damage by reason of defendant's wrongful retention of the funds of the partnership, court properly refused to make plaintiff an allowance on account of interest paid by a bank on daily balances on money of the firm in the hands of the defendant.

Appeal from St. Louis Circuit Court; Wm. M. Kinsey, Judge.

Suit by John R. Scott and another against John W. Thompson for an accounting. From a judgment, both parties appeal. Reversed and remanded with directions.

Kinealy & Kinealy, of St. Louis, for plaintiffs.

Marshall & Henderson and Jourdan, Rasleaur & Pierce, all of St. Louis, for defendant.

BLAIR, P. J. This is a suit in equity for an accounting between partners. The cause was referred. The referee recommended judgment for plaintiffs in the sum of \$36,-

823.76, with interest from the dissolution of the partnership, September 23, 1913. Both plaintiffs and defendant excepted to the report. The court disallowed one \$2,500 item included in the account against defendant, and overruled all other exceptions. Plaintiffs and defendant appealed. Separate abstracts and briefs are filed on the appeal and cross-appeal.

The parties were residents of St. Louis. Both long had been engaged in railroad construction, plaintiffs under the name of John Scott & Sons, and defendant under his own name. They were on friendly terms, and previously had worked together. Plaintiffs were more experienced in grading, track construction, etc., and defendant had given more attention to erecting depots, terminals, and the like. Defendant was a man of large means, and plaintiffs, according to defendant, were but very modestly, indeed, supplied with worldly goods. The first contracts for work under the partnership arrangement involved in this suit were made in May, 1910. There were five separate projects undertaken by the parties. The facts relevant to the several questions require separate statement and consideration.

I. Defendant challenges the allowance to plaintiffs of a share of the profits in one transaction involving the use of \$112,429.13 in connection with the construction of the Stephenville North & South Texas Railway Company. He contends the money was loaned by him, and that this loan had nothing to do with the construction contract under which he and plaintiffs, as partners, were building the line of that road.

In April, 1910, defendant learned that certain railroad construction work was in contemplation, advised John R. Scott thereof, and suggested that they undertake the work. In advance of a consultation with the railroad officials, defendant and John R. Scott agreed together to submit a bid on a unit basis, on the theory that the work would be paid for as it progressed, and agreed they would advance equal shares of the relatively small capital which, on such a basis, would be required to carry the work. They were later advised that the railroad was unable to finance the undertaking in this way, and desired the contractors to do so and carry the expense until bonds of the proposed line could be marketed. This required a new arrangement between defendant and Scott. It was agreed between them, so far as concerns four of their joint ventures, that defendant "was to finance the work and attend to all matters relating thereto that could be attended to in St. Louis, including making purchases, hiring the men, furnishing the money, settling with the railroad, etc., and that plaintiffs were to furnish no money or capital, but were to look after and su-

perintend the work." (This quoted statement is taken from defendant's brief.) With this understanding of the matter between themselves, and of the railroad's desire that the contractors were to finance the work, plaintiffs and defendant, under the name of Thompson & Scott, on May 12, 1910, entered into a contract with the Stephenville North & South Texas Railroad Company, as follows:

"St. Louis, May 12, 1910.

"Stephenville North & South Texas Railway. We, the undersigned, hereby propose to do all the clearing, grubbing, earth excavation and embankment, loose and solid rock excavation, necessary in connection with the construction of a line of railroad from Gatesville, Texas, to Hamilton, Texas (and if decided to be built, a line from Hamilton to Comanche), and will frame and place in position all timber trestles, mix and place all concrete work, place all drains (wood, tile, or cast iron pipe as may be necessary), and will furnish all labor and erect all depots, station buildings and outhouses, water tanks and turntables, and will furnish labor and construct all right of way fences; and, if required, will purchase all or any part of right of way lands required for depots, station buildings, outhouses and other necessary facilities, and will do any or all other work and furnish any or all material that may be necessary to complete the proposed line of railroad between the points above mentioned; all of such work to be done in accordance with the specifications heretofore agreed upon, and in compliance with plans furnished by your company, to the full and complete satisfaction and acceptance of your chief engineer; or, in the case of station buildings and work other than that properly classed as engineering, to the satisfaction and acceptance of such representatives as you may designate; such work to be completed within six (6) months from the date hereof, it being understood that your company is to furnish all bridge timbers, lumber, piling and other articles required in connection with the trestles to be constructed, right of way fences, as well as necessary rail, fastenings, switch material and other fixtures required in laying the track between the points hereinabove mentioned.

"We propose to furnish all labor required to complete the work as above outlined, and such material as may not be furnished by your company, at actual cost, to which shall be added fifteen per cent. (15%).

"Your company to furnish us by the fifteenth (15) of each month, estimates to cover the work done during the preceding calendar month.

"We agree to carry estimates, if desired by your company, until final completion of the work as hereinabove set forth, until the completion thereof, said estimates to bear interest at rate of five and one-half per cent ($5\frac{1}{2}\%$) from the fifteenth day of the month following that for which they are made to cover, your company to agree that you will not delay the work of securing right of way, engineering features, or delivery of material to be furnished by you, but will have all such items looked after, right of way secured, grade stakes, etc., furnished and material delivered at such time as will not cause us delay in the completion of the work.

"It is further understood that all payments to be made under this proposal are to be guaranteed by the St. Louis Southwestern Railway Company of Missouri. [Signed] Thompson & Scott, by J. W. Thompson.

"Accepted for Stephenville North & South Tex. Ry. Co. by B. C. Cage, President."

On the same day a contract identical in legal effect was entered into with the Central Arkansas & Eastern Railroad for construction for it. The Stephenville North & South Texas Railway Company (hereafter referred to as the Stephenville Company) was a Texas corporation, and its line was wholly within that state. The Central Arkansas & Eastern Railroad (hereafter referred to as the Central Arkansas) was an Arkansas corporation, and its line was wholly within that state. The guarantor company, the St. Louis & Southwestern Railway Company of Missouri, was a Missouri corporation and owned lines in Missouri and Arkansas. It will hereafter be referred to as the Missouri Company. The St. Louis & Southwestern Railway Company of Texas (hereafter referred to as the Texas Company) was a Texas corporation, and owned lines in that state. On May 12, 1910, F. H. Britton was vice president and general manager of the Missouri Company and president of the Texas Company. These two companies were jointly known as the "Cotton Belt." The Stephenville road was designed to be a sort of subsidiary of the Texas Company, and was subsequently operated under a lease to it. There is evidence the latter road was owned by the Missouri Company. The Central Arkansas was designed to be a subsidiary to the Missouri Company. All these corporations were separate and distinct entities.

Concerning the major part of the work under the Stephenville contract, there is no controversy. Defendant concedes partnership profits aggregating over \$102,000. The principal item in dispute in this connection is the sum of \$16,864.37, which plaintiffs contend are partnership profits arising from the purchase, under the contract, of rail, fastenings, switch material and switch ties, in the sum of \$112,429.13, which were used in the construction of the line under the Stephenville contract. Defendant contends he loaned the \$112,429.13 either to the Missouri Company or the Texas Company for use by it to purchase new steel rail for its own purposes.

On August 18, 1910, defendant wrote John R. Scott (then on the Stephenville line), among other things, that Britton "mentioned that he might want us to buy some rail." About March, 1911, the arrangement was made which is drawn in question by this assignment of error. The documentary evidence will be stated first. On March 15, 1911, the Texas Company made out its bill against Thompson & Scott for rail, rail fastenings,

switch material, and switch ties in the sum of \$112,429.13. This bill is itemized, and shows the various materials, the prices charged, and the total amount. On April 11, 1911, defendant made out his check for \$112,429.13, payable to the Missouri Company. This check was, by the payee, indorsed to the Texas Company, and deposited to the latter's account. The testimony of the vice president of the Missouri Company is that this check should have been made payable to the Texas Company in the first place, but was, by mistake, drawn payable to the Missouri Company. Its proceeds went into the general account of the Texas Company. On the books of the Texas Company the bill against Thompson & Scott is shown to be paid by this check. April 20, 1911, the Stephenville Company made out its voucher in favor of Thompson & Scott for \$129,293.50. This voucher covers the identical items set out in the bill made against Thompson & Scott by the Texas Company under date of March 15, 1911, at the same prices. The aggregate amount in the voucher is that of the bill (identical with that of defendant's check) plus 15 per cent., the per cent. of profit provided for in the contract between Thompson & Scott and the Stephenville Company. This voucher also bore interest at the rate of $5\frac{1}{2}$ per cent. until paid. This, also, was the contract rate upon deferred payments on vouchers. Upon defendant's personal books this matter appeared as follows:

to date of payment. So far as the documentary evidence is concerned, this transaction was clearly a partnership matter. Defendant's contention is that all this was a subterfuge; that the fact was that he loaned the Missouri Company \$112,429.13, which that company used to buy new rail, and that this was all there was to it. This matter was first broached to defendant. Thereafter he told Scott he was going to advance to the Texas Company money to buy new rail, and that the advance had nothing to do with work under the contracts of Thompson & Scott; that it was "outside the contract." Scott made no objection; if it was "outside the contract" it was no concern of his. Again defendant testifies in so many words that the \$112,429.13 was loaned to the Texas Company. His position is that the various bills, vouchers and bookkeeping entries are mere matters of bookkeeping, and that the real transaction is as he states it. To support this position he called C. W. Nelson, vice president of the St. Louis & Southwestern Railway. Nelson testified that the Missouri Company was purchasing a large quantity of new rail, part of which was to be used upon the lines of the Texas Company. This latter company was short of funds to repay the Missouri Company for the rail it got or was to get from it. The Missouri Company also would need the value of the rail sold to the Texas Company in order to meet the bill of the Illinois Steel Company, from

April 11, 1911.			
6-164	Bank of Commerce.....	62	\$112,429.13
	To bills payable.....	93	\$112,429.13
	Demand note (account of Cotton Belt rail) dated April 11th, at 5%, \$112,429.13.		
April 11, 1911.			
6-164	Stephenville N. & S. T. R. Co.....	75	\$129,293.50
	To St. L. & S. W. Ry. Co.....	405	\$129,293.50
	To S. H. 56 lb. rail and fastenings, switch material and switch ties furnished for use in connection with Hamilton and Comanche extension, per bill of St. L. & S. W. Ry. Co.		
	Attached	\$112,429.13	
	Add 15%	16,864.37	
		\$129,293.50	
April 11, 1911.			
6-171	St. L. & S. W. Ry. Co.....	405	\$112,429.13
	To Bank of Commerce.....	62	\$112,429.13
	Check No. 15147 account rail (This entry is included with other entries representing checks issued for the month of April, 1911.)		
3-262	St. L. & S. W. Ry. Co.....	534	16,864.37
	To Stephenville N. & S. T. R. Co. % account.....	663	16,864.37
	To balance.		

The rail, fastenings, etc., covered by the bill and voucher were listed at the usual prices and actually were used by Thompson & Scott in the construction of the Stephenville road, and the amount of the voucher (\$129,293.50) issued to Thompson & Scott therefor by the Stephenville Company was, on March 1, 1912, duly paid by that company, together with several hundred thousand dollars for work, concededly that of the partnership. This payment also included interest at $5\frac{1}{2}$ per cent. from date of voucher

which company it was making the purchase. The Missouri Company had guaranteed the Stephenville Company's contract with Thompson & Scott. Old rail from the Texas Company's line was to be used to lay the Stephenville Company's track. Nelson said: Defendant's \$112,429.13 check was given by defendant "in payment for old rail that went into the Stephenville road." That the Missouri Company "purchased a considerable quantity of new steel. A portion of that went to the Texas Company to permit of

taking up the light rail to be used on the Stephenville road. There was a transaction with Mr. Thompson in which this check was involved to this effect. Our company was short of funds to pay for this first original purchase on new rail; and in order to tide them over a shortage of funds, as they were in some financial difficulty, they arranged to— with Mr. Thompson, to pay cash for so much of the old rail as went into the Stephenville road, and Thompson carried the account for some months. The payment was made to the Texas Company” it “in turn paid the” Missouri Company this amount of money. The Missouri Company “of course paid it to the men who rolled the rail, the people from whom the rails were purchased.” The witness explained that the check was made payable to the Missouri Company, indorsed to the Texas Company and deposited to its account, and the money then turned back to the Missouri Company in payment for new rail furnished by the Missouri Company to the Texas Company, and this money and other funds used by the Missouri Company to pay for new rail, part of which it laid on its own lines. He said: That he and Britton when they first called Thompson in about the matter asked him if he “could provide the funds to pay for the rail that would go to the Stephenville road. That the Missouri Company needed the cash at that particular instant. That the whole situation was frankly discussed. Defendant said he would get the money. The old rail came from the lines of the Texas Company. That the Missouri Company “did not get the money from Thompson. The Texas Company got the money from Thompson, and the Missouri Company got the money from the Texas Company.” That the contracts were let to Thompson & Scott because Thompson was financially able to carry the contracts. That the Missouri Company was not in financial condition to carry more than a part of the cost. In another part of his testimony he explains the matter again: That he and Britton told Thompson that “we were short of funds” and asked him to “advance the amount involved in the old rail that was going to the Stephenville road,” i. e., “buy from the Texas Company the old rail that was being put into the construction of the Stephenville road.” The Stephenville road would reimburse him eventually. “Q. So that the transaction took the form of his buying the old rail from the Texas Company and using it in the construction of the Stephenville road, and the Stephenville road paying it back to Mr. Thompson. A. That’s what happened.” Witness said defendant’s check “never did go through the accounts of the Missouri Company,” but that the Texas Company “undoubtedly turned that money over with other funds it had” to the Missouri Company, the parent company, and, as far as he knew, it was used by

that company to pay for the new rail. On cross-examination he testified that defendant’s check was made payable to the Missouri Company by mistake; that “it was a mistake any one would make. Thompson undoubtedly would make a check reading that way because of the conversations and because of what had been said about new rails.” He testified that—

“Thompson paid that money to the Texas Company on a bill that listed a lot of old rail, old material, that would go to the Stephenville road. Now Thompson got his money back eventually through construction accounts of the Stephenville road, and in the meantime—the time of this transaction and the time the Stephenville Company paid out, Thompson, the contractor, Thompson & Scott, or the contract, carried the account, \$112,000. Q. As they were required to do under the contract? A. As was contemplated at the time this arrangement was made. Q. You don’t mean to say that any road borrowed any money, do you, on this transaction? A. Well, it was in the nature of forcing a loan; it is, in fact, forcing a loan from the contractor. Q. Now, then, if it was a loan, what rate of interest did you agree to pay on it? A. I don’t remember the rate; the contract states what the rate is. Q. What contract? A. With Thompson & Scott. Q. No; but you are talking now about borrowing money; that this wasn’t under the contract, but it was in reality a borrowing of money from Thompson? A. No, no; I used the words ‘forcing a loan.’ Q. Well, was it a borrowing of money from Thompson? A. It, in effect, amounts to forcing Thompson to loan the Texas Company. Q. You mean forcing him to provide that certain amount of money to the Texas Company, the value of the old rails? A. The value of materials. Q. In other words, you mean forcing him to buy material for the Texas Company? A. In a sense that’s it. Q. Not in a sense, but actually? A. He actually got the money. Q. He bought the material and paid you for that and got the material, didn’t he? A. Undoubtedly. Q. Well, it was no question of a loan, was it? A. Not directly. * * * Q. Now, you didn’t make any arrangement about borrowing money from him, did you? A. No; the arrangement was as I have stated; that Thompson would advance, which amounts to a loan, the amount involved in the old rail that was to go to the Stephenville road.”

He testified he thought, though the old rail was sold to Thompson for cash, it amounted, in the circumstances, to an advance; that it was not a loan “directly,” but amounted to “borrowing that much money”; that the Missouri Company “had no connection with the transaction, and would not pay Thompson & Scott, or the contractors, anything”; that the Texas Company never repaid any part of the money; that so far as it was concerned the transaction was a sale of old material; that “they got rid of the material and delivered it, got it off the premises and out of their hands, and in lieu of it they received an agreed price,” and that defendant’s \$112,429.-

13 was the amount "of that particular bill"; that the Texas Company billed the old material to Thompson & Scott according to its scale of prices; that was a matter for that company; that most of his conversations about the matter were with Thompson, but that he "undoubtedly" understood he was dealing with the contractors, Thompson & Scott. "Q. That was your understanding of the matter? A. Undoubtedly, all the way through, so far as the contract was concerned, it was the contractors; we didn't know anything about the arrangement with Thompson & Scott. Q. You felt that you were dealing with the persons who were bound by you under the contract with you, is that the idea? A. Yes."

On redirect examination the principal new matter testified to was that the purpose was to keep all the material, etc., that went into the Stephenville road "free and clear," and to prevent the obligation of the bonds of the Missouri Company and the Texas Company from applying to such material, and that the company made out the bills against Thompson so as to show that the materials which went into the Stephenville road had been bought and paid for by the contractors, and thereby get those values included in the valuation of the Texas Railroad Commission, which valuation would form the basis of a bond issue. Immediately following this last testimony the referee interposed:

"The Referee: Were you thinking about the question of bonds at all, or did you simply have in mind the Texas Company having some secondhand rail that you wanted to sell Mr. Thompson, or to the contractors, to have put into the railroad they were constructing, and you went ahead and sold them and got the money, because you needed it at the time? A. That was what really happened."

Mr. Britton testified: That in 1911 he was vice president of the Missouri Company and president of the Texas Company; that some time prior to April, 1911, he was about to sail for Europe, and it was necessary to make some financial arrangements for the company before he sailed. That "it was necessary to purchase rail, and Mr. Thompson agreed to furnish the funds necessary for that purpose, in order to release some rail which was to go to the Stephenville road. Q. The money that he agreed to furnish was for the purchase of rail for this St. Louis & Southwestern of Texas? A. Well, the rails he purchased were used on the St. Louis & Southwestern of Texas." That the arrangement was made with Thompson.

On cross-examination he testified that the old rail on the Texas Company's line was taken up and new rail laid, and that this old rail was used by Thompson & Scott in constructing the Stephenville road under their contract; that he supposed "it turned around" that the Stephenville road paid

Thompson & Scott for the old rail; that was a question of bookkeeping; that he did not know "how they charged it out"; that the Stephenville road paid Thompson & Scott for the old rail, and he supposed it "paid the percentage"; he had not seen the books; and when he went to the Railroad Commission of Texas for the purpose of issuing bonds on the Stephenville road, one of the items entering into the value of the road, as represented to the commission, was the amount "paid Thompson & Scott for those rails and the laying of them on the road;" what Thompson & Scott had paid for them. Witness thought the 15 per cent. commission was also included, and added, "It is all a question of bookkeeping; you had better go to the books;" that he had no direct knowledge of this last matter. He also referred plaintiffs' counsel to the books of the Railroad Commission and of the railway, saying:

"Well, that's all old—that was some time ago: I cannot tell just how these items were charged out on the books; the books will show, and our report to the commission will show; you can get it much better than I can give it to you."

For plaintiffs R. D. Cobb, auditor of the Texas Company, testified concerning some records of his office. He also stated that the bill of his company against Thompson & Scott was made out in advance of the shipment of the material it included, and sent to Mr. Britton, at St. Louis, by his request. He identified letters which tended to show the old material was billed to Thompson & Scott before it was taken from the track of the Texas Company. He further testified that the treasurer of the road reported to him on April 13, 1911, that the bill had been paid; that he did not know how it had been paid; in fact, he did not "know how any bill is paid, because the payment is made to our treasurer."

Defendant's bookkeeper testified that he "understood at the time" that the \$112,429.13 check was issued to pay a bill for "second-hand rail" received from the Cotton Belt Railway; that the bill was then attached to defendant's bill against the Stephenville road for a like sum, plus a commission of 15 per cent., that commission amounting to about \$16,000.00.

[1] (a) The fact that defendant told Scott he was going to furnish the railroad money to buy new rails is of no value in solving the question this exception presents. This is true because what defendant told Scott was that he was going to loan the Cotton Belt Railway Company money to buy new rail and tanks, and that it was a matter "outside the contract." This was what Scott was "agreeable to," according to defendant. If, in fact, the transaction was a loan of money to the Missouri or Texas company and "outside the

contract," plaintiffs have no right to participate in the profits of the transaction whether or not they assented to it. If it was not such a loan, but was a partnership transaction, then Scott was never told the true facts, and never waived any right of himself or his brothers. The question must be resolved on the other evidence.

(b) One of defendant's briefs proceeds upon the theory that the Stephenville road furnished the old rail and material used in constructing its line, and that it billed that material to Thompson & Scott, Thompson & Scott billed it to the Stephenville road, and that road issued its voucher to Thompson & Scott to cover the rail and material, and 15 per cent., the contract percentage due the contractor on cost of work and material furnished.

(c) In their contract with the Stephenville Company, Thompson & Scott agreed, among other things, to "do any or all other work and furnish any or all material that may be necessary to complete the proposed line of railroad between the points above mentioned." A subsequent clause in the contract provided that the work was "to be completed in six months from the date hereof, it being understood that your company is to furnish all bridge timbers, lumber, piling and other articles required in connection with trestles to be constructed, right of way fences, as well as necessary rail, fastenings, switch material and other fixtures required in laying the track between the points hereinbefore mentioned." Immediately following this is the clause:

"We [Thompson & Scott] propose to furnish all labor required to complete the work as above outlined and such material as may not be furnished by your company, at actual cost, to which shall be added fifteen per cent."

Then follows the agreement of the contractors to "carry estimates" until the completion of the work. A correct interpretation of these provisions of the contract depends upon the circumstances surrounding the parties. It is undisputed that the Stephenville Company had no funds of any consequence, and would obtain none until the road was completed, valued by the Texas Railroad Commission, and a bond issue authorized by that tribunal. It is also certain that the original idea of contracting with Thompson & Scott on a unit basis was abandoned because the company did not have the funds to carry the contract in that way, and the contract as written was given to Thompson & Scott because of Thompson's ability to finance the work and "carry the estimates" until the completion of the work. In the light of these facts it seems clear that the only reasonable construction of the apparently somewhat conflicting provisions of the contract, set out above, is that the company had the right to furnish such material as it could,

but that Thompson & Scott obligated themselves to furnish all materials the company did not furnish.

(d) As between defendant and plaintiffs, the agreement was that defendant should furnish the money required to carry the contract work in accordance with its terms. The Stephenville Company had neither rail to use on its line nor money with which it could purchase rail. The Texas Company was engaged in relaying portions of its tracks with new rail. After this relaying was done it would have old rail suitable for construction of the Stephenville road. The Texas Company was purchasing new rail from the Missouri Company. The Missouri Company had bought new rail from the Illinois Steel Company. The Missouri Company needed money to pay the Steel Company. The Texas Company needed money to pay the Missouri Company. The Stephenville Company needed the Texas Company's old rail, but had no money with which to buy. The contract of the Stephenville Company with Thompson & Scott obligated Thompson & Scott to furnish such material as was necessary, and which the Stephenville Company did not furnish. In this situation the books of the Texas Company, of defendant Thompson, and the bills, check, and voucher, show that the Texas Company sold the old rail, etc., to Thompson & Scott, the contractors; that defendant Thompson advanced the necessary funds therefor, as his contract with Scott provided; that Thompson & Scott then billed the same rail and material to the Stephenville Company, adding the contract percentage of 15 per cent.; that the Stephenville Company issued to Thompson & Scott its voucher covering the identical material and the percentage thereon, which voucher bore the contract rate of interest until paid; that this rail and material was laid in the track of the Stephenville Company by Thompson & Scott, under their contract; and that the Stephenville Company thereafter paid the amount, together with several hundred thousand dollars more, in one check, dated about March 1, 1912. The whole, about \$935,000, covered the whole amount due in connection with the Stephenville road.

[2] The contention that this \$112,429.13 was in fact a loan to the Texas Company or the Missouri Company has nothing in the documentary evidence or books to support it. It finds but scant support in the oral testimony, when that is studied. Defendant says he made the arrangement for the loan with Nelson. Nelson's testimony is somewhat confused, but he finally says, in answer to the referee's question set out above, that, in substance, what the books and documentary evidence show is "what really happened," i. e., that the Texas Company had some old rail they wanted to sell to the contractors to be put in the Stephenville road, and the Texas

Company "went ahead and sold them and got the money, because" it "needed it at the time." Thompson & Scott were obligated to buy rail. Defendant Thompson was obligated to plaintiffs to put up the money Thompson & Scott needed to buy the rail. Thompson & Scott did buy the rail, lay it in the track of the Stephenville Company, and the Stephenville Company paid the bill and 15 per cent. This percentage is the thing in dispute on this exception. It was a part of the profits of Thompson & Scott. Thompson kept it. The judgment requires him to account for half of it. In that the judgment is right. The fact that the Missouri Company is said to "own" the Texas Company, and that the Texas Company subsequently obtained a lease on the Stephenville road does not materially affect the question, as is apparent. These things seem to have served to confuse one or two of the witnesses and may account for some of the inconsistencies in the oral testimony. The fact that the Texas Company anticipated the taking up of its old rail and sent its bill to Thompson & Scott in advance of the actual removal of that rail from its track does not alter the transaction itself. It indicates that the Texas Company needed money to pay for new rail before it could deliver all the old rail, in the place of which the new rail was to be laid. It does not affect the fact that the old rail was actually sold by the Texas Company, at scale prices to Thompson & Scott and used by Thompson & Scott in carrying out their contract with the Stephenville Company. There was no error in overruling this exception.

[3] II. Exception was taken to the holding that defendant must account for the percentage (15 per cent.) received by him for money furnished to pay for water tanks and pumps on the Stephenville and Central Arkansas roads. The contracts with the Central Arkansas and the Stephenville Company were of the same date, and identical with respect to the obligations of Thompson & Scott. Each required the contractors to "furnish all labor and erect all depots, station buildings, and outhouses, water tanks and turntables," etc. Defendant testified that—

"Our contract called for wooden tanks, and it was expected we would furnish wooden tanks or build wooden tanks, but after we got into it, Mr. Purdon, the chief engineer, decided to put in steel tanks. This was outside our contracts; we took this up with Mr. Scott at the time that we were going to do this; it was perfectly agreeable to do that, and we did it."

It is apparent the contracts did not call for wooden tanks. They called simply for tanks. In this situation the companies doubtless were permitted to determine the kind of tanks they desired. The tanks were ordered and contracted for under the firm name of Thompson & Scott. Thompson conducted the correspondence, and advanced the

money. His agreement with plaintiff required both these things of him. Thompson & Scott billed the tanks and pumping outfits therefor to the Stephenville and Central Arkansas companies, respectively. Some were put in on one line and some on the other. Each company issued its voucher to Thompson & Scott for the cost of the tanks and pumps erected on its line. Each added to the cost the contract percentage, 15 per cent., and included this in its vouchers. These vouchers bore the contract rate of interest. There is no evidence sufficient to justify overturning the ruling of the trial court on these items. The receipt referred to by counsel as showing a settlement covering these and other matters does not warrant that conclusion. Properly understood, and as explained by the evidence, it shows merely a payment on account.

III. The judgment awards plaintiffs one-half the profits on the construction of a freight depot at St. Louis. These profits amounted to something over \$47,000. This allowance is assailed. July 14, 1911, Thompson & Scott, as partners, contracted to construct in St. Louis a freight depot for the St. Louis & Southwestern Railway Company. The work was to be paid for on monthly estimates, as it progressed. These estimates were to be paid "on or before the 15th day of the month succeeding the month in which the work" was done. The contractors were to receive cost and 15 per cent. and 10 per cent., respectively, on disbursements for labor and material. Unlike the four other undertakings of the firm, plaintiffs and defendant agreed to advance equal amounts of the capital necessary to carry the work. Under this agreement plaintiffs, on July 22, 1911, paid defendant \$2,500. It seems a capital of \$5,000 was then deemed adequate. The work progressed without incident until late in September.

Defendant contends that in September, 1911, he called upon Scott for additional capital; that Scott was not ready to furnish it and withdrew his firm, entirely, from further participation in the work under the contract, and it is therefore entitled to no part of the profits thereon. Plaintiffs contend there was no withdrawal, and that they are entitled to participate in all the profits on the depot work. The referee and trial court found the facts for plaintiffs. This question, like those which have preceded it, is one of fact. When Thompson & Scott contracted to build the depot at St. Louis, work on the Stephenville and Central Arkansas lines in Texas and Arkansas was progressing and required attention. Scott was to continue to look after these enterprises, and did. He also gave, for the firm, the only attention which was given by way of actual superintendence to a contract with the International & Great Northern in Texas, carried out in

the spring and summer of 1912, and another with the St. Louis & Southwestern of Missouri, in Arkansas, carried on in the fall of 1912 and spring and summer of 1913. Defendant testifies it was agreed that he (defendant) should "run this job" and "take care of" the depot work himself. He explains that this was agreed because it was "more in his line," and was "right here in St. Louis," and he "had an organization to take care of it." John R. Scott testifies he, also, was to give the depot work his attention when in St. Louis. Soon after the depot contract was signed, defendant and John R. Scott were in Chicago, and Scott looked up one Falkenstein, who was employed and put in charge of wrecking old buildings on the depot site. This work continued until the last of September or the first of October. Meanwhile, some of the construction work was begun. Either in the latter part of September or early in October occurred the conversation which defendant testifies resulted in plaintiffs' withdrawal from the whole work, and which plaintiffs contend, and the referee and trial court found, amounted to no more than a conditional agreement that plaintiffs would waive their claim to profits on the structural steel subcontract. Defendant's answer thus stated his view when it was filed:

"That thereafter, to wit, about January 8, 1912, it became necessary for this defendant and said John R. Scott to put up and advance an additional sum of \$74,000 for the purchase of steel to be used in the erection of said buildings and depots; that upon request by this defendant of said John R. Scott to put up and advance his one-half of said \$74,000 said John R. Scott declared himself unable so to do, and refused to put up his one-half of said \$74,000, and thereupon it was agreed between this defendant and said John R. Scott that said John R. Scott should be released from all further rights, obligations, and duties in any manner arising out of the contract aforesaid, and that he should not have any part of the profits arising therefrom, but that this defendant should proceed and complete the work aforesaid and advance all of the money and do all of the work necessary for the completion of said contract, and this defendant, thereafter, on his own account completed said work at his own cost and expense; that in pursuance of said agreement, releasing said John R. Scott from further liability on account of said contract, it was agreed that the \$2,500 heretofore advanced and put up by said John R. Scott on account of said contract should be returned and refunded to him, and the same was done, and the said \$2,500 was applied by said John R. Scott to another venture of his own, wholly separate and apart from the contract aforesaid; that thereafter said John R. Scott advanced no money and did no work and assumed no responsibility, and was not entitled to any of the profits in any manner arising out of said contract or the execution thereof."

Ed Scott, one of plaintiffs, testified he was in defendant's office prior to the transaction

between defendant and John Scott; that as he was leaving defendant said:

"By the way, I have ordered some steel for the warehouse [depot] and it will have to be paid for. It is going to take— I think he said \$75,000. Now, if you fellows can't put up your part of the money, and I have to put up all the money to pay for this steel I want all the percentage" on the purchase price of the material.

Witness says he told defendant they (plaintiffs) would put up their part of the money. He then wrote his brother John, who thereafter looked after the matter. After Ed Scott wrote his brother John the latter was in St. Louis, and went to see defendant about his proposition concerning the steel.

John R. Scott testified: That he thought the conversation referred to above occurred in September, 1911. Defendant asked that plaintiffs put up \$30,000 to pay one-half the bill for the steel; that he, Scott, was then in Texas. On his return he saw defendant, and suggested that there was much more than \$30,000 due plaintiffs. Defendant said that was true, but it had not been paid in. Witness told defendant he could use some of the vouchers to raise money. Defendant said he had money borrowed on them and "wouldn't give them to" witness. Witness then told defendant that to put in \$30,000 then might cramp plaintiffs, and rather than take that chance he would not put it up, but would waive all profits on the steel contract if the money was needed before they could get it from the railway. That he could put up the money for a few weeks until it would be repaid by the railway, but defendant refused to agree to his taking the money down when the railway paid for the steel in place. That there was no agreement to withdraw nor any that Thompson should finish the work on his own account, and that the proposition he made was to waive the profits on the steel contract upon a condition which was never fulfilled.

Defendant's version is that in September he told John Scott that "the contract [for the steel work] would amount to about \$74,000 or \$75,000; their [the Steel Company's] proposition was to have it in a lump sum, and it was to be paid in a lump sum at that time, and at the time I made the contract;" that "they were about to let the contract" at the time this occurred; that Scott said his firm was losing money on a New York contract and one in St. Louis, and "he couldn't put up his money, and I was to finish the contract; that was all; go ahead with the work, which I did." A little later he was asked by his counsel what was said between them when Scott said he "couldn't put up his part of the Christopher & Simpson (steel) contract, about his (Scott's) continuing or having anything to do with the freight depot work." He answered, "Why, he didn't specify any

contract at all; he just simply couldn't put up his money, any part of it, go any further on it; that \$2,500 was all he could put up. Q. What, if anything, was said as to who was to continue that work? A. There never was said anything about it, because it was understood that I was to continue the work, because my money was there; there was no discussion of that; it was just supposed that I was to do it."

On cross-examination, defendant testified he meant by this that he and John Scott had an understanding that Scott was giving up his interest in the contract because he could not get the money to advance his half of the needed capital, and that Scott did give up his interest, and he, defendant, completed the contract. At another place he testified he told Scott, not only about the contract for the steel, but "about all these contracts that were going on, that I was about to let," and asked him to put up money, but did not "ask him any special amount," though he mentioned the steel contract and others besides; never did talk with Scott about the steel contract alone; asked Scott to put up money "for the balance of the work; there were several contracts"; he, defendant, wanted the money put up so "we could draw on it." He testified this was in September, 1911, just before the steel contract was let. The proposal of the Steel Company was dated September 23, 1911. The acceptance was of later date. The price accepted was \$74,378; erection to start about seven weeks after acceptance and work to be completed six or eight weeks after work commenced; payment to be made about the 10th of each month for 85 per cent. of the value of all work finished during the previous month. Defendant testified he did not recall that anything was said, at the time he says Scott withdrew, about Scott's further liability; that Scott understood he was not liable; that he, defendant, told him that much. He also testified nothing was said between them at the time about Scott's interest in profits already accrued. Defendant says any such interest would have been "very slight." The books show plaintiffs' interest in percentages on work done in July and August was \$551.20 and in September \$113.43, making a total of \$664.63. Defendant admits that nothing was said at the time of plaintiffs' alleged withdrawal about the \$2,500 of capital which they put into the work at the beginning. The books show that the payment he now relies on as a "taking down" of this sum was not made until March 21, 1912. The question concerning this payment is much discussed, and will be considered later.

The account on this work was kept throughout in the depot contract books, except that the entries concerning the structural steel did not appear thereon, but were shown only on the individual books of de-

fendant. Defendant testified he continued to carry on the work in the name of Thompson & Scott, and that contracts were made under the name of Thompson & Scott "all through the work." The record shows many contracts so made. On October 16, 1911, a contract was entered into, in the name of Thompson & Scott, with the Globe Automatic Sprinkling Company. A proposition of Blackmer & Post, dated October 25, 1911, made to Thompson & Scott, was accepted in their name. November 8, 1911, a contract was entered into with the Corrugated Bar Company, under the name of Thompson & Scott. December 8, 1911, a proposition of the International Electric Fixture Contracting Company addressed to St. Louis & Southwestern Railway and Thompson & Scott, was O. K'd by Purdon, chief engineer of the railway, and carried out. January 27, 1912, a proposition of the St. Louis Terra Cotta Company, addressed to J. W. Thompson, manner of acceptance not shown. Proposition of McDonald & Dunn, painters, dated February 23, 1912, addressed to Thompson, was accepted by Thompson & Scott, by O. G. Shands, defendant's chief clerk. Contract or proposition (accepted) of date April 20, 1912, addressed by Shiras Electric Company to Thompson & Scott. Proposition of O'Brien Boiler Works, dated April 27, 1912, addressed to J. W. Thompson and O. K'd by Purdon, chief engineer of railway, goods "bought on his O. K." Contract with Wm. Burke, plumbing, April 27, 1912, with Thompson & Scott. Geo. F. Smith, contractors' equipment, May 4, 1912, addressed to Thompson & Scott, manner of acceptance not shown; defendant said he thought it was "just an order." Otis Elevator Company, May 24, 1912, addressed to Thompson & Scott, accepted by Barry, the railway's superintendent of bridges. Mesker Bros., May 30, 1912, addressed to Barry, care of Thompson & Scott. June 3, 1913, Mesker Bros., addressed to Barry (two others) care of Thompson & Scott. "An order for some flat wire partitions for the freighthouse, dated June 4, 1912, from Lasar Manufacturing Company, addressed to Thompson & Scott; this is for roofing, Keystone Manufacturing Company, June 11, 1912, addressed to Thompson & Scott." Parker-Washington Company, June 27, 1912, for painting, addressed to Thompson & Scott, and accepted by Thompson & Scott. Chas. A. Olcott, July 11, 1912, addressed to Thompson & Scott, open order, no acceptance on it. National Hygiene Flour Company, August 15, 1912, ordered by Barry. Armstrong Cork Company, July 22, 1912, accepted by Shands for Thompson & Scott. Hall Safe & Fixture Company, September 6, 1912, "to Thompson & Scott." Howe Scale Company, September 12, 1912, addressed to Thompson & Scott, accepted by Barry and contract executed Condle-Neal Glass Com-

pany, proposition to Thompson & Scott, but defendant did not "remember how it was accepted"—date September 12, 1912. McGuire & Lane, September 13, 1912, addressed to Thompson & Scott. Hydraulic Pressed Brick Company, September 19, 1912, "pressed brick that was bought, just an order; the address is here Thompson & Scott." Boeckeler Lumber Company, November 11, 1912. Three orders, St. Louis Fire Door & S. M. Works, December 11, 1912; several orders Ludlow-Saylor Wire Company, December 17, 1912, addressed to Thompson & Scott. American Sign Company, December 24, 1912, proposition in name of Thompson & Scott, form of acceptance not shown. Proposition of Fluegel Roofing Company, to Thompson & Scott, January 10, 1913; acceptance does not appear. Propositions for furnishing contractors' equipment were, in several instances, chiefly before September, 1911, addressed to Brenneky & Fay, engineers. Defendant said contracts were made in the name of Thompson & Scott "all through that work," but he thought "there was some of them with J. W. Thompson." He produced only those referred to above.

Defendant testified he did not think the total liability under contracts in the name of Thompson & Scott after September, 1911, would amount to \$100,000; he would have to look it up; the books would show; "they addressed their communications to Thompson & Scott, and as far as that was concerned I didn't pay any attention to that; I just took them in that way, some of them and some of them were addressed to me." He testified he did not change old contracts, because he "didn't want to embarrass Mr. Scott"; that for the same reason he signed new contracts in the name of Thompson & Scott, and refrained from informing the railway company and Purdon of Scott's withdrawal. Samen, superintendent of the work, employed by Thompson & Scott, testified defendant never told him the Scotts had withdrawn. Defendant testified he did not want to "embarrass or belittle" Scott by telling he did not have any money and had to get out for that reason. He admitted that the giving of that reason was not necessarily incident to notice of Scott's withdrawal. As already stated, the depot account was kept in a set of books separate from other construction contracts and from defendant's individual books, except that the structural steel subcontract and the mule and cart percentage accounts are found on defendant's individual books.

Purdon, chief engineer of the railway building the depot, "designed the building and lay out of the yards, and superintended the work in a general way as it went along." He testified he visited the work frequently, giving instructions to the general foreman, Falkenstein, and afterwards to Samen, who succeeded Falkenstein, and thereafter to

Pierson, who succeeded Samen; that he "didn't keep any dates," but sometimes he went to the work with defendant and sometimes with John R. Scott; that this continued during the whole time the work was progressing; that Scott gave more attention to the work during the period of wrecking the buildings than afterward; his time was thereafter more occupied with the construction work in Texas and Arkansas, which he (Purdon) also superintended for his company; that when he had any business about the depot work at St. Louis he communicated with Thompson & Scott; made no distinction between the two, dealt with the one he found "on the work." This continued until the work was completed. (Defendant testified as already stated, that he did not notify Purdon of Scott's withdrawal.) Plaintiffs offered to prove by Purdon that defendant "never notified or said anything to Purdon tending to show that he claimed that Mr. Scott's connection with that work had ceased at any time." Purdon identified pay rolls for August, 1912, "just as an example." The bill was in the name of Thompson & Scott, and the approval by Purdon was on a summary under the same name. To the bill or pay roll were appended the names of all persons at work on the depot, and each such person signed a receipt acknowledging payment to him by "Thompson & Scott" of the amount due him for the month. Witness said the bills for all the other months were in the same general form; that so far as he knew no request was ever made to make out the vouchers otherwise than to Thompson & Scott.

E. W. Samen testified he took charge of the work in September, 1911, as superintendent of construction; that defendant brought John R. Scott to the work at a later date, which witness could not fix, and introduced him as his partner; that thenceforward he saw Scott on the work frequently, and took directions from him and defendant impartially, until he left for other employment with defendant, about the 8th of February, 1913, the work being largely done at that date; only odds and ends unfinished; that in August, 1912, he arranged with Scott to take a vacation; that when he left the work in 1913 Scott "came up there and spoke about it, spoke about leaving somebody in charge, and I recommended Roy Pierson as a good man." It is undisputed that Pierson was put in charge at that time, and remained in charge as a sort of superintendent until the work was finished in April, 1913. Samen leaves the impression that Scott put Pierson in charge; Scott testified he did so; defendant does not claim to have put him in charge, and Pierson said Samen put him in charge. Samen further testified that some time in October, 1911, some one put up an old sign over the toolhouse, "J. W. Thompson, General

Railroad Contractor;" that defendant saw it, and asked him who put up the sign, and said, "Have that taken down; I wouldn't want Mr. Scott to see that." Defendant denies this; says he does not recollect it; "don't think it ever came up; I never heard of it." Samen further testified that defendant did not instruct him to take no orders from Scott. This was in rebuttal. Defendant had testified he had given Samen such orders some months after September, 1911.

August C. Kountz, accountant, called by defendant, testified he was employed by Mr. Shands, defendant's chief clerk, to make a detail cost account of the depot work; was engaged in this from September 2, 1912, until February 7, 1913; that he was at the depot until about January 7, 1913, and thereafter worked in defendant's office; that he saw Scott "a couple of times there on the work, walking around"; that he did not hear him give any orders; saw him once walking around with the superintendent, Samen; "don't know what he said"; Scott saw him in defendant's office, and asked him how he was getting along, and looked at witness' work; on one occasion defendant came in just after Scott had been there, and told witness not to give out any information about his report; thinks defendant saw Scott talking to him; witness never told Scott what defendant said; this was in January, 1913; witness understood the work was being carried on in the name of Thompson & Scott.

A. R. Pierson, called by defendant, testified he had been working on the depot job as foreman until Samen left (January or February, 1913); that about that time Samen sent for him, and he went up to where Samen, Scott, Purdon, and another railway official were, and Samen introduced him to the men; Purdon asked him if he was capable of taking charge; witness said he was, and Samen said the same thing, and Purdon said, "All right." Scott said nothing; had not seen Scott there during the three weeks he worked as journeyman, but was then at the extreme end of the building, away from the office; saw Scott there a few times while he was foreman; that he was employed in 1912, and had been there about six months before Samen left, and he was put in charge; never saw Scott "on the job" after he took charge; saw him talking with Samen, but did not know what he said. The evidence shows that on January 7, 1913, before Pierson supplanted Samen, the railway company occupied the new building, which was then nearly completed, and that but little remained to be done in finishing the work, "only odds and ends."

Defendant testified John R. Scott did "absolutely nothing" in connection with the wrecking work, except that "very early during the work and during the wrecking" Scott gave some directions about some men who were injured; that these directions were not

"in accordance with our policies covering the insurance," and defendant then gave the foreman orders not to take directions from Scott. Samen says this incident occurred while he was superintendent in April, 1912; and that defendant gave him no such order as he claimed, but did say injured persons should not be carried on the pay roll; said to witness:

"You ought not to do anything like that; anything like that ought not to show on the time book; it should be a separate account; the insurance company takes care of injuries."

Defendant further said John R. Scott "never did anything on the terminals at North St. Louis [the depot] of any kind or description; had nothing whatever to do with it." He admitted Scott went with him "up to the work" on many occasions, and that on "one or two occasions" when he was out of the city he asked Scott "to go to the job, but not in any capacity of directing it or having anything to do with it; only just as a favor to me; he may have wired me something about it; I don't know; I don't recollect." Defendant testified he went to Europe about July 22, 1912, and returned September 9, 1912; that as he was about to depart, he asked Scott while he (defendant) was away. "If he had time, if he would run down to the work and write me a letter of the general condition of it, which" he thought Scott did. The letter was in evidence. Defendant said he asked it "just as a favor" on "account of our being together in other work." He testified, also, that he employed Brenneke to look after the work during this trip to Europe. Brenneke testified to the same thing, and said he looked after it, though the work was well organized, and there "wasn't much occasion to give directions." Brenneke also testifies he went to the depot work several times with defendant and John R. Scott, and saw Scott on the work occasionally. Brenneke's testimony leaves a strong impression that during defendant's absence in Europe he visited the work little, if any, more frequently than he did while defendant was in St. Louis. In one place he says there was no definite arrangement covering this time. His firm was employed by the year by defendant, and had designed the "towers, chuting arrangements and the plant in general, and looked after the work with him [defendant], visiting the work and giving advice to him, and afterwards, while he was away I looked after it in person for him." Defendant concedes that Scott went with him and the mayor of St. Louis to the depot September 21, 1912, when some matter was pending in which the city had an interest.

Scott testified that he "started the work, employed the men, and put in the organization" until he had to leave for other work of Thompson & Scott; that he left J. E. Baker

in charge, and Baker was in charge a few days until Evans succeeded him. Defendant testified he put Evans on the work. Evans seems to have been succeeded by Falkenstein. Scott says that when he was not engaged in other work for Thompson & Scott and was in St. Louis he went to the depot work nearly every day, and went over the work with the superintendent, "giving directions, noting and promoting progress"; that when in St. Louis he went to the work "almost every day." He produced memoranda and testified to numerous trips to the work during the 18 months it was in progress; gives dates and circumstances. Some of these trips were made with defendant and others were with Purdon, and on others he was alone; others with Cotton Belt officials and with Brenneke. He also testified that he was "on the work" on dates other than those of which he had kept a record. His testimony shows numerous consultations, some with the superintendent, some with Purdon, some with defendant, about the work, and shows occasions on which he and defendant "went over the work" together. He gives many dates and circumstances. No effort was made to contradict him concerning any particular visit. Defendant relied upon the sweeping statement that Scott had nothing to do with the work, though he might have visited it. Much of Scott's time was occupied with the Stephensville, Central Arkansas, and International & Great Northern (in the summer of 1912) and double-tracking work (this last after October 1, 1912), but he was very frequently in St. Louis, where he lives. Letters and a telegram from defendant to John R. Scott were offered, in which defendant refers to the St. Louis work. Defendant on his own account bought mules and carts which he put to work on the depot job. They were carried on the pay roll in an account kept under the name of E. W. Sawade, defendant's bookkeeper. Under the contract a day rate for mules and carts was charged in this account, and the usual percentage of 15 per cent. charged in addition. This account was kept in Thompson's personal books, and did not appear on the Thompson & Scott books.

On January 6, 1912, a voucher was issued for depot work in the following form:

"Edwin Gould St. Louis Realty Account.
Thompson & Scott.

"St. Louis, Mo., Jan. 6, 1912.

"Dec. 11. Partial payment on account of Christopher & Simpson, contract covering furnishing and erection of steel framework for the new St. Louis freight depot..\$40,000.00
"First payment.
"Contract price, \$74,378.00."

On this voucher was indorsed the following:

"Received, St. Louis, Mo., Jan. 8, 1912, in full payment for the above account the sum of forty thousand dollars.

"[Signed] Thompson & Scott."

On January 13, 1912, the following bill was rendered:

Edwin Gould, St. Louis, Mo., in account with
Thompson & Scott, Railroad Contractors.

Structural steel furnished in place by Christopher & Simpson subcontractors, on Cotton Belt Freight Depot, Main and Florida streets, St. Louis, Mo., per contract	\$74,378 00
Add 10 per cent.	7,437 80
	<hr/>
	\$81,815 80
Less cash received on account.....	40,000 00
	<hr/>
	\$41,815 80

February 12, 1912, a voucher was issued to Thompson & Scott for final payment on this bill and indorsed thereon is:

"Received, St. Louis, February 14, 1912, in full payment of the above account the sum of forty-one thousand eight hundred and fifteen and 80/100 dollars.

"[Signed] Thompson & Scott."

The first payment to Christopher & Simpson on this structural steel subcontract was \$30,000, and was made on January 8, 1912. A second payment of \$30,000 was made February 14, 1912, and the balance, \$14,378, was paid March 1, 1912.

Defendant testified he paid out, at Scott's direction, on account of Butler Bros., the \$2,500 the plaintiffs put up July 22, 1911, as their share of the capital to be used in carrying the depot work. He gives no date, so far as the record seems to show. His books show a charge against Scott under date of March 21, 1912. Defendants said that Butler Bros. (grocers in St. Louis) had previously borrowed \$6,000 or \$8,000 from him, for which had no security; that they came for more money; that he said to John Scott that one of Butler Bros. had married Ed Scott's cousin, and they were "pretty good fellows," and he (defendant) felt like helping them, and he wanted one of the Scotts to help; that Scott did not say whether he would or not, but later wired him he would not; that later still John Scott saw him, and "said he would give them \$2,500," while "I gave them \$2,500, totaling \$5,000," and that he gave them \$2,000 later, "which made a total, I think, I was in there of about \$16,000 and it's in there to-day." Defendant secured a mortgage on the store and all property of Butler Bros. used in connection with it, and had them transfer to him the capital stock of the corporation which operated the store. Scott had no interest under either of these so far as the face of the papers is concerned. Defendant said Scott's money was intended to be secured also. The Scotts say they authorized defendant, and he agreed to

advance to Butler Bros., \$2,500 out of profits then due plaintiffs and in defendant's hands, and that the arrangement was made with a view to the increase of the stock of Butler Bros.' organization, and the money they advanced was for such stock. As stated, defendant later secured all the capital stock as security for himself. He says it is worth nothing. That may be due to the existence of the mortgage he holds. On request of plaintiffs, defendant produced from his files a copy of a telegram, dated September 20, 1911, addressed to John R. Scott, Comanche, Tex., in which Scott was asked whether he would take \$2,500 stock in "new organization, Butler Bros. Grocery Company. E. J. Scott is taking this amount; Thompson says will advance money for you if you wish it and advise me to wire him. Please answer." This was signed, "Andy Butler." With this defendant also produced a telegram from Scott, dated September 21, 1911, addressed to defendant: "Cannot take Butler stock; tell Andy Sharp has Rock Island Juck's half interest." Defendant, in explanation of his previous testimony that there had been no talk of taking stock when Scott, according to his version, authorized him to advance the Butlers \$2,500, said that these telegrams were prior to that authorization "altogether." He had already testified that at the time he had the conversation with Scott, now relied on as authority for paying out the \$2,500 for the Butler Bros., he did not agree to put up for the Scotts \$2,500 for stock subscription in a company to be organized, "because I didn't know there was going to be any such a company organized." This organization clearly seems to have become a fact some time after September 20, 1911. Ed Scott testified that he agreed at one time to take \$2,500 of new stock. Later he agreed with defendant, for himself and John Scott, to put up \$2,500, to come out of profits due the Scotts, and then in defendant's hands, and that defendant said that was all right, "was agreeable." John Scott's testimony is to the effect that defendant never asked or received any authority from him to pay out plaintiffs' share of the working capital (on the depot contract) to or for Butlers; that defendant agreed to pay this out of profits he owed plaintiffs at the time the advance was made. Andy Butler, for defendant, testified Ed Scott told him some time in November that "he thought it would be all right; they were going to pay off the creditors"; that one time later, "some time ago," Ed Scott asked him if he knew the Scotts had \$2,500 in the store; that was after the creditors were paid off; that the creditors were paid off; defendant put up \$8,000 for that purpose; that defendant took a mortgage on all the company's property and all the stock as security for about \$16,000 advanced.

Defendant testified John R. Scott was kept continually advised as to the state of the ac-

count between the partners, but that no settlement was asked for on a job until it was completed. Defendant thought Scott got statements or memoranda from the bookkeepers.

The bookkeepers and accountants testified the books did not, even after the partnership was dissolved in September, 1913, show the interests of the respective partners. Scott testified he had asked for a statement on the completion of each piece of work, but never had received any. In April, 1913, he requested a statement, and received several sheets with figures on them, but the evidence shows these were incomplete. A copy of this statement remained in defendant's office. No copy of any other statement to plaintiffs was produced by defendant. Defendant had turned over to plaintiffs very considerable sums prior to April, 1913, and, in each instance took an interest-bearing note to cover the amount paid. In March, 1912, he paid plaintiffs \$50,000. The receipt shows this payment was not a settlement, but merely a payment on account of "Cotton Belt work." The statement furnished on April 13, 1913, did not purport to show much in detail, except the amounts paid to plaintiffs. The accrued profits were stated in lump sums. Among other things, this statement omitted all notice of the freight depot profits. Scott discovered this, and "took it up with" defendant by telephone, and called his attention to the fact that the statement afforded no real information, and also that the freight depot contract was entirely omitted. He testified that defendant then told him that he (Scott) had no interest in the depot job; witness told defendant that he must be joking, and defendant then said the telephone was not a good means for discussing it. This was at night. Witness went to defendant's office the next day, and asked if he was serious about the matter; defendant said he was; witness told defendant his attitude was ridiculous, and it would be a simple matter to establish his rights; defendant said, "Go ahead and establish them." Witness said defendant's bookkeepers refused him statements and information, and told him defendant desired that witness get his information from him. Sawade, defendant's bookkeeper and later chief clerk, testified that "it was an iron-bound rule with Mr. Thompson, and everybody in the office has understood it, that no one is to see his books or any other books in the office without first getting permission from Mr. Thompson." Defendant testified that the railroad paid "fairly promptly" as the work progressed, but that the \$5,000 original capital was wholly insufficient to carry the work. John R. Scott testified that the original capital and accumulated percentages were sufficient to carry the work at all times. Defendant's contention, in this connection, is, in effect, that the evidence shows that plaintiffs did not have in his hands

enough money to carry their half of the capital investment by the contractors in the work, and that the reasonable inference from that fact supports his claim that plaintiffs abandoned the contract. For the purpose of examining this contention it is therefore necessary to credit plaintiffs with one-half of percentages paid by the railway on the work and other money, if any, in defendant's hands and belonging to plaintiffs. In July plaintiff's \$2,500 exceeded the amount furnished by defendant. In August, 1911, defendant advanced more than \$2,500. In September, also, defendant's "investment," as it is called, somewhat exceeded plaintiffs' \$2,500 and percentages theretofore paid on it and in defendant's hands. These months have little bearing on the question at issue. It is not contended plaintiffs withdrew until some time near October 1, 1911. The inference is justified that defendant did not then put such a strict construction on the capital feature of the partnership contract as he now does. In October plaintiffs' \$2,500 had grown to \$3,047.33. Defendant's investment was \$4,922.23, nearly \$2,900 less than it had been in August. In November plaintiffs had \$3,624.62 in the work, and defendant \$4,213.45. In December plaintiffs' \$2,500 and accrued percentages in defendant's hands in cash aggregated \$4,072.93. In December, 1911, and January, February, and March, 1912, the whole capital in use did not equal plaintiffs' \$2,500 and their accumulated percentages in defendant's hands in cash. February 23, 1912, defendant received payment for the firm of a large amount of money. March 1, 1912, he paid the Scotts \$50,000, leaving a balance due them of \$1,904.30, without crediting them with the sums found due under paragraphs I and II, supra, or any profits on the depot work. These sums, considered in paragraphs I and II, aggregated more than \$10,000. Adding the \$1,904.30, the total is, in round numbers, \$12,000. This does not include percentages on work of mules and carts previously paid defendant and in his hands. With that exception the aggregate in defendant's hands, on March 1, 1912, adding the paid percentages on the depot work to the profits mentioned (\$12,000) and the original \$2,500, was about \$16,850. Defendant contends he paid out \$2,500 to Butler Bros. in March, 1912. This would leave \$14,350 of plaintiffs' money in his hands. By August 16, 1912, paid percentages in defendant's hands swelled plaintiffs' share to about \$19,000. This is exclusive of one-half of the \$7,437.80 in profits on the structural steel contract. It is unnecessary to go further. The figures show that for nearly all the time, except in August, 1911, plaintiffs had in defendant's hands cash exceeding one-half of the actual money put in the work and yet unpaid by the railway. Much of the time it exceeded the whole. Defendant asserts he had more than \$91,000 in the work in December, 1912. The

fact is that this represented all the money then due from the railroad on the contract. It also assumes that all material bills were paid before being billed to the railroad on the contract. This Scott denies, defendant does not affirm, and the steel vouchers show was not true in that case. The \$91,000 included all profits to that date and the mule and cart account. Plaintiffs were not concerned with the value of the mules and carts. They were concededly defendant's property. He was receiving a per diem for them on the pay roll, in which per diem plaintiffs claim no interest. This investment was not one of the partnership. In connection with this \$91,000 item the defendant's expert shows defendant's "advances" (and he is credited with all advanced; plaintiffs with none) to be \$33,260.35, in December, 1912, omitting cart and mule account. One-half of the percentages on payments after August, 1912, and to and including December, 1912, amounted to \$7,910.48. Adding this to the sums already in defendant's hands would make plaintiffs' investment equal more than half the sums credited as funds, "advanced" on the depot work in December, 1912. Defendant did not ask plaintiffs for any further advance after the incident preceding the letting of the steel contract.

[4] (a) The referee and trial court found plaintiffs were entitled to participate in the profits of the depot contract. This court is asked to overturn those findings on this question of fact. We are of opinion the evidence does not justify us in doing so. It is undisputed that the contract was that of the partnership, and that the work proceeded for a time as a partnership undertaking. It is now contended plaintiffs withdrew from that contract. The work was admittedly carried out in the firm name; the subcontracts were made in that name throughout the work, as well after as before the time of the alleged withdrawal. Correspondence was evidently carried on under the firm name. Shands, defendant's chief clerk in charge of his office until February, 1913, accepted in the firm's name propositions addressed to Thompson & Scott, and so accepted one addressed to defendant. Large liabilities were incurred on these contracts of the firm. The pay rolls, bills, and vouchers were in the firm name. The laborers each month or week receipted the firm for their wages. Payments were made to Thompson & Scott, and the receipts to the railway (or Gould) were signed by Thompson & Scott. The railway's chief engineer, charged with oversight for it of the work, dealt with the firm and with defendant and Scott as partners all through the work. The superintendent, Samen, employed by the firm, dealt with them the same way at all times, and neither of these men ever learned that defendant claimed plaintiffs had withdrawn. The railway was never advised of

this claim. Defendant gives no reasonable explanation of these things.

Defendant's testimony concerning the conversation he says resulted in plaintiffs' withdrawal is not consistent with the facts or itself. One version he gives is that the steel contract alone was discussed. Another is that he brought up "all these contracts," and asked plaintiffs to put up money so "we could draw on it." In September the steel contract apparently was the only contract pending. The proposition was dated September 23, 1911. The next contract was made October 16, 1911, the next October 25, 1911, the next November 8, 1911, the next December 8, 1911, and the next January 27, 1912. The rest were made after February 23, 1912, so far as the record shows. A request of plaintiffs to put up money for all contracts or for any contracts except in reasonable time to meet their half of payments thereunder would not have comported with a reasonable construction of the partnership agreement. Defendant testified he told Scott the steel company's "proposition was to have it in a lump sum, and it was to be paid in a lump sum at that time, and at the time I made the contract." This was assigned by him as a reason for the demand. The steel company's proposal shows the contrary. Dated September 23, 1911, work under it would commence seven weeks after acceptance. If accepted on the 23d of September, the work would have begun November 10, 1911, and the first payment, for 85 per cent. of the work done in November, would have fallen due December 10, 1911. The work was actually paid for in January, February, and March, 1912. The subcontract, therefore, itself contradicts defendant.

His answer also shows he did not have the matter clearly in mind when that pleading was drawn. Defendant admits nothing was said about plaintiffs' accrued profits or capital in the work when the conversation of September, 1911, occurred. The answer avers that it was agreed plaintiffs were to be relieved of further liability. Defendant testifies, at first, that nothing was said at the time about that. Later he said he told Scott he would not be liable. Nevertheless, the work was so carried on thereafter that plaintiffs shared all liability. Further, this alleged withdrawal occurred, if at all, before the steel work was begun. Defendant kept the steel subcontract account separate from the rest of the work and in his individual books. He did not explain why, if plaintiffs had wholly withdrawn, it was necessary to do this. He says the \$2,500 plaintiffs advanced in July, 1911, was paid out for the Butlers on an agreement that it should be disposed of in this way. The trial court and referee were unable to take this view. The testimony set out above shows the reason for this too clearly to require discussion. The

argument based upon the claim that defendant was not aided by plaintiffs in the matter of capital in use in the work is disproved by the evidence. The fact is that one month before the date of the alleged withdrawal defendant furnished more than one-half, and two months thereafter he did so. After that the discrepancy was the other way. Defendant did not ask for further capital. John R. Scott undoubtedly took an active part in the oversight and management of the work. This was his duty under the partnership agreement, according to his testimony. Defendant's testimony that no such duty was imposed by that agreement upon Scott is difficult to believe, in view of the way the work was done. It is not easy to see how Scott could have exercised the authority he and Purdon and Samen say he did without defendant's knowledge; and it is hard to understand, if defendant knew, why he acquiesced, if plaintiffs had withdrawn from the contract. Without further elaboration, we are unable to find that the record justifies us in overturning the finding of the referee and trial court in this connection. Plaintiffs' version of the agreement of September, 1911, must be accepted.

The agreement to waive profits on the steel contract was based upon a condition which was not fulfilled. The money asked for was never needed, as the payments by the railroad and those to the steel company show. The latter company was not paid until after the railroad paid Thompson & Scott for their work. The trial court's ruling on this assignment was right.

[5] IV. During the progress of the work on the several contracts of Thompson & Scott, defendant paid or advanced to plaintiffs considerable sums, for which, except in one or two instances, he took interest-bearing demand notes. (a) In casting up the account, the referee and trial court determined the amount of profits in defendant's hands on the completion of each contract and payment therefor, and allowed plaintiffs interest at 6 per cent. on their half thereof until the date of dissolution of the partnership, September 23, 1913; then allowed defendant interest at the same rate until the same date on all advances made by him to plaintiffs. According to defendant's counsel the net result of these cross-charges of interest was an interest allowance to plaintiffs of \$1,167.04. It is contended no interest was legally allowable to plaintiffs until dissolution. The Thompson & Scott partnership was not a general partnership. Each contract was a separate undertaking. The testimony of John Scott and defendant shows that there was to be no division of the profits on any contract until the work under that contract was completed. The notes given to defendant were for advances out of profits not yet ready for division under the partnership agreement. John

R. Scott testified he asked for statements upon the completion of each job, but never received one. Defendant, in effect, concedes that payment of their share of profits was due plaintiffs at the completion of the respective jobs. Also, he testifies that plaintiffs did not demand settlements of profits arising out of "these separate contracts until they were finished." That he never gave them a correct statement is proved by the evidence. Counsel invoke general rules to the effect that interest is usually not allowed partners on profits left with the firm, on fluctuating balances on advances to the firm, or on periodical balances struck, in the absence of an agreement or course of action justifying it. It is frequently said that no fixed rule can be extracted from the cases. Rowley on Partnership, vol. 1, § 362. With respect to allowances of interest between partners "during the continuance of the firm," it has been said that:

"There are, broadly speaking, three grounds upon which interest is allowable: (1) As the fruit of a contractual provision therefor, express or implied from the situation of the parties or mercantile usage; (2) as damages for the detention of a sum of money after it has become due; (3) as an equitable equivalent for the use of money fraudulently withheld from its rightful owner." Rowley on Partnership, vol. 1, § 359, quoting *Kilworth v. Ice*, 84 Kan. 458, 114 Pac. 857, 35 L. R. A. (N. S.) 220.

In this case, in view of the agreement that profits were to be divided on the completion of the separate contracts of the firm, the conceded demands for settlements, which settlements were not made, the withholding from the books of the firm of practically all profits upon which interest to September 23, 1913, was allowed, and the effort of defendant to deprive plaintiffs of these profits without real reason, we are of opinion that interest was allowable. The allowances to defendant upon the sums advanced was merely a method of computing the net interest due plaintiffs on the date of dissolution. The notes themselves were but evidence of payments in advance of the agreed time of distribution.

[8] (b) It is argued that by taking the sums found due on September 23, 1913, and allowing interest thereon until the date of judgment, the court erred, since this included some interest on interest. The balance struck as of September 23, 1913, was then due and unpaid. In view of the fiduciary relations between the partners and the equitable features arising out of the facts of this case, the trial court was well within its powers, in this suit in equity, in computing the interest with a rest at the date of dissolution.

V. Some of defendant's counsel contend the deduction of \$1,151.98 from the payment of \$4,000 to plaintiffs on October 20, 1911, is error, and wholly unsupported by evidence. Others concede it is correct. The debit and

credit account on the Stephenville and Central Arkansas work as it appears in the record shows advances by Scott in excess of receipts to October 20, 1911, of \$1,151.93. The exception is overruled.

VI. The railway allowed defendant \$3,200 to cover the expense of office work and bookkeeping. Of this sum, defendant paid part to his office force for the extra work they did, and retained the balance. The referee and trial court seem to have found that the amount defendant retained, was \$1,200. Plaintiffs were allowed one-half of this sum, \$600. Defendant contends this was error. Plaintiffs insist, on their cross-appeal, that they were entitled to one-half of the whole or \$1,600, and asked that they be allowed an additional sum of \$1000.00.

[7] It was defendant's duty, as between the partners, to keep the books and do the office work. The contract of the firm with the railway did not obligate it to pay any of the bookkeeping or office expense. For some reason it saw fit to pay defendant \$3,200 to cover an expense incumbent upon him alone. The case would have been no different had a disinterested fourth party advanced the money for this purpose. Plaintiffs were entitled to no part of this money. The allowance of \$600 to them on this account was error.

[8] VII. After the dissolution it was found that the partnership books were not posted to date. Plaintiffs employed an accountant who, under the supervision of the defendant's chief clerk, aided in completing the books. It was shown that the reasonable value of his service in this was \$250. The trial court allowed plaintiffs one-half of this sum. Defendant complains of this allowance. In view of what is said in the preceding paragraph, the allowance might well have been for the whole amount. Defendant had not performed his duty in regard to the books, and the work was necessary before the accounts could be put in proper condition. The assignment is overruled.

VIII. The referee allowed plaintiffs credit for the \$2,500 paid by them to defendant on July 22, 1911, as their one-half of the capital upon which the firm of Thompson & Scott began the St. Louis freight depot work. To this allowance the trial court sustained defendant's exception, and this ruling is assigned for error by plaintiffs.

On the hearing defendant attempted, in an effort to support his contention that they had withdrawn from the depot work, to show that plaintiffs had withdrawn the capital payment of \$2,500 by directing him to pay it on account of Butler Bros. Plaintiffs' position was that they had not authorized the payment as of the capital fund, but that the payment authorized was to be made out of accrued profits, and was not a taking down of their initial capital payment. Defendant did pay \$2,500 on Butler Bros.' account under authority from

plaintiffs. There was no real controversy about that fact on the hearing. The assignment is overruled.

[9] IX. On the work on which the contractors "carried the estimates" vouchers were issued by the railway company which bore interest until paid. This was in accordance with the contract between the railway and Thompson & Scott. The referee and trial court refused to permit plaintiffs to share in this interest. Of this ruling plaintiffs complain.

As between the railway company and Thompson & Scott, the latter were bound as a copartnership to carry the estimates until the completion of the work, the estimates to bear interest from the fifteenth of the month following that in which the work which the estimates covered was done. As between the partners the burden of financing the contract was imposed upon defendant. The contract between the partners was oral. It is apparent that the case is not one in which interest upon partnership funds has been received by one partner and not accounted for. All the interest in question here accrued on vouchers to cover expenditures advanced by defendant. Defendant testified to an express contract with plaintiffs, as part of the partnership agreement, that he was to have all the interest on the vouchers by reason of his putting up all the money for the work. During the work plaintiffs, without objection or protest, permitted defendant to make use of the vouchers to secure his personal notes to the bank for funds to carry on the work. The whole course of action during that time was in accord with defendant's theory of the interest agreement. John R. Scott testified nothing was said about voucher interest as such; that the agreement was that the profits were to be divided equally when the work was completed. It is not clear from his testimony that even he understood the word "profits" to include this interest. It is true that such interest, in a proper case, would be held to be a part of the profits and subject to division. This is not a case in which it is conceded or shown interest was to be distributable under the term "profits," but one which the referee and trial court found, and we think correctly, that the interest in question was, under the partnership agreement, to go to defendant in consideration of his advancing all the capital, for much of which he was obliged to pay the bank many thousands of dollars in interest. The record does not justify a ruling overturning the decision of the referee and trial court on this assignment.

[10] X. Plaintiffs asked an allowance of interest paid by the bank on daily balances on money of the firm in the hands of defendant. The referee and trial court found against this claim. The judgment allowed plaintiffs interest at a greater rate on all money in de-

fendant's hands from the time it was due and demanded until judgment was rendered. This covered all interest to which plaintiffs were entitled. The interest at 6 per cent was allowed to cover plaintiffs' loss or damage on their funds during the time they were retained by defendant. Perhaps it might have been compounded had plaintiffs asked it. *Bobb v. Bobb*, 89 Mo. loc. cit. 421, 422, 4 S. W. 511. That question, if ever raised, has not been kept alive. Certainly plaintiffs did not contend for the profits or interest at 3 per cent. on daily balances in lieu of the 6 per cent. interest allowed to them. The point is ruled against plaintiffs.

XI. The judgment is reversed, and the cause remanded, with directions to the trial court to sustain defendant's exception to the \$600 item discussed in paragraph VI and then render judgment in accordance with this opinion. All concur.

HARRISON v. PUNCH et al.

(Supreme Court of Missouri, Division No. 1. April 10, 1920. Rehearing Denied June 2, 1920.)

Appeal and error \S 528(1)—Where the motion for new trial is not properly called for in the bill of exceptions, bill cannot be reviewed.

Where the motion for new trial was set out in the abstract of the record proper, and in the bill of exceptions it was omitted, and there was no proper call for the same, the bill of exceptions cannot be considered.

Appeal from Circuit Court, Stoddard County; W. S. C. Walker, Judge.

Suit by Fred C. Harrison against Soonie Punch and others. From a judgment for plaintiff, defendants Samuel A. Punch and others appeal. Affirmed.

Oliver & Oliver, of Cape Girardeau, for appellants.

Walter T. Gunn, of Danville, Ill., and R. P. & C. B. Williams, of St. Louis, for respondent.

GOODE, J. Jasper Newton Punch died intestate in Stoddard county, Mo., on November 5, 1915, seized and possessed of lands in said county of considerable value. He left a widow, Soonie Punch, who is one of the defendants in this action, which was brought by the plaintiff to specifically enforce an oral contract by Jasper Newton Punch to adopt plaintiff and make him his heir; a contract alleged to have been made by Jasper Newton Punch with the mother and grandmother of plaintiff and to have been fully performed by them and by plaintiff. A further purpose of the suit was to

have adjudged that the three half-brothers of Jasper Newton Punch had no interest in the lands to which they asserted title. If there was not an adoption of plaintiff as said Jasper Newton's son and heir, the half-brothers were his only heirs, and inherited an undivided one-half interest in the land in controversy, and the widow the other one-half, whereas if there was such a contract, and it is enforced, the half-brothers take nothing. A third object of the suit was to have the lands partitioned between plaintiff and Mrs. Soonie Punch, the widow.

It is needless to state more of the facts, because the abstract of the record is in such condition that we cannot look beyond the record proper, and that is free from error. The bill of exceptions neither sets out the motion for new trial in the case nor calls for it; hence exceptions taken during the trial cannot be considered. The motion for new trial is referred to in the bill of exceptions in practically the same words in which reference was made in a bill of exceptions to the like motion in the case of *State ex rel. Peet v. Ellison*, 196 S. W. 1103. In said case the effect of omitting to copy or call for the motion for new trial in the bill of exceptions was carefully considered, and the decisions in this state on the subject reviewed. That decision, as well as those referred to in the opinion in the case, determine that with such a reference to the motion as was therein made, and made in the present case, it is not preserved in the bill of exceptions as a part of the bill, and leaves nothing to be examined on the appeal except the record proper.

The judgment, therefore, is affirmed.

All concur, except WOODSON, J., absent.

SANDERS v. KASTER.

(Supreme Court of Missouri, Division No. 1.
April 10, 1920. Rehearing Denied June
2, 1920.)

1. Mortgages §427(2)—Trustee not a necessary party to action to foreclose deed of trust.

Under Rev. St. 1909, §§ 2828, 2829, the trustee named in deed of trust containing power of sale in trustee was not a necessary party to action by cestui que trust to foreclose the deed of trust.

2. Appeal and error §187(3)—Failure to join trustee in action to foreclose not available unless raised by answer or demurrer.

In action by cestui que trust to foreclose deed of trust, defendant could not complain on appeal of failure to make trustee a party to the action, where the question was not raised by demurrer or answer in lower court.

3. Appeal and error §187(1)—Defects of parties must have been raised by demurrer or answer.

The question of whether there are defects of parties plaintiff or defendant should be raised by demurrer or answer, and upon failure to so do the question is waived, and cannot be urged on appeal.

4. Evidence §76—Defendant's failure to testify casts suspicion on his claims.

Defendant's failure to testify to the salient things contained in his answer casts suspicion upon the bona fides of his claims; he having peculiar knowledge as to such facts.

5. Acknowledgment §54—Acknowledged deed of trust and note secured thereby admissible, without proof as to genuineness.

Under Rev. St. 1909, § 2818, duly acknowledged deed of trust and note secured thereby were properly admitted in evidence in action to foreclose deed of trust, without proof that defendant had signed the deed of trust; the acknowledgment making the deed of trust evidence of all facts recited therein, including the fact that defendant has signed and delivered note to plaintiff.

6. Appeal and error §232(2)—Objection to introduction does not raise question of want of proof of signature.

In action to foreclose deed of trust, defendant's objections to introduction in evidence of deed of trust and note, "for the reason, under the pleadings, it is irrelevant and incompetent," held insufficient to raise objection on appeal that proof of signature had not been made.

Appeal from Circuit Court, Putnam County; L. B. Woods, Judge.

Action by August Sanders against N. L. Kaster. From an adverse decree, defendant appeals. Affirmed.

Action to foreclose a deed of trust on 160 acres of land in Schuyler county, Mo. The petition is in conventional form, but has therein the allegation that N. L. Kaster, one of the makers of the note secured by the deed of trust, and also one of the makers of the deed of trust, was in 1913 declared by the probate court of Schuyler county to be a person of unsound mind, and that John Sloop was appointed as his guardian. The petition alleges two interest payments upon the note of \$7,600, of dates March 8, 1912, and March 17, 1913, and for the sum of \$456 each. The note was dated March 10, 1911.

By answer the defendant avers that he was readjudged by the probate court of Schuyler county to be a person of sound mind on March 30, 1916. This was some two weeks after the filing of the suit and service of process in the case. In his answer, after a general denial, defendant, N. L. Kaster, avers that he was a person of unsound mind at the time the note and deed of trust were signed, and had been for some months prior thereto, and continued to be for some months

thereafter, all to the full knowledge of the plaintiff. He asks that the deed of trust and note be canceled and for naught held, and in a further count of his answer he asks to be adjudged the two payments of interest mentioned in plaintiff's petition. Defendant also avers that he received no benefit or money from said note and deed of trust. The record shows the filing of a reply. The additional abstract of the record shows the reply, and in it a plea of *res adjudicata*. Upon a trial the court found the issues for the plaintiff, and ordered defendant's equity of redemption foreclosed, to satisfy an adjudged sum of \$10,871.46, including an attorney's fee of \$750.

After defendant was adjudged to be of sound mind, he filed answer, and the case proceeded as between plaintiff and defendant. On change of venue the trial was had in Putnam county. From the adverse decree, defendant has appealed. Further detail of facts will be left to the opinion.

A. D. Morris, of Lancaster, and J. M. Jayne, of Memphis (Lozier & Morris, of Carrollton, of counsel), for appellant.

Higbee & Mills, of Lancaster, and Campbell & Ellison, of Kirksville, for respondent.

GRAVES, J. (after stating the facts as above). I. It will be noted that the trustee in the deed of trust was not made a party to this foreclosure proceeding, nor is Bert Kaster, the wife of N. L. Kaster, made a party, although she signed the same, as well as the note secured thereby. It develops in the testimony that Mrs. Kaster is the daughter of plaintiff, and that she had later sued for divorce, and had obtained judgment of divorce and alimony in the sum of \$4,000 which judgment was settled during the guardianship of Kaster at the sum of \$3,500. Of this we may have occasion to speak later. We mention it now as tending to show the status of the parties at the institution of the suit.

Appellant contends that the failure to make the trustee a party renders this judgment void, and this is the point we have in view now. Kaster was the owner of the land, and during the life of Kaster the wife only had dower initiate. How this was determined by the divorce suit does not appear in this record. There may be something in that decree which precludes her from further interest in Kaster's property. But this is adrift from the point. Can this judgment stand, absent the presence of the trustee as a party? Was his presence as a party so necessary as to render the judgment void? This is the point we now have before us.

The deed of trust in this case is the usual one, with power of sale in the trustee. It occurs to us that the statutes fully answer the contention of the appellant. The pertinent portion of section 2829, R. S. 1909, read:

"Deeds of trust in the nature of mortgages may, at the option of *cestuis que trust*, their executors or administrators or assigns, be foreclosed by them, and the property sold in the same manner in all respects as in case of mortgages."

Note that this section authorizes the "*cestuis que trust*, their executors or administrators or assigns," to foreclose such deed of trust, "and the property sold in the same manner of all respects as in case of mortgages." The foreclosure of mortgages is governed by section 2828, R. S. 1909, which reads:

"All mortgagees of real estate or personal estate, including leasehold interests, when the debt or damages secured amounts to fifty dollars or more, may file a petition in the office of the circuit court against the mortgagor and the actual tenants or occupiers of such real estate, or persons in possession of personal property, setting forth the substance of the mortgage deed, and praying that judgment may be rendered for the debt or damages, and that the equity of redemption may be foreclosed, and the mortgaged property sold to satisfy the amount due."

The parties to this kind of suit are the mortgagee, as plaintiff, and the mortgagor, as defendant. If there are tenants, then the tenants are to be made defendants. In the case before us there was no question of tenants. The maker of the deed of trust and his legal guardian were made the parties defendants. Section 2829, *supra*, gives to the *cestuis que trust* in these deeds of trust, the same rights to foreclose as are given to mortgagees in the case of mortgages. In other words they can, in court, do just what they could request their trustee to do by way of a sale under the instrument. The section contemplates two methods of foreclosing the equity of redemption; i. e. (1) by a suit in court by the beneficiary in the deed of trust, as plaintiff, and the maker of a trust deed, as defendant; and (2) by advertisement and sale by the trustee under the terms of the deed of trust.

[1] The reference in section 2829 to foreclosures of mortgages compels us to read sections 2828 and 2829 together in order to get the full meaning of the latter section. When so read together, section 2829 means that, if the beneficiary in the ordinary deed of trust prefers to foreclose by court action, then such beneficiary is the sole necessary party plaintiff, and the maker of the deed of trust the sole necessary party defendant, unless there are tenants (a question not involved here), in which case the tenants should be made parties defendant. The statutes go no further. So that we conclude that it was unnecessary to make the trustee a party under the provisions of these sections. We are cited to the provisions of section 2859, R. S. 1909, but an examination of that section will show that it does not apply to a deed of trust

such as we have here under consideration. This statute refers to deeds of trust in which a foreign corporation or individual is a trustee.

It is true that we say in cases that the trustee has the bare naked legal title, but, on the other hand, the trustee cannot divest himself of that bare naked legal title, nor the maker of the deed of trust of his equity of redemption, save and except he be requested so to do by the beneficiary in the instrument. He can only act when he gets the command from the real party in interest; i. e., the beneficiary. But, as said above, the statute (section 2829, *supra*) contemplates two methods of reaching the same end. In one the trustee is a factor, because at the request of the beneficiary he can sell the property and pass title. In the other the beneficiary is permitted to act for himself and have the sale made under a decree of court. Both sales obtain the same result. In *Rogers v. Tucker*, 94 Mo. loc. cit. 352, 7 S. W. 417, it is said:

"A complaint is made that the trustee in the Rogers deed of trust was not made a party plaintiff. These trustees in deeds of trust to secure debt generally have no duties to perform, save to sell the property in case of default in the payment of the debt. It is not claimed or shown that Picon, the trustee in the Rogers deed of trust, had or possessed any other power than that of making sale in case of default. He was not the proper party to foreclose by suit the deed of trust. In suits brought to foreclose the state's lien for taxes, it is not sufficient to make such a trustee a defendant. The holder of the secured debt must be made a defendant; otherwise, the deed of trust is not foreclosed, and this because the holder of the secured debt is the real party in interest. *Stafford v. Fizer*, 82 Mo. 388; *Bank v. Grewe*, 84 Mo. 478. This is but a suit to have the Rogers deed of trust declared a prior lien, and we can see no reason for making the trustee a party to the suit. He was not a necessary party."

Now, bearing in mind that section 2829, R. S. 1909, by direct reference incorporates therein section 2828, *supra*, much light is thrown upon the question, by the opinion of *Valliant, J.*, in *State ex rel. v. Evans*, 176 Mo. loc. cit. 316, 75 S. W. 915, whereat he says:

"The proceeding there contemplated deals with no uncertain parties and no equivocal titles. The parties are the mortgagee on the one side and the mortgagor and the man in possession on the other; the one holding the legal title with a defeasance, the other holding the equity of redemption and the possession. The only duties of the court are to ascertain the amount due on the mortgage debt and pass judgment that the property be sold for the amount so ascertained and that execution issue for the balance, if any, against the mortgagor's other property."

He was discussing section 4342, R. S. 1899, which is section 2828, R. S. 1909, which we

have quoted, *supra*; but as the method of procedure under section 2829, the section under which this action is brought, is to be determined by section 2828, by direct reference thereto, the language used is of high import here. But why go further? The terms of the statutes (sections 2828 and 2829, when construed together, as they must be, because that latter refers to the former) settle the matter. The trustee might be a proper party, but by no means a necessary party, in a proceeding under section 2829, *supra*. The statute precludes him from being a party plaintiff, and he serves no useful purpose as a party defendant. This point is therefore ruled against the appellant.

[2] But in addition to this, be it said, the defendant in this case did not raise the question either by demurrer or answer. He is in no position to raise it now.

[3] II. It is urged that Bert Kaster, the wife of the defendant, should have been made a party defendant. If there were defects of parties plaintiff or defendants, such should have been raised either by demurrer or answer; otherwise, the question is waived, and cannot be urged in this court. The question was nowhere raised below. It is an afterthought in this court. In the recent case of *Kideout v. Burkhardt*, 255 Mo. loc. cit. 124, 164 S. W. 508, it is said:

"The only remaining proposition urged by appellants is that A. Kuns, trustee in the deed of trust executed by appellants, was a necessary party, and, since he is not made a party, there is a defect of parties defendant. As to this proposition, it is sufficient to say that, appellants having failed to raise the point either by demurrer or answer in the trial court, the point is deemed to have been waived. R. S. 1909, § 1804."

What is here said applies with equal force to the trustee, as indicated in the close of our point 1, *supra*.

[4] III. The answer upon which the case was tried was an amended answer, and was verified by affidavit, and it is urged that it in effect was a non est factum plea. In this answer there is a general denial, but nowhere in it is there a specific averment that the defendant did not in fact sign such note. On the contrary, the remainder of the answer proceeds upon the theory that the defendant did sign such note, but was mentally incapacitated at the time. The whole defense was conducted upon that theory. During the whole trial defendant sat mute, and never took the stand to deny his signature to the note. He was not a witness in his own behalf. By proper legal action he had been determined to be a person of sound mind long before the trial. His failure to testify to the salient things contained in his answer casts suspicion, at least, upon the bona fides of his claims. *Kame v. Railroad*, 254 Mo. loc. cit. 195, 162 S. W. 240; *Bryant v. Lazarus*, 235

Mo. loc. cit. 612, 139 S. W. 558; 16 Cyc. 1062. Of whether the signature to the note was his signature the defendant had peculiar knowledge. Whether he secured the consideration for the note was within his peculiar knowledge. Yet, with the latter question fully within his answer, he stood mute throughout.

But the foregoing is but preliminary to the question which appellant urges. The plaintiff offered the deed of trust, and the note, and rested his cause. The defendant then placed upon the stand a number of witnesses in an attempt to show that he was mentally incapacitated at the time of the execution of these instruments, and that plaintiff had knowledge of his condition. We use the words "in an attempt to show," *supra*, advisedly and purposely. He nowhere attempts to show that his signatures to the two instruments were not genuine. He proceeds throughout on the theory that they were genuine, but not binding, because of his mental incapacity. The note introduced was the note described in the deed of trust, and the deed of trust was duly acknowledged before a notary public. Upon the close of defendant's evidence, the trial court refused to allow plaintiff to introduce evidence upon mental capacity, stating that defendant's evidence failed to show mental incapacity, and entered judgment for plaintiff as heretofore stated. Now, when the deed of trust was offered, the following occurred:

"By Mr. Campbell: Plaintiff offers in evidence Plaintiff's Exhibit A, being the deed of trust in suit.

"By Mr. Jayne: Defendants object to the introduction of Plaintiff's Exhibit A, for the reason under the pleadings it is irrelevant and incompetent.

"By the Court: Objection overruled.

"(To which ruling on the part of the court, the defendants, by counsel, then and there duly excepted at the time, and still excepts.)"

When the note was offered, the following occurred:

"By Mr. Campbell: Plaintiff offers in evidence Plaintiff's Exhibit A1, being the note described in the deed of trust.

"By Mr. Jayne: Defendant objects to the introduction of Plaintiff's Exhibit A1, for the reason stated. It is irrelevant and incompetent, and not proper to introduce Exhibit A1 under the pleadings.

"By the Court: Objection overruled.

"(To which ruling on the part of the court the defendants, by counsel, then and there duly excepted at the time, and still excepts.)"

[5] Upon this status of the record the defendant now maintains that there was error in admitting these two instruments in evidence. There was no oral proof that defendant signed either instrument. The deed of trust was duly acknowledged, and no proof of signature was required. *Barbee v. Bank,*

240 Mo. loc. cit. 306, 144 S. W. 839; R. S. 1909, § 2818.

The deed of trust, when in evidence, furnished proof of the fact that the note therein described was signed by the defendant, because there was such recitation in the deed of trust over the signature of the defendant. The certificate of the notary as to defendant's signature to the deed made the deed evidence of all the facts recited therein. Among the recited facts was that he had signed and delivered this note to plaintiff. This made a *prima facie* case for the plaintiff.

[6] In addition to this the objections to the introduction of these instruments are not specific, and insufficient to raise the point made here. The point made here is that plaintiff should have proved the signatures. Such objections should have been made to the trial court. Those made are insufficient to raise the point. *Williams v. Williams*, 259 Mo. loc. cit. 250, 168 S. W. 618. In that case it is said:

"The above was not a sufficient objection upon which to base error. An objection to a question should be specific, so that the trial court may have a chance to pass upon the exact point which is intended to be urged. *Kinlen v. Railroad*, 216 Mo. 145; *O'Neill v. Kansas City*, 178 Mo. 91; *Schmidt v. St. Louis Ry. Co.*, 163 Mo. 645; *Primm v. Raboteau*, 56 Mo. 407."

In the instant case the objections made should have pointed out to the court that proof of signatures had not been made. The objections are in the most general language. A trial court would have to think long before (if ever) he would conclude that the real objections were no proofs of signature had been made. Trial courts are entitled to know the real objections to the introduction of evidence, and cannot be ambushed by such general language as here used.

IV. We are asked (in a general way) to read the record from pages 30 to 168, for the evidence as to the mental condition of the defendant prior to the execution of the deed of trust. We have read it with care, although the brief filed makes but little point on this evidence. There were a number of witnesses examined. Many were indefinite as to dates, and whilst they concluded that defendant was incapable of transacting business, yet when pressed for facts, the facts related were trivial. Defendant drank liquor, and many of his alleged statements were no doubt due to that fact. They all had to admit that defendant had conducted a large business, and so far as they knew a successful business. The testimony was all oral, and the witnesses before the court, and in such case we will yield to his judgment.

But in addition to all this it appears that defendant's wife had procured a judgment for divorce and alimony. The alimony was in the sum of \$4,000. In this status of af-

fairs the defendant, through his guardian, brought a suit to set aside the very deed of trust and note here in suit. The present defendant, through his guardian and curator, was the plaintiff in that suit, and the present plaintiff, Sanders, was the defendant. Before the trial of the case there was an adjustment of difficulties. It was agreed that the wife should reduce her judgment to \$3,500, instead of the \$4,000 allowed her, and that the parties would close all litigation. Pursuant to this understanding, the following judgment of dismissal was entered in the suit to cancel the deed of trust and note:

"By agreement, order granting change of venue is set aside and plaintiff enters nonsuit, and by agreement it is found and adjudged that Nathan Kaster executed the deed of trust mentioned in plaintiff's petition, and same is adjudged to be a valid lien on the lands mentioned in said petition, and it is ordered by the court all costs heretofore be taxed against plaintiff herein, and execution issue therefor."

The reduced judgment of \$3,500 was paid, and apparently all matters were adjusted until this case was instituted. The pleadings in that case are not fully set out in this record, but the substance of the petition is set out, and its allegations were substantially those of the answer in this case. It occurs to us that the question in this case has been adjudicated by this agreed judgment. But, whether so or not, there is no substance in this appeal, and the judgment below is affirmed.

BLAIR, P. J., concurs.
WOODSON, J., absent.

GOODE, J. (concurring). In this case the omission to make the trustee a party was not raised in the court below, and cannot be raised for the first time in this court; so whether, if the point had been made below, it would have been good, need not be considered here. 2 Jones, Mortgages (7th Ed.) 1397; *Shelby v. Burtis*, 18 Tex. 644.

**ST. PAUL FIRE & MARINE INS. CO. et al.
v. AMERICAN TRUST CO. et al.**

(Supreme Court of Missouri, Division No. 1.
April 10, 1920. Rehearing Denied June 2,
1920.)

1. Appeal and error ⇨719(4)—Appeal from judgment sustaining demurrers not dismissible because of absence of formal assignment of errors.

Plaintiffs' appeal from judgment following the sustaining of demurrers to the petition will not be dismissed because of lack of formal assignment of errors, where the case is one on

the record proper, and appellants have, under their head of points and authorities, succinctly and definitely pointed out the reasons why they think the court erred in sustaining the demurrers.

2. Usury ⇨127—Owner of securities contracting with pledgor not to be personally liable not in privity, and entitled to raise question of usury.

Where bondholders of an insolvent railroad assigned their bonds to a bondholders' committee, empowering the committee to pledge the bonds, but expressly stipulating that the bondholders should not be personally liable on any loan, the bondholders could not recover the securities, when pledged, from the pledgee on the ground that the loan made was usurious, under the rule that the plea of usury is a privilege personal to the debtor or his privies, having, in effect, cut off their privity by their agreement, turning over the securities to the committee with plenary power and disclaiming personal liability on any contract for a loan.

3. Usury ⇨111(1)—Pleading held insufficient as not showing time that loan, for which commission was paid, had to run.

Usury was not sufficiently pleaded, where the only allegation of fact as to a \$50,000 loan as to which usury was charged was that there was paid a commission of \$1,000 and interest at the rate of 7 per cent. and the length of time the loan was to run was not stated; for mere conclusions are not sufficient, and the pleadings should show that the length of time the loan was to run was not such that, even with the \$1,000 commission, the actual rate of interest would not exceed the legal rate, 8 per cent.

4. Usury ⇨92—To recover property pledged to secure loan usurious only in part, the valid portion of loan must be tendered.

Railroad bondholders could not recover from pledgee on ground of usury securities which had been pledged by bondholders' committee, as authorized by plaintiffs, where one of the loans for which the securities were pledged was not usurious, but was a valid lien upon the securities, and the plaintiff bondholders did not tender the amount of such loan, but merely offered to pay their pro rata share; the pledgee having the right to hold all the security until the payment of the debt.

5. Account ⇨4—No action lies for accounting by bondholders against committee, in absence of showing of insolvency.

Suit for accounting by railroad bondholders against bondholders' committee, on the ground the committee violated their duties to the bondholders' damage, held not to lie, in the absence of a showing of insolvency; there being a remedy at law.

Appeal from St. Louis Circuit Court; Vital W. Garesche, Judge.

Action by the St. Paul Fire & Marine Insurance Company and others against the American Trust Company and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Kinealy & Kinealy, of St. Louis, for appellants.

Wilfley, McIntyre, Nardin & Nelson, of St. Louis, for respondents.

GRAVES, J. Action in equity for an accounting. The petition only covers 50 closely printed pages. Defendants filed separate demurrers to the petition, each of which was sustained, and, plaintiffs refusing to plead further, judgment was entered against them, and from such judgment they have appealed. Counsel do not agree as to the substance and effect of the divers allegations of the voluminous petition. We give plaintiff's outline thereof, and can in the course of the opinion note the points of the divergent views of counsel. Plaintiffs' outline will at least convey the general idea of the case, and plaintiffs' contentions. In their statement of the case counsel for plaintiffs say:

"The case made by the petition is as follows:

"The Alton, Jacksonville & Peoria Railway Company, owned and operated an electric railroad from Alton to Godfrey, a distance of some five miles, in Madison county, Ill., with the right to extend same to Jerseyville, Jacksonville, and Peoria. On July 1, 1910, the company executed a mortgage upon all its property to secure an issue of \$600,000 of bonds, and nearly the whole amount of the bonds were issued and sold. Thereupon the company entered into a contract with Grommet Bros. and John Scott & Sons to construct the roadbed for an extension of the road from Godfrey to Jerseyville, and that being completed in May, 1911, there was due the contractors some \$10,000, for which, under the laws of Illinois, they had a lien. For the finishing of that portion of the road the company entered into a contract with Grommet & Johnston to surface the roadbed, lay the steel, and put up the overhead structure, and under that the contractors did work until August, 1911, when it was stopped by the railroad company, at which time the contractors claimed a balance of about \$40,000 due, for which, under the laws of Illinois, they claimed a lien. In the fall of 1911, one Davis filed a suit in the circuit court of Madison county, Ill., for the appointment of a receiver for the road, and in that suit one Butler was appointed receiver, with authority to take possession of and operate the railroad. Thereupon the holders of the bonds of the railroad company entered into a written agreement dated December 4, 1911, between themselves as parties of the first part and W. C. Fordyce, George L. Edwards, and J. C. Van Riper, of St. Louis, C. A. Caldwell, of Alton, and John J. Cummings, of Chicago, as a bondholders' committee, parties of the second part, which recited the execution of the mortgage and the receivership proceedings and the desirability that the property and franchises of the road should be sold either at receiver's sale or under foreclosure of the mortgage and that the interest of the bondholders should be protected and that that could best be done by a committee, and therefore it is agreed between the parties as follows:

"First. That the above-named parties should constitute a committee to represent all the subscribers to the agreement with power to

take such measures and do such things to effectuate the above purposes and to protect the interests of the subscribers as the committee deemed advisable.

"Second. Each subscriber sets opposite his name the face value of the bonds owned by him, and agrees to deposit same with the Commonwealth Trust Company for the use of the committee, and assigns to the committee for the purposes of the agreement all his bonds and his rights as bondholder.

"Third. The committee shall represent the subscribers in all rights as such bondholders, and the action of the committee shall be deemed the action of the subscribers. The committee shall have the sole management of matters arising under the agreement and may pay out such sums as they deem necessary, including a reasonable compensation to themselves. The committee may take such steps as they deem for the best interest of the subscribers towards causing a sale of the property and to protect the interests of the subscribers.

"Fourth. In case of a sale of the property of the railroad the committee is authorized to purchase same, and to use the bonds and coupons in payment therefor.

"Fifth. The committee shall have power to borrow money required to be put up in case of a sale of the property in order to pay the costs and expenses of the receivership and of the sale, including all allowances to receivers, attorneys, etc. The committee shall have power to execute a mortgage on the properties bought at any such sale, and is authorized to mortgage or pledge all the rights of the bondholders, or which they may have to any of the proceeds of the sale of the railroad property, and also all the rights of every kind which the subscribers may have as bondholders; it being understood, however, that for reimbursements for money borrowed the committee must look solely to the property transferred to the committee, and that there shall be no personal liability on the part of the bondholders.

"Sixth. In case the committee should purchase the property of the railroad company, it is authorized to organize a new corporation and to transfer same to it.

"Seventh. The committee shall exercise all the rights and powers of the several owners of the bonds, and shall take such measures and do such acts as it appears proper to the interests of the subscribers. The Commonwealth Trust Company is authorized to deliver all the bonds to the committee. The committee shall have all powers necessary or incident or which appear expedient for carrying out the purposes of the agreement.

"Eighth. Any person loaning money to the committee shall not be required to look to the application thereof.

"Ninth. In case any question arises as to the construction of the agreement, same shall be decided by the written instructions of three-fourths in value of the bonds represented by the subscribers. The committee shall not be liable for any errors of judgment. The death, resignation, or disability of any member of the committee shall not dissolve it, but the remaining members shall appoint a successor. The agreement shall continue in force until the matters therein provided for shall have been carried out. The trust company shall give a receipt for all bonds deposited under the agree-

ment, and the agreement shall be for the benefit of the parties, their executors and assigns. The death of a subscriber shall not revoke the powers of the committee, nor shall such powers be revoked during the existence of the agreement. The vote of a majority of the committee shall control its action.

"Tenth. The failure of any subscriber to perform any part of his undertaking shall not release any other subscriber.

"Eleventh. Upon the winding up of the matters covered by the agreement, all moneys, properties, and securities held by the committee shall, after payment of all expenses and liabilities incurred by the committee, be divided ratably among the holders of the depositary receipts.

"Twelfth. Since certain of the subscribers hold bonds in pledge, they shall be entitled to participate on the understanding that they shall later on perfect their title to the bonds held by them.

"This bondholders' agreement was signed by the holders of a total of \$589,750, face value out of the total of \$600,000 of bonds issued, and each signer deposited his bonds with the Commonwealth Trust Company in accordance with the agreement. Amongst such signers and depositors were T. J. Scott, \$20,000; Hearne Timber Company, \$9,500; S. H. Wyss, who later assigned his rights to plaintiff, Khlmliller, \$54,000; Frank Blake, who later assigned his rights to plaintiff, St. Paul Fire & Marine Insurance Co., \$55,500.

"On May 18, 1912, a written agreement was made between John J. Cummings on the one part and the other members of the bondholders' committee on the other part to the effect that the parties should co-operate in causing the Madison county circuit court to authorize the receiver to issue receiver's certificates to finish the road to Jerseyville and for equipment, and that efforts should be made to have the road sold and purchased by the committee, and that thereupon the parties to the agreement should cause a new railroad corporation to be formed, with a capital stock of \$500,000, and which should issue \$500,000 in bonds. Thereupon the bondholders' committee and Cummings filed a petition in the receivership case, asking that the receiver be authorized to issue receiver's certificates for the purposes aforesaid, and the court made an order, granting the request and ordering that the certificates should be a first lien upon the property of the railroad company. From this order Grommet & Johnston, Grommet Bros., and John Scott & Sons, the lien-claiming contractors, appealed, and the appellate court affirmed the order authorizing the issue of the receiver's certificates, but reversed it so far as the order undertook to make the receiver's certificates a lien prior or superior to the mechanics' liens of the contractors. The receiver's certificates were issued and used in completing the construction of the road to Jerseyville and in purchasing certain cars and other equipment.

"Under date of February 20, 1914, a contract was made between John J. Cummings as party of the first part and the remaining members of the bondholders' committee as a committee, which recites that whereas, various agreements had been made between the parties; and whereas, negotiations are now being concluded whereby those agreements are to be

abrogated and adjustments made disposing of the various interests of the bondholders, lien claimants and others interested in the property and the litigation: Therefore it is agreed between the parties as follows:

"(1) The prior agreements between the parties shall be deemed abrogated upon the taking effect of this agreement.

"(2) The parties agree to co-operate to procure an order of sale of the railroad company's property from the circuit court of Madison county, and to bid in the property at such price as shall be agreed upon.

"(3) The bonds deposited for the use of the committee shall be used and deposited in payment of the purchase price of the property, if bought by the committee, and, if deemed advisable, the receivers' certificates may also be used for that purpose, Cummings agreeing to procure the same for the committee; the committee to issue to him a participation certificate evidencing the amount of such receiver's certificates.

"(4) The committee agrees to raise sufficient money by pleading the securities in their possession to pay all the necessary incidental expenses, the receiver's salary, and any cash that may be necessary to be expended in compromising the lien claims.

"(5) Before participation certificates shall be issued to parties whose claims are compromised, such parties shall agree to release their pending proceeds and discharge the company and its property from liability.

"(6) In case the property is purchased at the contemplated sale by the committee, a corporation shall be organized by the parties to the agreement, with a capital stock to be later determined, and with authority to issue \$2,000,000 of first mortgage bonds of which \$450,000 shall be issued and the remainder held to be used for extensions and betterments; the general form of the mortgage deed to be satisfactory to Cummings and the committee, as well as to E. W. Clarke & Co. of Philadelphia; the \$450,000 of bonds to be delivered to the committee and all the stock to Cummings; the reorganization to be subject to the orders of the Public Utilities Commission of Illinois.

"(7) In case any question arises as to the relative amount of stock and bond issue, the stock issue shall be reduced instead of the bond issue, so that \$450,000 of bonds may be issued.

"(8) Cummings agrees to cause said \$450,000 of bonds to be guaranteed by the East St. Louis & Suburban Railroad Company or any of the associated companies controlled by E. W. Clarke & Co.

"(9) It is understood that Cummings represents that he has a valid agreement with E. W. Clarke & Co., under and by the terms of which they undertake to guarantee at least \$450,000, par value, of the bonds of the company to be organized as herein provided, and it is agreed that the only liability that Cummings assumes relating to the procurement of the guaranty is his obligation to enforce at his own expense the agreement with E. W. Clarke & Co. and he agrees that he will perform the several provisions of his contract with those parties, and in the event of the failure of Clarke & Co. to fulfill the terms of their agreement and guarantee the bonds the committee may be subrogated to the rights of Cummings in his agreement with Clarke & Co. Cummings represents that

he has not, since the execution of his contract with Clarke & Co., permitted anything to be done which would impair his right to enforce that contract, and agrees that if there are any equities to that effect of which he has no cognizance he will at once remove or satisfy same so that the contract may be enforced.

"(10) It is agreed that all bonds which shall be issued by the reorganized company shall be held by the committee for the purpose of conserving the rights of all parties, and participation certificates shall be issued by the committee as evidence of the interest of the respective parties, and the committee agrees that there shall be issued to Cummings, to evidence the lien of the receiver's certificates aggregating \$100,000, and which were purchased by him, a participation certificate, entitling him to receive \$90,000 in cash from the committee within five years from the date hereof, with interest at 5 per cent. per annum. None of the bonds of the reorganized company shall be distributed or sold until the amount for which the new bonds are pledged have been paid, and until the said sum of \$90,000 is paid to Cummings on his participation certificate. The committee agrees to try to sell within five years enough of the bonds to realize said sum of \$90,000.

"(11) If bonds sufficient in number are not sold to realize the amount due Cummings within five years, then the committee shall deliver to him bonds which, at their market value shall equal \$90,000, and in case of a difference of opinion as to the market value of the bond same shall be determined by arbitration.

"(12) In case settlement cannot be made with the lien claimants, and others, so as to permit an adjustment of those claims for less than \$90,000, this agreement shall be void.

"(13) Cummings agrees to accept the participation certificate mentioned in clause 10 in exchange for the receiver's certificates, and will on demand secure said certificates and assign them to the committee.

"(14) Cummings pledges certain bonds belonging to him in the possession of the committee under the bondholders' agreement for the faithful performance of the terms and conditions of this contract.

"Upon the execution of that agreement between Cummings and the bondholders' committee the latter compromised and settled the lien claims of the contractors. The agreement for such compromise was made on the faith of Cummings' statement that the new bonds would be guaranteed by E. W. Clarke & Co., and were all in the same form, and the following, with Grommet & Johnston, may be taken as a sample:

"In consideration of the bondholders' committee using their best endeavors to effect a settlement of all matters involved in the receivership of the Alton, Jacksonville & Peoria Railway Company, and in order to bring about an early settlement for the benefit of all parties concerned, we, the undersigned, hereby agree to accept in full settlement of all claims, and liens which we have against the Alton, Jacksonville & Peoria Railway Company, and all other persons, firms and corporations, a participation certificate, to be issued by the bondholders' committee (appointed under agreement of December 4, 1911), which shall represent nine thousand dollars (\$9,000) par value of five per cent. bonds of a new railway company with

an authorized issue of bonds aggregating two million dollars, of which amount four hundred fifty thousand dollars (\$450,000) are to be issued at the time of making the new mortgage. The participation certificate shall be issued under the terms and conditions set forth in the agreement between John J. Cummings and the bondholders' committee, dated February 20, 1914.

"It is understood that the bondholders' committee have secured the obligation of E. W. Clarke & Co. that said four hundred fifty thousand dollars (\$450,000) of bonds, principal and interest shall be guaranteed by the East St. Louis & Suburban Railway, or any of the associated companies controlled by E. W. Clarke & Co. of Philadelphia, said company to be satisfactory to the bondholders' committee and John J. Cummings.

"We further agree to dismiss all our suits now pending against said railway company and all others, and pay the court costs incurred by us and taxable against us in connection with our litigation, not including any attorneys' or receivers' fees or allowances; we, however, to pay our own attorneys' fees. And we hereby fully completely release and discharge all claims and causes of action which we have against the Alton, Jacksonville & Peoria Railway Company or the bondholders of said company and the properties involved in said receivership, and all liens and claims of every kind whatsoever against said parties and said properties.

"It is further understood and agreed that we will co-operate with your bondholders' committee in an effort to procure as speedy as possible an order of the circuit court of Madison county, Illinois, directing the sale of the property of the Alton, Jacksonville & Peoria Railway Company.

"It is understood that the participation certificates shall be issued to us as soon as the agreement between Mr. John J. Cummings and the bondholders' committee, dated February 20, 1914, goes into effect, as provided in said agreement and if said participation certificates be not so issued, this agreement shall be null and void and all rights under same canceled and held of no effect.

"On the execution of these agreements with the lien claimants the participation certificates, in accordance with the terms of the agreements, were issued to them, and they dismissed their lien proceedings.

"When these agreements had been all made, Cummings and the committee took such steps in the receivership case as resulted in a sale of the road under an order of the court, and upon such sale J. O. Van Riper of the committee became the purchaser of the road, and in payment for same surrendered and canceled all of the receiver's certificates, and \$589,750 worth of the bonds. In order to pay the allowances made the attorneys and the receiver, the commissioner and other incidental expenses attending the sale, the committee borrowed from the American Trust Company of St. Louis \$50,000 and by reason of an agreement to pay a commission of \$1,000, as well as 7 per cent. interest, this loan was usurious. Later on, the committee, requiring other funds, borrowed an additional amount of \$7,000 from the trust company.

"After Van Riper had bought the road, Cummings and the committee caused a new corpora-

tion to be organized under the laws of Illinois, known as the Alton & Jacksonville Railroad Company, and to this company Van Riper transferred the property purchased by him at the sale. The directors of this new company are Van Riper, Edwards, Fordyce and Caldwell, of the bondholders' committee, John J. Cummings, John L. Butler, and Edward P. Keshner, Mr. Van Riper being president. The capital stock of the corporation as organized was originally \$1,000, and thereupon an application was made to the Public Utilities Commission of Illinois for leave to issue bonds and stocks. Several hearings were had upon this application, and several orders made, but the whole proceeding culminated in a final order, made on December 2, 1915, in lieu of all other orders and findings of the commission. That order recited the sale of the property under the decree of the circuit court of Madison county, in pursuance of the reorganization agreement, and it set forth a finding by the commission that the total amount of the bonds and stock of the new company should not exceed \$642,000, and authorized the railroad company to increase its capital stock to \$142,000, and to issue \$500,000 of first mortgage bonds, of which the stock and \$450,000 of the bonds should be issued for the acquisition of the Alton, Jacksonville & Peoria Railway Company property, and the remaining \$50,000 in bonds should be sold at not less than 85 cents on the dollar, and the proceeds used as a working capital for the company and for improving the roadbed. All of the stock permitted by this order was issued and delivered to the directors, who delivered same to the American Trust Company, and all of the bonds were issued and delivered to the American Trust Company, but none of the bonds were guaranteed by E. W. Clarke & Co. or by any of the companies controlled by them, and they refused to make such guaranty.

"Although Cummings in his agreement with the bondholders' committee contracted on the express agreement that he had a contract with E. W. Clarke & Co., by which they pledged themselves to guarantee the bonds, and although the lien claimants gave up their prior liens on the faith of that statement of Cummings, yet he never exhibited the alleged contract to the committee, and as a matter of fact he had no such agreement with E. W. Clarke & Co. Plaintiffs are informed that he was interested in some contract of somebody with Clarke & Co., wherein they, under certain conditions, agreed to guarantee such bonds, but they claimed that those conditions were never fulfilled. At any rate Clarke & Co. never guaranteed the bonds, and all idea of procuring their guaranty was dropped by Cummings and the committee.

"Plaintiffs, lien claimants and holders of participation certificates as well as certain of the original bondholders of the old Alton, Jacksonville & Peoria Railway Company, made demand upon the American Trust Company for the distribution of the bonds and stocks of the Alton & Jacksonville Railroad in its possession, offering to pay their pro rata share of any valid indebtedness for which they were pledged to the trust company. The trust company refused to do this, and claimed that it was holding the bonds and stocks of the Alton & Jacksonville road, first, to secure an indebtedness due itself of \$57,000; and, secondly, to secure an indebt-

edness of \$90,000 due to John J. Cummings for his receiver's certificates.

"The prayer of the petition is that Cummings, by reason of his default in regard to the procuring of the guaranty of the bonds by Clarke & Co., be decreed to have no lien or claim against the bonds and stocks of the Alton & Jacksonville Railroad Company prior and superior to that of plaintiffs; that an account be taken of the amount of such bonds and stocks in the possession of the American Trust Company which plaintiffs are entitled to receive, respectively, as their proportionate part thereof; that the American Trust Company be decreed to deliver to plaintiffs their said proportionate part thereof upon the payment of their respective proportionate part of any valid indebtedness for which they are pledged, and for general relief."

The demurrers were alike in form and language, and that of one of them reads:

"Now comes the American Trust Company, defendant in the above-entitled cause, and demurs to the petition filed herein, and for grounds for demurrer states:

"First. That said petition does not state facts sufficient to constitute a cause of action against this defendant.

"Second. That this defendant is not a necessary party to this action.

"Third. That this court has no jurisdiction over the subject-matter of the action complained of in the petition.

"Fourth. That there is no equity in the petition."

As stated, the divergent views of counsel as to the substance and effect of the averments of the petition can be best noted in the course of the opinion. This outlines the case.

[1] I. In brief of respondents is a motion to dismiss the appeal because appellant has not made a formal assignment of errors. This point is not well taken. The brief of appellant contains several distinctly and clearly made points, with cited authorities, and this has always been held sufficient, although there might not be a formal assignment of errors. The only formal assignment of error that could be made in this case is that the court erred in sustaining the several demurrers. The case is one on the record proper; and, as said appellants have, under their head of points and authorities, succinctly and definitely pointed out the reasons why they think the court erred in sustaining the demurrers, under both the old and new rules of this court, we have held this a sufficient compliance with our rules. This point is ruled against respondent.

[2] II. Going to appellant's brief, the first and really a pivotal point, in their view, is that the American Trust Company cannot hold these securities against these plaintiffs (the alleged beneficial owners of a part thereof) because such company holds them as a pledgee under an usurious contract. They do not deny that the American Trust Company loaned the bondholders' committee the

money claimed, but they say that by reason of the fact that the American Trust Company charged 7 per cent. on the loan, and an additional \$1,000 commission, they exceeded the lawful rate of 8 per cent. and the contract was usurious. To our mind there are several answers to this contention. First the contract for the loan was made between the bondholders' committee and the trust company. The plaintiffs were not parties to the contract. By their agreement they had expressly excluded themselves from making such contracts, and had provided against any personal liability thereon. That under the contracts this committee had the right to borrow money, provided they only used the property as security, there is no question. That they did borrow the money there is no question. That the property in dispute is being held as security for this money there is no question. That these plaintiffs by their agreement refused to become parties to this loan agreement, or otherwise become parties to the loans which were to be made, stands out in bold type, on the face of the petition. They declined to be parties to this or any other loan to the committee. The committee was placed in charge of certain securities, to be used by it, but with the express understanding and agreement that these plaintiffs and others interested in the work of the committee would not negotiate loans or be responsible personally for loans.

So that the first question arising upon these facts, is whether or not these plaintiffs are in position to raise the question of usury. The loan was made between the committee and the trust company. These are the parties to the contract. The committee was forbidden to make plaintiffs and those similarly situated parties to such a contract. Under this status of pleaded facts, can plaintiffs raise the question of usury? We think not. The general rule is:

"The plea of usury is a privilege personal to the debtor or his privies in blood, contract or representation, and an attaching creditor of the mortgagor is a privy in representation with the mortgagor, and hence can interpose the defense." *Coleman v. Cole*, 158 Mo. 253, 59 S. W. 106; *Marx v. Hart*, 166 Mo. loc. cit. 524, 66 S. W. 260, 89 Am. St. Rep. 715.

So in the case at bar these plaintiffs might be in position to challenge this contract but for the fact that they, in effect, cut off their privy by the bondholders' agreement, by which they turned over the securities to such committee to be used as their own, and with the express reservation that they should not be obligated by any contract made for a loan. They are in the attitude of the man who stands by and sees a third party sell his horse without objection. Their mouths are closed, and their remedy is elsewhere, if any they have. They turned over these securities with the express understanding that they

would be pledged, and the further express understanding that they must not be made liable in any contract of pledge. This contract of pledge is one solely between the bondholders' committee and the trust company, and these plaintiffs are in no position to urge usury. They cut off their own privy to the contract as successfully as it could be done, by the bondholders' agreement. By that contract the matter passed beyond their control as to future contracts. The powers of the committee were plenary.

[3] III. There is another reason for the failure of the petition in this case as to the matter of interest. The allegations are that the American Trust Company made at least two loans of money to the committee, one for \$50,000 and another for \$7,000. The usury is charged as to the first. As to this loan the only allegation is that for it there was paid a commission of \$1,000 and interest at the rate of 7 per cent. Eight per cent. is the allowable interest. The length of time this loan was to run is not stated. This is important in the charge of usury. Mere conclusions of fact should not suffice. Had the time the loan was to run been stated it might appear that even with the \$1,000 commission, the actual rate of interest would not exceed the 8 per cent. allowed by law. The facts should have been pleaded, and not mere conclusions.

[4] IV. No charge of usury is made as to the second \$7,000 loan. This is clearly a valid lien upon all the property sought in this action. Under the bondholders' agreement, the committee was authorized to make the loan and pledge all the property. Until this debt is paid, or tendered, the plaintiffs have no standing. They only offer to pay their pro rata share. This will not suffice. The American Trust Company has a valid lien for at least the whole of this \$7,000, as against all and each part of the property, and a mere offer to pay a small pro rata part of the debt is not sufficient. As to this \$7,000 the American Trust Company had the right to hold all the security until the debt was paid. Plaintiffs should at least have tendered the payment of this full sum. This they did not do.

[5] V. Other matters pleaded go to mere irregular conduct upon the part of the committee, now claimed to be their agents. With these the American Trust Company had no part nor parcel. If the committee violated their duties, if they were the agents of the plaintiffs, and if plaintiffs were damaged or injured thereby, there is no action in equity, unless there be a showing of insolvency, so as to avoid a perfect remedy at law. No such showing is made in the petition. The demurrers were well taken, and the judgment nisi is affirmed.

All concur, except WOODSON, J., absent.

McFARLAND et al. v. BISHOP et al.
(No. 21141.)

(Supreme Court of Missouri, Division No. 1.
April 10, 1920. Motion for Rehearing
Denied June 2, 1920.)

1. Appeal and error §1009(4)—Findings not disturbed in equity cases unless clearly against weight of evidence.

In equity cases, the Supreme Court will not disturb lower court's findings of facts unless clearly satisfied they are against the weight of the evidence, especially where there is a volume of conflicting testimony by oral witnesses on each side of every issue.

2. Trusts §48—That one trustee shared in cash commission with another trustee held not to invalidate deed of trust.

That one trustee shared with the other in a cash commission in addition to regular commission provided for by deed of trust, pursuant to letter prepared by former trustee and signed by trustor after former trustee had told trustor that latter trustee demanded the cash commission, did not impair validity of deed of trust, even though trustor did not read, or read carefully, such letter, where former trustee did nothing to prevent him from so doing.

3. Evidence §271(7), 317(4)—Trustor's declarations as to contents of deed held inadmissible as hearsay and self-serving.

In action to cancel deed of trust on ground that trustees misled trustor as to contents thereof, evidence offered by plaintiffs as to trustor's declarations to witnesses as to contents of deed of trust held inadmissible to show that trustor made a mistake, or did not know contents thereof, being hearsay and self-serving.

4. Fraudulent conveyances §110(6)—Deed of trust held not void in so far as to use of grantor's children.

Father's deed of trust providing for monthly payment by trustees of specified amount to him during his lifetime and thereafter to his children, and providing for payment of principal to children upon their reaching specified age, was void, under Rev. St. 1909, § 2880, making conveyances to use of grantor void as to creditors and purchasers, as to father's subsequent purchasers or creditors who could reach such specified amount in a proper proceeding, but was not void as to children's remainder, being a valid conveyance, so far as it was for use of the children, even as to creditors and purchasers.

5. Fraudulent conveyances §172(2) — Deed of trust to grantor's use will not be canceled in action for grantor's benefit.

Deed of trust will not be canceled in action therefor brought for grantor's benefit under Rev. St. 1909, § 2880, making conveyance to use of grantor void as to creditors and purchasers; such statute not being for benefit of grantor, but for purchasers and creditors.

6. Deeds §7—Parent can deed children a contingent remainder.

A parent can by deed give his children a contingent remainder; such conveyance not being void or for grantor's use.

7. Remainders §1—Contingent remainder an "interest in real estate."

A contingent remainder is an "interest in real estate."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interest.]

8. Trusts §140(3)—Deed of trust held to create vested remainder in trustor's children.

Father's deed of trust, providing for monthly payment to him of specified amount out of income or principal during his lifetime and thereafter to his children born or to be born, and providing for payment of principal to children upon their reaching specified age, created a vested, and not merely a contingent, remainder in the children, notwithstanding after-born children were to share in remainder, and notwithstanding that amount annually payable to father was payable out of principal.

9. Fraudulent conveyances §172(1)—Deed of trust not void as a conveyance to grantor's use.

Father's deed of trust, providing for monthly payment of \$500 to him, with such further sum as in trustees' discretion became necessary for medical and other extraordinary expenses, with remainder over to children, held not void as a conveyance to father's use on theory that entire estate might be appropriated for such extraordinary expenses, where income was \$5,000 per month, since if the contingency of father being entitled to anything for medical expenses, etc., in addition to regular allowance to the detriment of creditors or purchasers ever happened, equity would determine the amount to which he would be so entitled, and award it to creditors or purchasers.

10. Equity §65(2)—He who comes into equity must come with clean hands.

Equity will not cancel deed of trust on ground that by fraud or mistake certain clauses had been omitted therefrom, when purpose of omitted clauses had been to enable grantor, a married man, to carry out an illegal agreement with a married woman, whereby they were each to procure divorces and marry each other, though in fact grantor, when divorced, married a third person, since he who comes into equity must come with clean hands.

Appeal from St. Louis Circuit Court; Wm. T. Jones, Judge.

Action by Bates H. McFarland and another, trustees for Henry B. Graham and Georgine M. Graham, against John E. Bishop and another, trustees for Henry B. Graham, Dorothy M. Graham, Marjorie P. Graham, and Henry B. Graham, III, and others. Judgment for defendants and plaintiffs appeal. Affirmed.

Koerner, Fahey & Young and Jourdan, Ras-sieur & Pierce, all of St. Louis, for appellants.

Wilfey, McIntyre, Nardin & Nelson, of St. Louis, for respondents Bishop and American Trust Co.

T. J. Rowe, of St. Louis, guardian ad litem of infant respondents Marjorie P. Graham and Henry B. Graham, III.

SMALL, C. I. On May 24, 1916, Henry B. Graham of that city, then about 41 years of age, signed and delivered an agreement dated May 23, 1916, which is sought to be set aside by this proceeding. By said agreement Graham conveyed to the defendants John E. Bishop, his attorney, and the American Trust Company, as joint trustees, all of his estate, consisting of both real and personal property, all located in St. Louis. The real estate was incumbered and the equities were of the estimated value of \$87,200. The personal property, consisting mostly of stocks and bonds, was of the value of about \$513,351.81. The yearly gross income from the personal estate was about \$32,420. Not including the deeds of trust on the real estate, the amount of his indebtedness was \$168,000, and the total yearly fixed charges, including interest, amounted to \$23,246.22. In addition, he owed sundry current bills, amounting to \$2,772. The larger part of this indebtedness was held by W. K. Bixby, all of which was secured by stock in the Graham Paper Company, a very prosperous concern, the common stock of which was then paying 27 per cent. annual dividends. Afterwards, such dividends were greatly increased, so that from the time the deed of trust was made, until the trial, a period of less than 2 years, the aggregate dividends on such common stock, of which the trustees held 700 shares, was \$220 on each share. His net income at the time the first deed of trust was made, over interest and other charges, was about \$9,000 per annum, and at the time the petition was filed it alleges the gross income from the estate was \$5,000 per month.

The deed of trust by which the property was conveyed to the defendants Bishop and the American Trust Company, as trustees, after reciting that it was made "to make provision for the party of the first part and his children, Dorothy, Marjorie, and Henry B., III, and any child or children that may hereafter be born to the party of the first part," and with the power and obligation on the part of the trustees to hold, sell, manage, invest, and reinvest said property, and to that end to undertake to provide for the payment of the then existing debts and obligations of the said Graham, and of all liens and incumbrances upon said property from either sale or by pledging said property, provided that "from the property hereby conveyed to said trustees, or from the income or proceeds of sale of said property, or from any property or proceeds thereof, acquired by the trustees,

under the provisions and powers hereof, the said trustees shall pay or provide for the payment of the fixed charges," etc. And also by paragraph 4 it was provided that—

"From said estate, or from the income or proceeds thereof, said trustees shall during the lifetime of the party of the first part (said Graham), and the continuance of this trust, pay to the party of the first part, the sum of \$500.00 per month * * * and in addition thereto, such further sums, as in the sole discretion of the said trustees, may be necessary and proper to provide for medical and hospital care and treatment, and such extraordinary care and expenses as may arise from bodily injury, sickness or ill health of the party of the first part."

Then follows a provision that after all the debts of said Graham have been paid, together with all expenses and indebtedness incurred by the trustees, the said Graham shall receive "all of the income from said estate." It was also then provided as follows in said agreement:

"The trust hereby created shall be a continuing one, and the trust estate shall be held intact subject to the payments hereinabove provided, during the life of the party of the first part, and after his death, the same shall be held for his children in equal parts, and as they severally arrive at the age of twenty-five (25) years the proportionate part of the estate then held by the trustees hereunder shall be paid to said children, except that no child shall receive his or her proportionate part of said estate until one year after the death of the party of the first part. And providing further that the trustees are authorized after the death of the party of the first part from said estate to pay to or on behalf of each of said children such amount as in the judgment of said trustees may be necessary and proper for the support, maintenance, education and comforts of said children."

At the time said agreement was executed and delivered, the trust company agreed to and did advance some \$15,000 or \$16,000 to pay off pressing debts secured thereby, and at the time of the trial, had paid off about one-half of the total indebtedness, leaving about one-half thereof unpaid, and had also, in the meantime, paid the said Graham \$500 per month.

On March 12, 1917, Graham and his then wife made another deed of trust, revoking the deed of trust of May 23, 1916, made to the defendants Bishop and American Trust Company, and conveying to the plaintiffs McFarland and Janis, as trustees, all of his property, real and personal, including that in possession of the defendants, and authorizing them to take possession thereof, and, if necessary, to resort to the courts for that purpose. Plaintiffs thereupon, on March 14, 1917, demanded of said defendants, trustees, the possession of all the property conveyed to them, and then in their hands, with which de-

mand they refused to comply. Thereupon, on March 17, 1917, this suit was brought.

The deed of trust executed to the plaintiffs on March 12, 1917, after conveying all said property, provided that the much larger part thereof in value should be held by said trustees for the joint use and benefit of the said Henry B. Graham and Georgine Graham, his wife, and to the survivor of them, and also contained the following clause:

"In case of the death or divorcement of my wife, prior to my decease, said estate shall vest automatically in said trustees and be thereafter held and administered by them as part of my general estate, under paragraph second hereof, subject to the order, as to alimony, of the court granting such divorce and said joint estate may be changed or revoked at any time prior to such death or divorcement by joint action of myself and my wife, Georgine Graham."

The balance of the property, not included in the joint estate in case he died before his wife, was to be held in trust and paid to his children then living and afterwards born in practically the same manner as in the deed of trust of May 23, 1916. As to this part of the trust estate, a power of revocation was vested in Graham alone. There was also a similar provision for the payment of all existing creditors by the trustees, and like powers of management, control, sale, investment, and reinvestment, as in the conveyance of May 23, 1916. Also a provision for a payment of \$1,000 per month to said Graham, until all debts were paid, and then the whole income from the joint estate was to be paid to his wife and himself jointly, and the income on the balance of his estate to himself. The instrument further provided that in consideration of the creation of the joint estate in the wife and the husband, the wife relinquished all her rights of dower to her husband in said estate. It was signed by Graham and his wife, Georgine Graham.

The petition, after setting up the execution of these two deeds of trust, charged that the deed of trust of May 23, 1916, made to the defendants Bishop and American Trust Company, as trustees, was void under section 2880, R. S. 1909, which provides that all conveyances for the use of the grantor shall be void as to existing creditors and subsequent creditors and purchasers. The petition further alleged that the plaintiffs, as trustees, were purchasers, in that they were trustees for the wife, and also represented the creditors of said Graham. That it was also void because it was procured by the fraud of the defendant Bishop, in inducing said Graham by false representations as to its contents to execute it. Also, because it was procured by accident and mistake, in that the said Graham, at the time he executed it, supposed that it contained a clause authorizing him to revoke it and change it, and for the return of his property to him, when his debts were paid.

That it was also void because said Graham was intoxicated at the time he executed it, and was mentally incapacitated on account of his indulgence in strong drink, and by reason of worry over his daughter's illness, his own bad health, and the trouble with his then wife.

The prayer of the petition is that the agreement of May 23, 1916, be canceled, and an order be made, compelling defendants Bishop and the American Trust Company, trustees, to deliver possession of the estate to the plaintiffs. The answer of the defendants put the allegations of the petition in issue.

It appeared from the evidence that said Graham, at the time the suit was commenced, had been married four times. His first wife had died, leaving two children, Dorothy and Marjorie. In 1912 his second wife was divorced; she had one child, Henry B. Graham, III. He afterwards married a third time, and in February, 1916, his third wife left him, and went to New York City, where she lived in adultery with another man. By her Graham had no children.

In March, 1916, he became engaged to marry Mrs. Snowden, who was then living with her husband in St. Louis, as soon as he should be divorced from his wife and she from her husband. Both of them employed the same lawyer in St. Louis to bring their divorce suits for them. Graham's divorce suit was brought in the county of St. Louis, his wife coming on from New York City and being served with process in that county. She failed to appear at the trial. A divorce was granted to him on the 3d of June, 1916. The wife received \$2,500 in money, for which she released her rights in his homestead, and made no defense to his suit. Mrs. Snowden brought her suit in the city of St. Louis, and her divorce was granted on the 30th day of June, 1916. On the 1st of July, Graham eloped with Mrs. Snowden's sister. They went to Decatur, Ill. They tarried there a day or so, and then went to Indianapolis, where they remained a few days. They then proceeded to Pearl Beach, Mich., where Graham had a summer home, and the next day they were married. They returned to St. Louis about the 26th of July, in order that Graham might attend a meeting of the Graham Paper Company, in which he was a director. Mrs. Snowden then sued him for breach of promise for \$100,000 which he compromised for \$4,000.

The evidence showed that Graham was a hard drinker, but it was conflicting as to whether or not it incapacitated him from business. Much testimony was introduced pro and con on this issue. The same is true as to whether or not he was drunk at the time he executed the instrument of May 23, 1916.

There was evidence on the part of the plaintiffs tending to support the allegations of the petition that Graham supposed that said in-

strument of May 23, 1916, contained a clause giving him the right to revoke it, and providing that his property should be returned to him, when his debts were paid, for the reason, among other things, that he was engaged to marry Mrs. Snowden, when he should be divorced from his then wife, and Mrs. Snowden should be divorced from her husband, and he desired to make a provision for her of greater value than he would be able to do from the \$500 per month and the income of his property, after his debts were paid, reserved to him by said agreement. On the other hand, there was evidence to show that while Graham wanted this reservation in said deed of trust, he was notified a day or so before it was executed by defendant Bishop that the trust company would not consent to any such reservation, and would not act as trustee except on condition that the said deed of trust was irrevocable; that Mr. Bishop fully explained the deed of trust, as it was made, to Graham before he executed it, and that he fully understood its contents, and was sober and in his right mind when he executed and delivered it.

Likewise, on all other issues in the case, there was much evidence, and it was conflicting. The evidence was all practically oral, and delivered in open court before the judge below, who decided all the issues of fact in favor of the defendants, and rendered judgment against the plaintiffs and for the defendants. After unsuccessfully moving for a new trial, the plaintiffs appealed to this court.

In the view we take of this case, it is not necessary for us to set out the proceedings at the trial, or refer to the very voluminous testimony to any greater extent than we have done, or shall do in the course of this opinion.

[1] II. The record is very voluminous. It would be wholly impracticable to attempt to set out even the substance of the evidence of the various witnesses. The testimony was practically all oral. It was heard by the learned chancellor below, who had a better opportunity to observe the witnesses and judge of the weight of their testimony than we have from the cold type of the record. He found all the issues of fact for the respondents and against the appellants. Even had we some doubt as to the correctness of his conclusion on the facts, we should not be inclined to disturb his rulings, because our rule in equity cases is to defer somewhat to the findings of the lower court as to the facts, and not to disturb such findings unless we are clearly satisfied that they are against the weight of the evidence. This rule is especially applicable when there is such volume of conflicting testimony by oral witnesses on each side of every issue as is the case here. But in this case the evidence has not awakened any doubt in our minds as to the soundness of the conclusion on the facts of the

learned chancellor below. On the other hand, we entirely agree with him that the weight of the evidence is clearly in favor of the respondents on the issues in the case. That there was no fraud or misrepresentation practiced by any one to induce Graham to execute the instrument of May 23, 1916, mentioned in the petition; that he was a hard drinker, but was not drunk when he executed said instrument; that he was not incapacitated by drink or otherwise so that he did not understand it; and that he was fully informed as to its contents and made no mistake, when he signed and delivered it. We are also satisfied that it was a wise, timely, and provident disposition for him to make of his property, under all the circumstances of the case. His affairs, owing to his dissipated habits, were drifting towards bankruptcy, and he wisely determined to turn his property over to competent and responsible trustees to manage and control it and hold it, so that he could not further waste or dissipate it, and thereby his existing creditors would be paid and he would be assured a sufficient support for life, and the children of his blood and bone would receive the corpus of his estate at his death. We find that he, himself, first thought of and suggested a trusteeship, as admitted by appellants. This shows that while, in his dissipated condition, he did not think he was competent to successfully handle his affairs, in which we agree with him, he was competent enough to know that fact and to understand and appreciate it, and sensible and sound-minded enough to conclude to put his affairs in competent hands. The agreement itself is strong evidence that he was in his right mind. It is true that at first he desired to have a power of revocation in the trust deed, but when he found he could not obtain a satisfactory trustee without making the trust irrevocable, he concluded, and we think wisely under the circumstances surrounding him, to make the trust irrevocable. In any event, we find he did so with full knowledge and appreciation of the fact, and we see no reason in the proofs to set aside his action or that of the lower court in refusing his demand in that behalf.

[2] III. But, independent of all other considerations, it is said by appellants that the evidence shows that defendant Bishop misled Graham, as to his receiving one-third of the \$3,000 cash commission paid by Graham to the trustees, in addition to the regular commission provided for in the deed of trust. The evidence shows that Bishop told Graham that the American Trust Company wanted a cash commission of \$3,000, besides the regular commission, and did not inform him that he (Bishop) was to get any part of it. The regular commission was to be 5 per cent., of which Bishop was to receive 2 per cent. and the trust company 3 per cent. This was pro-

vided for in the deed of trust. Both were trustees. It is not claimed that Bishop told Graham that he was not to receive any part of the \$3,000 cash commission, but that he told him (Graham) that the trust company wanted the \$3,000 extra commission. This was true. Bishop did not ask for it. It was the trust company which demanded it. But, as there were two trustees, and the commission provided for in the deed of trust was to be divided between them, Graham was, at least, put upon inquiry by Bishop as to whether he would receive a part of the \$3,000 commission, when he told Graham that the trust company demanded such commission. The presumption was natural, it seems to us, that this commission would also be divided between the trustees. Furthermore, Bishop prepared and Graham signed the following letter, directed to both the trust company and himself, with reference thereto:

"St. Louis, Missouri. American Trust Co., and John E. Bishop. St. Louis, Mo.—Gentlemen: In view of the proposed contract contemplated to be entered into between you and myself for the purpose of handling my property and disposing of it in accordance with that contract, and, as an inducement and additional compensation for handling the matter, I hereby authorize you to pay to yourselves the sum of three thousand dollars (\$3,000.00) in addition to the compensation provided for in said contract, the same to be paid out of the property transferred to you by said contract.

"Yours truly, H. B. Graham."

It may be that Graham did not read, or read carefully, this letter, but Bishop did nothing to prevent him from so doing, and it shows he intended to do nothing to mislead him. We hold, there was nothing improper in the conduct of Mr. Bishop in this regard, and that the deed of trust assailed is in no way impaired thereby.

[3] IV. It is also asserted that the lower court erroneously excluded certain declarations alleged to have been made by Graham to third parties, in the absence of defendants, before and after the deed of trust to them was executed and delivered, as to the contents of said instrument; that he told said parties he had made, or was going to make, an instrument which placed his property in the hands of trustees until his debts were paid and the property was returned to him. The evidence was offered on the theory that it tended to show that Graham made a mistake or did not know the contents of the instrument he made. It was therefore to prove the truth of the plaintiffs' assertions. The court rejected this testimony, as hearsay and self-serving. We know of no authority holding that a party can make declarations to third parties in his own favor, and then have such parties testify to such declarations to sustain the truth of his allegations in the case. The rule is elementary that such de-

clarations are inadmissible. *Gibson v. Gibson*, 24 Mo. 227; *Bush v. Bush*, 87 Mo. 485; *Hammond v. Beeson*, 112 Mo. 201, 20 S. W. 474; *Teckenbreck v. McLaughlin*, 209 Mo. loc. cit. 546-549, 103 S. W. 46; *Weber v. Strobel*, 236 Mo. loc. cit. 663, 139 S. W. 188.

V. But, it is claimed that section 2880, R. S. 1909, makes the trust deed to defendants null and void. That section is as follows:

"Every deed of gift and conveyance of goods and chattels, in trust, to the use of the person so making such deed of gift or conveyance, is declared to be void as against creditors, existing and subsequent, and purchasers."

[4] It may be admitted that this section makes the conveyance, so far as it is to the use of Graham, null and void as to creditors and purchasers. But the statute does not make it null and void, even as to creditors and purchasers, so far as it is for the use and benefit of Graham's children. This deed provided for the payment of his then existing debts, and there is nothing in the statute preventing Graham from giving or conveying the remainder of his property to his children or others as against subsequent creditors and purchasers.

[5] Furthermore, this statute does not provide that a conveyance to one's own use shall be void as to him, but only void as to purchasers and creditors. This proceeding is more for the benefit of Graham than for either creditors or his wife, even conceding she is a purchaser. The plaintiffs are not purchasers nor creditors, but simply agents or trustees. This case is therefore not bottomed upon the statute relied on, because said statute is not for the benefit of the party making the conveyance. *Sauter v. Leveridge*, 103 Mo. loc. cit. top page 624, 15 S. W. 981.

[6, 7] VI. We hold said deed of trust to defendants is valid as to the defendant trustees and Graham's children. It is said the remainder to Graham's children is a contingent remainder, void and ineffectual, and that the conveyance to them was, in effect, but for the use and benefit of Graham. We know of no reason why a man cannot by deed give a contingent remainder in his property to his children, or why such conveyance should be deemed void or for the grantor's use. A contingent remainder is an interest in real estate. *Godman v. Simmons*, 113 Mo. 123, 20 S. W. 972; *Sikemeier v. Galvin*, 124 Mo. 367, 27 S. W. 551.

[8] But, it is plain enough that the remainder to Graham's children created by the deed of trust assailed is a vested remainder. The children to whom the remainder is given were living and are named, and the fact that the remainder opens to let in after-born children does not make it a contingent remainder. All the children, not simply those living at his death, are to take upon Graham's death, which is sure to occur. The vesting of the ti-

tie is not postponed after Graham's death, until they reach the age of 25 years, but only the enjoyment of the possession of the property is thus postponed. This does not make the remainder contingent, or in any manner militate against its character as a vested remainder. *Barkhofer v. Barkhofer*, 204 S. W. loc. cit. 910 (Division 1, this court); *Waddell v. Waddell*, 99 Mo. loc. cit. 345, 12 S. W. 349, 17 Am. St. Rep. 575; *Thomas v. Thomas*, 149 Mo. loc. cit. 433, 51 S. W. 111, 73 Am. St. Rep. 405; *Doerner v. Doerner*, 161 Mo. 406, 61 S. W. 801; *Carter v. Long*, 181 Mo. loc. cit. 709, 81 S. W. 162; *Warne v. Sorge*, 258 Mo. 162, 167 S. W. 967; *Eckle v. Ryland*, 256 Mo. 424, 165 S. W. 1035; *Buxton v. Kroeger*, 219 Mo. loc. cit. 261, 117 S. W. 1147; *Heady v. Hollman*, 251 Mo. 632, 158 S. W. 19.

It is also urged that the remainder is contingent in the children and void because Graham's \$500 per month is payable out of the principal, as well as the income, and therefore might absorb the whole estate. In effect, this monthly charge is but an incumbrance on the property, and simply makes the remainder subject thereto. It does not change the nature of the title of the remaindermen any more than an incumbrance on a fee simple would change the fee-simple title. Both remain unchanged, except they are subject to the incumbrance. They are in no way made void thereby.

But, we hold that the remainder to Graham's children, whether vested or contingent, was a valid conveyance for the benefit of said children, and not for Graham's use. It is immaterial, therefore, so far as this case is concerned, whether said remainder was vested or contingent.

VII. The deed of trust, being valid as to the provision for the children, may, no doubt, be avoided by subsequent purchasers or subsequent creditors of Graham, in so far, and so far only, as it is for Graham's use. In a proper proceeding, subsequent creditors or purchasers might therefore reach and appropriate the monthly sum of \$500 and the income reserved to Graham. Authorities, *infra*.

[9] VIII. But, it is said by learned counsel that it is possible that the vicissitudes of fortune might so reduce the income and value of the property, or might so afflict Graham personally, that the trustees, in the exercise of their honest discretion, might appropriate, or be compelled to appropriate, the entire estate to the payment of doctor bills and extraordinary expenses for the care of Graham, on account of personal injury or sickness; that even if the creditors or purchasers might secure his monthly stipend, they could not reach that part of the fund necessary to be reserved for Graham's benefit, in case of injury or sickness, because that amount is uncertain. The law is a practical science. There is no allegation in the petition, and no

proof that it will ever be necessary for the trustees, in their honest discretion, to advance more than \$500 per month, or than all the income after Graham's debts are paid, to pay his doctor bills. The petition alleges that the income was \$5,000 per month when the suit was brought. At this rate, the debts will all soon be paid, if they have not already been paid, when Graham is entitled to the entire income. The doctor bills are only payable when necessary, and the amount so payable is in the sole discretion of the trustees. It is not presumable that they would determine to pay such bills, or any part thereof, if Graham wasted his income in riotous living, so that he would not have enough left to pay doctor bills. The contingency of Graham ever receiving or being entitled to anything for doctor bills, in addition to his regular allowance provided for by the deed of trust, to the detriment of creditors or purchasers, is a most remote possibility, and will not, in a court of equity, be presumed, against the allegations of the petition and the evidence in the case, to destroy an estate created in good faith for the benefit of his children. But, if this contingency should ever happen, it is not beyond the power of a court of equity to determine the amount Graham would be entitled to for such doctor bills and extraordinary expenses on account of sickness or personal injury, or require the trustees to do so, and award it to such creditors or purchasers instead of to Graham. We must rule this contention also against the appellants.

IX. But, it is strenuously argued that the case of *Jamison v. Mississippi Valley Trust Co.*, 207 S. W. 788, decided by Division No. 2 of this court, is decisively in favor of the claim of learned counsel for appellants that under section 2880, R. S. 1909, the deed of trust of May 23, 1916, to defendant trustees, is void. We are not of that opinion. That was a proceeding by judgment creditors, and could have no application here for that reason alone, as we have already indicated. In that case, there was no provision for the security of creditors, as in the case at bar. But the grantor conveyed his property to trustees: First, for the benefit of the grantor for 5 years, and if he died during that time, and in the absence of a will, to his heirs at law, under the laws of Missouri; second, the trustees were to pay to the grantor the net income, as he might demand; third and fourth, the trustees were authorized to sell and manage the property in their discretion; fifth, the trustees were not to pay the grantor more than the income, "except that in case of extremity of the beneficiaries, or if by misfortune or unavoidable accident the value of the trust estate shall become greatly diminished and imperious necessity affecting the then beneficiary * * * should, in the judgment of the trustees, render it proper to use

additional amounts out of the trust estate * * * as to what is such extremity or imperious necessity and what amount of the principal is necessary to be used, the trustees shall exercise their best discretion, and their decision shall be absolute"; sixth, the grantor was prohibited from anticipating the income payable to himself, and prohibited from selling or encumbering it, and both principal and income were declared not subject to his debts or liabilities.

The court held the conveyance to the trustees was wholly for the use of the grantor, and was therefore void as to the plaintiffs, under said section 2880 of the statutes. White, C., delivering the opinion of the court, said (207 S. W. 790):

"It was not shown that Bell [the grantor] had any children, or that there was any one answering the description of 'his heirs' in case he should die. This contingent estate, if it may be so construed, depends upon several contingencies: The contingency that he die within 5 years; the contingency that he leave no will; and the contingency that he have heirs capable of taking. In case of his death without a will, the property would go to his heirs precisely as if no trust had been created; that is, the trust would terminate at the end of 5 years, or sooner in the case of his death. He retained control of the contingency by which the title might vest by purchase in his heirs. The restraining barrier set to prevent assault upon the corpus of the estate contained an elastic panel euphemistically designated as 'imperious necessity,' which had already yielded under pressure so as to permit the escape of something near 10 per cent. of the amount in the trustee's hands."

The cases cited by the court from other states, including also *McIlvaine v. Smith*, 42 Mo. 45, were all cases where the intent was apparent that the transfer was intended to be and was wholly for the grantor's use, and not, as in the case before us, for his use for life with a clear vested remainder in his children.

Nolan v. Nolan, 218 Pa. loc. cit. 140, 67 Atl. 52, 12 L. R. A. (N. S.) 369, cited by the court was like the case before Commissioner White, and the court in that case clearly distinguishes it from cases like the one we have to pass upon, by saying (218 Pa. 141, 67 Atl. 54, 12 L. R. A. [N. S.] 374):

"What has been said does not in any way disturb the rule in *Potter v. Fidelity Ins. Trust & S. D. Co.*, 199 Pa. 360, 49 Atl. 85, wherein it was held that, where a voluntary, active trust by express terms is made irrevocable, and there has been no failure of the purpose of the trust, and it is not shown that the deed was procured by fraud or imposition, or executed under a misapprehension of the facts or the law, the trust cannot be revoked at the instance of the settlor, but will be enforced in favor of the beneficiaries. That was a controversy between the settlor and the beneficiaries, and the rights

of the creditors were not considered. Even in that case it was said that one of the reasons for setting aside a voluntary settlement of this character was when it appeared that the design of the deed was to give the settlor full enjoyment of his property for life, with power of testamentary disposition, and at the same time protect it from his creditors. This is exactly what the learned court below held the present deed to be, and we concur in that conclusion."

When, however, as in the case at bar, conveyances have been made without power of revocation, and reserving a life estate to the grantor, with remainder over, the conveyances have uniformly been held valid, except as to the income or part reserved to the grantor, which is held subject to the rights of creditors and purchasers. *Brown v. McGill*, 87 Md. 161, 39 Atl. 613, 89 L. R. A. 806, 67 Am. St. Rep. 804; *Bank v. Windram*, 133 Mass. 175; *Schenck v. Barnes*, 156 N. Y. 316, 50 N. E. 967, 41 L. R. A. 395; *Low v. Carter*, 21 N. H. 433; *De Hierapolis v. Lawrence* (C. C.) 115 Fed. 761; *Sloan v. Birdsall*, 58 Hun, 317, 11 N. Y. Supp. 814; *Jones v. Clifton*, 101 U. S. 225, 25 L. Ed. 908; *Curtis v. Leavitt*, 15 N. Y. 9.

X. But there is another reason which would lead to an affirmance of this judgment. The principal complaint in the petition is that a clause in the agreement of May 23, 1916, making defendants Bishop and American Trust Company trustees, reserving to said Henry B. Graham the right of revoking said trust and terminating it upon the payment of his debts and the restoring his property to him, was omitted through the incompetency, mistake, or accident of Graham, or fraud of the defendant Bishop, who drew up said agreement, as the attorney of said Graham. The evidence shows that if said Graham desired any such clause of revocation in said agreement of May 23, 1916, or a clause restoring said property to him, it was principally for the purpose of enabling him to provide more abundantly than he otherwise could for Mrs. Snowden as his future wife. Mrs. Snowden then was a married woman, living with her husband in St. Louis. Graham had for some time visited her almost daily, and was engaged to marry her when he should be divorced from his wife, who was then living in adultery with another man in New York City, and Mrs. Snowden should be divorced from her husband, with whom she was then living in the house where Graham visited her. In fact, the appellants claim in their brief that such was the purpose of said Graham in desiring to have the revocation and return clause inserted in the deed of trust now assailed. Appellants' learned counsel say in their brief:

"Despite the numerous sharp conflicts, certain facts stand out clearly in the record. Mr.

Graham was intending to get a divorce and to marry Mrs. Snowden. He was heavily in debt, and had the idea that the very existence of his estate was threatened by a pending foreclosure of collateral then in the hands of W. K. Bixby. It was clearly his intention to dispose of his property so that his wife would not be able to assert a claim against it, and that the collateral in Bixby's hands should be protected, and to have the conveyance in such shape that he could modify it to provide for Mrs. Snowden as soon as he was married to her. This was his general purpose."

[10] We are asked, therefore, to exert the powers of a court of equity to set aside an agreement which said Graham made, because by fraud and mistake it omitted certain clauses which he desired inserted to enable him to carry out an illegal agreement with Mrs. Snowden to marry and provide for her when both he and she were divorced. It is true that he deserted Mrs. Snowden and eloped with and married her sister, as soon as he and Mrs. Snowden were divorced, and seeks now to have said deed of trust to defendants set aside, not for Mrs. Snowden's benefit, but for her sister's. But the clauses he desired to have inserted in, but which were omitted from said agreement, being designed to carry out a wholly unlawful contract, he could not have been heard to complain of their omission at the time the agreement was made, and the fact that they would be used for a lawful purpose now (if such were the fact), had they

been so inserted, would not purge the plaintiffs' case of its original vice and immorality. He who comes into a court of equity for relief must come with clean hands. *Gilmore v. Thomas*, 252 Mo. 147, 158 S. W. 577; *Creamer v. Bivert*, 214 Mo. 485, 113 S. W. 1118; *Stillwell v. Bell*, 248 Mo. 61, 154 S. W. 85.

XI. Complaint is also made of the allowance of \$18,000 as compensation to defendants' attorneys for their services in the circuit court trying this cause. There was evidence taken by the learned court below, which we have examined, as to the value of such services. It abundantly supported the allowance. The deed of trust to defendants authorized the charge of necessary counsel fees to the trust estate. The lower court, who not only heard the evidence as to the value of such services, but by optical and long-continued oral demonstration knew what such services were, made such allowance as a reasonable charge for such services. We shall not disturb it.

The judgment of the lower court, being without error, is in all things affirmed.

BROWN and RAGLAND, CC., concur.

PER CURIAM. The foregoing opinion by SMALL, C., is adopted as the opinion of the court.

All the Judges concur, except WOODSON, J., absent.

BUERGER v. WELLS. (No. 2623.)

(Supreme Court of Texas. May 19, 1920.)

1. Garnishment §1—Statute must be strictly followed.

Garnishment is merely a species of attachment, being a summary proceeding, and the statute governing it should be followed with strictness.

2. Garnishment §9, 88—Affidavit in suit against two defendants must allege neither has property within state.

Under the statute plaintiff in a suit for debt against more than one defendant, as a suit against maker and indorser of notes, cannot call a stranger into court on writ of garnishment of a fund as the maker's, subjecting such stranger to inconvenience of proceeding and possible hazard, if either defendant has property within the state subject to execution from which the demand may be made; it being requisite that affidavit state "defendants" (not merely defendant) have no property within state.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Action by H. C. Wells against Fred Buerger and another, in which writ of garnishment issued against an insurance company. From an order dismissing the writ, plaintiff appealed to the Court of Civil Appeals, which reversed and remanded (157 S. W. 289), and the named defendant brings error. Judgment of the Court of Civil Appeals reversed, and judgment of the district court affirmed.

J. L. Lackey, of Burkburnett, for plaintiff in error.

R. H. Templeton, of Wellington, and C. L. Black, of Austin, for defendant in error.

PHILLIPS, C. J. The suit was one by H. C. Wells against Fred Buerger as maker, and Mrs. Martha Mooney as endorser, of certain notes. A garnishment was sued out against an insurance company to reach a fund in its hands due Buerger. The affidavit for the garnishment only stated that Buerger did not have property in his possession within the State, subject to execution, sufficient to satisfy the plaintiff's debt, omitting to negative such ownership of property by the other defendant. The honorable Court of Civil Appeals for the Seventh District held that the motion to quash the affidavit was improperly sustained by the trial court. We granted the writ of error because of the probable conflict between this holding and that of the Court of Civil Appeals for the Sixth District in *Smith v. City National Bank*, 140 S. W. 1145.

[1, 2] The plain effect of the statute is that a plaintiff in a suit for debt against more

than one defendant, cannot call strangers into court on a writ of garnishment, subjecting them to the inconvenience of the proceeding and possible hazard, if either of the defendants has property within the State subject to execution from which he may make his debt. Garnishment is but a species of attachment. It is a summary proceeding. The statutes governing it should be followed with strictness. The statute requires that the affidavit state that "the defendant" has not, within the affiant's knowledge, property, etc. Where there are two defendants, or more, in the suit, this clearly means the affidavit shall state that "the defendants" have not such property. Garnishment is not intended as a remedy for one able to make his debt of the property of one of his debtors in the suit, whether such debtor be primarily liable or not. The question is ruled by *Willis v. Lyman*, 22 Tex. 268.

The judgment of the Court of Civil Appeals is reversed and the judgment of the District Court affirmed.

KANAMAN v. HUBBARD et al. (No. 2669.)
(Supreme Court of Texas. May 19, 1920.)**1. Attachment §175—Levy creates a lien, but there is no satisfaction of plaintiff's debt until property is sold.**

Under Rev. St. 1911, arts. 257, 268, the effect of a levy of attachment is to create a lien upon the property, but there is no satisfaction of the plaintiff's debt until the property is sold under the judgment foreclosing the lien.

2. Attachment §186—Plaintiff not liable for injuries to attached property caused by negligence or misconduct of sheriff.

As under Rev. St. 1911, arts. 252, 255, 256, the sheriff's possession of property attached at the instance of the plaintiff is no more subject to control of the plaintiff as to the manner in which he keeps the same than to direction of defendant, and as levy of a writ of attachment does not satisfy the debt, plaintiff is not responsible to defendant for injury to the attached party due to misconduct or negligence of the sheriff; but the sheriff's wrong is an injury to both parties to whom the sheriff and the sureties on his bond may be caused to respond.

3. Sales §38(9)—Slight loss will be sufficient to justify rescission of purchase induced by fraud.

Slight loss is sufficient to justify a court of equity in rescinding a contract of purchase and sale where the purchase was induced by the seller's fraud.

4. Sales §52(7)—Finding that buyer, who was induced by deceit to purchase, was injured, held warranted.

In a suit by the buyer to rescind a contract for purchase of an automobile, finding that the

buyer was injured *held* warranted in view of the fact that deceit was necessary to effect the sale of the machine, and that the seller resisted the refund of the purchase money on tender to him of the car.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by W. McK. Hubbard and others against W. I. Kanaman. Judgment for plaintiffs was affirmed in part and reversed and remanded in part by the Court of Civil Appeals (160 S. W. 304), and defendant brings error. Judgment of Court of Civil Appeals affirmed.

Robt. B. Allen and A. B. Flanary, both of Dallas, for plaintiff in error.

K. R. Craig, of Dallas, for defendants in error.

GREENWOOD, J. The writ of error was granted because of the conflict between the decision of the Galveston Court of Civil Appeals in the case of Taylor v. Felder, 23 S. W. 483, with the decision herein of the Dallas Court of Civil Appeals.

In the former case it was held to be the duty of a plaintiff, causing a distress warrant to be levied on personal property, to see that the property seized was properly treated by the officer and applied to the discharge of the debt sued on, and that hence the defendant whose property was seized could have his debt to the plaintiff credited with any loss incurred through the default or negligence of the officer in the execution of the distress warrant.

In this case it was decided that the plaintiffs in attachment were not liable to the defendant for damages to an automobile of the defendant, occasioned by the wrongful acts of the sheriff, while he held the automobile under the attachment. 160 S. W. 307. The holding herein was in accordance with the conclusion of the Galveston Court of Civil Appeals in a later case than Taylor v. Felder, to the effect that where a horse died, while in the possession of a sheriff under a writ of attachment, not wrongfully issued, as the result of negligence on the part of the sheriff, there was no liability on the part of the plaintiff in attachment to the defendant in attachment. *McFaddin v. Sims*, 43 Tex. Civ. App. 598, 97 S. W. 337.

The liability of an attaching plaintiff for a sheriff's tort to property held under attachment, rightfully issued, must rest on the assumption either that the sheriff in proceeding under the writ acts as the agent or servant of the plaintiff or that the levy operates as a satisfaction of the plaintiff's debt to the extent of the value of the seized property.

[1, 2] Our statutes negative either assumption. The sheriff derives his power to seize and hold the attached property, not from the plaintiff nor from the defendant, but from the statutes, which declare the will of the state. The sheriff is no more subject to direction or control from the plaintiff than from the defendant as to the manner in which he keeps personal property, under levy of a writ of attachment, until final judgment. Articles 252, 255, 256, R. S. The effect of the levy is to create a lien on the attached property, but there is no satisfaction of the plaintiff's debt until the property is sold under the judgment foreclosing the lien. Articles 257, 268, R. S.; *Cravens v. Wilson*, 48 Tex. 339.

This case discloses a tort committed by the sheriff when he was under a duty to both the plaintiffs and defendant in the attachment suit. The tort resulted in injury to both the plaintiffs and the defendant, but the tort was a breach of a duty owing by the sheriff and not by the plaintiff in attachment. He, who owed the duty, and his sureties, who were responsible for its faithful performance, must be held accountable for the breach of the duty, and not another who was a stranger to the duty.

The plaintiffs in attachment, according to the facts in this record, have done nothing save to enforce a righteous demand conformably to law. The tort of the sheriff has not relieved the defendant in attachment of his obligation to satisfy the demand to secure which the attachment was issued. Should the defendant satisfy the plaintiffs' demand, he will then be alone entitled to enforce and collect the liability of the sheriff and his sureties. Otherwise, any recovery for the sheriff's tort will be applicable first to the payment of the plaintiffs' debt.

[3, 4] In the face of plaintiff in error's resistance to the return of the sum received for the car, when it was tendered back to him, and of the deceit which appears to have been necessary to negotiate a sale at that price, we do not think the conclusion of the Court of Civil Appeals should be disturbed that some pecuniary injury from the fraud was shown to have been sustained by defendants in error. It is therefore unnecessary for us to determine whether a court of equity would not order a rescission for fraud in the absence of a showing of actual pecuniary loss, for, were the necessity recognized for the showing of such loss to warrant the relief of rescission in equity, certainly any appreciable prejudice, though slight in amount, would be sufficient. 12 R. C. L. § 139; *Pomeroy on Contracts*, § 227.

The judgment of the Court of Civil Appeals is affirmed.

PYE et al. v. CARDWELL. (No. 2766.)

(Supreme Court of Texas. May 19, 1920.)

1. Malicious prosecution ~~§~~—Interference with person or property essential.

Damages will not be awarded for the prosecution of civil suits with malice and without probable cause, unless the party sued suffers from interference by reason of the suits with his person or property.

2. Malicious prosecution ~~§~~—Complaint alleging series of suits without probable cause pursuant to conspiracy held bad.

A petition, alleging institution against plaintiff of seven successive chattel mortgage foreclosure suits in furtherance of a conspiracy by defendants to unlawfully extort money from plaintiff, causing plaintiff worry, annoyance, and physical inconvenience, loss of sleep, peace of mind, and business, and certain expenses for attorney's fees, held not to state cause of action in absence of allegation of facts showing that plaintiff suffered by such suits interfering with her person or property.

Certified Question from Court of Civil Appeals of First Supreme Judicial District.

Action by Margaret Cardwell against B. F. Pye and others. Judgment for plaintiff, and defendants appealed to Court of Civil Appeals. Question certified in Supreme Court. Question answered.

See, also, 179 S. W. 683.

Lewis Fisher, of Galveston, and B. F. Pye and Lipscomb & Lipscomb, all of Beaumont, for appellants.

George Clough, of Houston, and Aubrey Fuller, of Galveston, for appellee.

GREENWOOD, J. The question certified is whether a cause of action was alleged by appellee for damages, actual and exemplary, resulting from the institution against her of seven suits at the instigation of appellants. It was averred that the suits were brought in furtherance of a conspiracy by the three appellants to unlawfully extort money from appellee, which appellants knew she did not owe; that appellants used the names of other persons in bringing the suits; that, as fast as appellee employed counsel to present her defense in each suit, it was dismissed and a new suit was filed in a different place; that the suits caused appellee great worry, annoyance and physical inconvenience, and also caused her to lose sleep, peace of mind, and business; and that she incurred \$50 attorney's fees; and she prayed for the recovery of \$250 actual damages and \$700 exemplary damages.

[1] The rule is firmly established in Texas which denies an award of damages for the prosecution of civil suits, with malice and without probable cause, unless the party sued suffers some interference, by reason of the

the suits, with his person or property. *Smith v. Adams*, 27 Tex. 30; *Salado College v. Davis*, 47 Tex. 134; *Johnson v. King*, 64 Tex. 226.

[2] It is claimed that the rule stated should not govern this case for two reasons: First, that since in each suit a foreclosure was sought of an alleged chattel mortgage lien, there existed the requisite interference with appellee's property; and, second, that, the rule should not be applied to a series of unfounded and malicious suits, brought in furtherance of a conspiracy, in the names of third persons as well as of the conspirators.

It is obvious that the attempt to foreclose the chattel mortgage caused no seizure of any property. Besides in *Johnson v. King*, supra, where there was an actual issuance of an attachment, the failure to seize any property under it was held fatal to the recovery of damages for maliciously suing out the attachment, without probable cause.

Under the rule, each suit could be maintained without liability to appellee save for the costs. Judge Gould, speaking for the court in *Salado College v. Davis*, supra, said:

"In ordinary cases, where no further wrongful act is complained of than the institution of a groundless suit, though done knowingly and with intent to harass, the award of costs is, in contemplation of law, full compensation for the unjust vexation. (*Cotterell v. Jones*, 73 Eng. Com. L. 727.)

"In such cases, the defendant recovers his costs 'but no allowance is made for his time, indirect loss, annoyance, or counsel fees.' (*Sedg. on Dam.* 38.) He proceeds: 'Every defendant against whom an action is "unnecessarily" brought, experiences some injury or inconvenience beyond what the costs will compensate him for.' This injury or inconvenience results from a resort to the legally constituted tribunals; and it seems to be the policy of the law to content itself with meting out something less than our ideas of natural justice would demand, rather than to increase the risks attending and discouraging such a resort, and at the same time add to the difficulties and intricacies of ordinary litigation."

If it is not an actionable wrong for one person to bring an unfounded suit, to harass a defendant and extort money from him, it cannot be actionable for two or more to join in the same sort of suit. The single actor is certainly no less culpable when he proceeds alone and the injury is the same when he acts alone or with others. As long as the law makes the imposition of the costs the sole penalty for the wrongful prosecution of civil litigation, without seizure of person or property, no greater penalty can be rightly imposed for a series of wrongful suits of that character than the imposition on the wrongful plaintiff of the accumulation of costs in the series of suits. *Smith v. Adams*, 27 Tex. 30.

The sound reasoning of Judge Stayton, in

Johnson v. King, in discussing the opinion of the Supreme Court of Vermont in *Closson v. Staples*, 42 Vt. 209, 1 Am. Rep. 316, is conclusive against the contention that appellee ought to recover because appellants used the names of other parties in some of the suits against her; for Judge Stayton points out that, where Staples caused Burnham to prosecute a suit against Closson in the name of Burnham on a note which had been paid to Staples, the true foundation for a cause of action in favor of Closson, against Staples, was his use of an irresponsible person to bring the suit, so as to shield himself from the judgment for costs; that being the relief which the law affords for such a wrong. 64 Tex. 230.

Here, there is no allegation that any person, whose name was used in the suits against appellee, was not as solvent as appellants, and it is fairly inferable from the petition that all costs were paid by the plaintiffs in the several suits or were adjudged against them alone.

We answer that, as held in the original opinion of the Court of Civil Appeals, the petition of appellee presented no cause of action for damages by reason of the mentioned suits.

CORSICANA PETROLEUM CO. v. OWENS et al. (No. 2716.)

(Supreme Court of Texas. May 19, 1920.)

1. Mines and minerals \Leftrightarrow 78(7)—Evidence held insufficient to raise issue of abandonment of oil lease.

In a suit to forfeit an oil lease, evidence held insufficient to raise the issue of abandonment.

2. Mines and minerals \Leftrightarrow 58—Oil and gas lease held not invalid, because allowing lessor to pay rent, instead of drilling a well.

An oil and gas lease, granted for valuable consideration, though the sum was small, which gave the lessee the right to prospect on the land and to seven-eighths of oil, etc., found, and also in lieu of the lessee's completion of a well within one year, the right to extend time for completion by making quarterly payments of approximately \$30, is not invalid, even though the lessee had the option of abandonment on payment of a nominal sum.

3. Mines and minerals \Leftrightarrow 57—Option to abandon oil lease, based on independent consideration, not unilateral.

An option contract, based on an independent consideration, is not invalid, as unilateral; hence where an oil and gas lease was supported by an independent consideration, an option of abandonment on payment of \$5 is not invalid.

4. Mines and minerals \Leftrightarrow 58—Option to abandon oil and gas lease held valid.

Where an oil and gas lease, executed on an independent consideration, gave lessee option of abandoning the same on payment of \$5, the lease is not invalid, as inequitable or unilateral, where it was distinctly provided that the surrender should not affect existing rights.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Suit by Mrs. M. J. Owens, as surviving wife, in her own behalf and for her children, against the Corsicana Petroleum Company. On plaintiff's appeal, judgment for defendant was reversed, and cause remanded, by the Court of Civil Appeals (169 S. W. 192), and defendant brings error. Judgment of Court of Civil Appeals reversed, and that of trial court affirmed.

Geo. O. Greer and W. H. Francis, both of Dallas, and Carrigan, Montgomery & Britain, of Wichita Falls, for plaintiff in error.

Slay & Simon, of Ft. Worth, for defendants in error.

PHILLIPS, C. J. The suit of the plaintiff, Mrs. M. J. Owens as surviving wife of M. J. Owens, deceased, and in her own behalf and for their children, was to cancel a mineral or oil lease upon 188 acres of land executed by herself and husband, June 6, 1911, in favor of the Corsicana Petroleum Company, upon the several grounds: (1) That it was a unilateral agreement and therefore void; (2) that the lessee had breached it by failing to complete an oil well on the premises within one year from the date of the instrument; and (3) that the lease had been abandoned by the lessee.

In the trial court, a verdict was directed for the defendants. The honorable Court of Civil Appeals, on the appeal, held the lease to be void because unilateral; but in reversing the judgment, remanded the case for trial upon the issue of estoppel made by the Petroleum Company.

The lease recited that the grantors, in consideration of \$28.20 paid by the grantee, the receipt being acknowledged, had granted, sold, etc., unto the grantee all the oil, gas, coal and other minerals in and under the land described, with the exclusive right to drill, mine and operate thereon for producing oil, gas, coal and other minerals; to be held by the grantee for the term of ten years from the date of the instrument and as much longer as oil, gas or other minerals were produced in paying quantities; yielding to the grantors the 1/8 part of all oil produced and saved from the premises. The grantee agreed in the instrument to complete a well on the premises within one year from the date of the instrument, or pay to the grantors as lease

rental, \$28.20 each three months in advance from the 6th day of June, 1912, from quarter to quarter, to the end of the term, or until the well was completed, or the lease surrendered as elsewhere stipulated in the instrument; the drilling of such well to be full consideration of the grant made by the instrument. A further clause provided that in consideration of the payment of the \$28.20 and the quarterly amounts, just mentioned, the grantee acquired and had the right and option either to surrender the grant at any time upon the payment of the sum of \$5.00 and all amounts then due under the instrument and thereby be discharged from all further obligation, the grant thereby becoming null and void, or to continue the grant in full force and effect from quarter to quarter and from year to year by making the stipulated quarterly payments which the grantors bound themselves to accept when tendered, it being further recited that such option was granted for a valuable and satisfactory consideration.

Before the end of the first year of the lease, M. J. Owens died, leaving his wife and ten children surviving. There was no administration upon his estate. On June 6, 1912, one year from the date of the instrument, Mrs. Owens was paid and accepted the stipulated quarterly lease rental, \$28.20, further quarterly payments in that amount being regularly paid to and accepted by her down to and including the payment due December 6, 1912. This extended and carried the lease, according to its terms, to March 6, 1913. On this latter date, a further quarterly payment was duly tendered Mrs. Owens, but its acceptance was refused. On March 28, 1913, the Petroleum Company began preparations to drill a well on the premises. Actual drilling of the well began on April 7, 1913, at an expense of \$14,000.00 in that connection up to the time the present suit was filed on May 14, 1913. The well was completed July 5, 1913, producing oil in paying quantities, with an average of 117 barrels of oil per day.

[1] The issue of abandonment of the lease was, in our opinion, not raised by the evidence. The parties to the lease were competent to contract. No fraud or imposition of any kind is charged. The question in the case, therefore, is simply whether the terms of the lease are such as to make it unenforceable.

[2] We fail to see anything in the terms of the several agreements evidenced by the instrument which invalidates it. The finding of oil upon the land was merely prospective. For a valuable consideration, satisfactory to themselves, the grantors by the instrument gave the grantee the right to prospect upon the land for a definite period; the right to seven-eighths of the oil if found; the right,

in lieu of its completing a well within the first year, to extend the time for its completion, within the term of the grant, by its making the quarterly payments; and the right or option to surrender the lease by paying the sum of \$5.00 and all other amounts due under it up to that time. There is nothing unlawful about such a contract, and the parties were privileged to make it. If the grantors were willing to accept the quarterly payments instead of the completion of a well within the original period stipulated for its completion, that was their affair. They contracted to that effect by the instrument. The contract being fair, there can be no reason for a court's striking down that part of it.

[3, 4] The grant of the right to the grantee to surrender the lease by the payment of an amount in addition to the original consideration and all other amounts then due under the instrument, relieved the grantee of any requirement to complete a well. But the grantors, for an independent consideration, by their contract agreed that the grantee should have that option. The unilateral character of the agreement for the option, is of no consequence. A contract for the grant of an option is necessarily unilateral. An option is granted for the purpose of enabling the grantee to exercise the particular right or not, as he may elect. The value of it consists in that privilege. Owners of property have the unquestioned power to grant such rights with respect to it. They are free to validly make such contracts. When so made, it is the duty of courts to uphold and enforce them. A contract for the grant of an option, limited to a definite time, is therefore valid and enforceable if supported by an independent consideration. *National Oil & Pipe Line Co. v. Teel*, 95 Tex. 586, 86 S. W. 979. In many valid contracts the promise is only on one side. They are unilateral. As to them, the inquiry is not whether they are of that character, but whether they are supported by a consideration. In return for the consideration paid them, the grantors here agreed that the grantee should have the right to surrender the lease on the terms stated. If the right was not exercised, the grantee would remain bound by its covenants. If exercised, the grantors would be free to deal with the premises. A surrender was not to affect any existing liability. There is nothing inequitable about such an agreement. Its presence in the instrument did not invalidate it. *Guffey v. Smith*, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856; *Rich v. Doneghey*, 177 Pac. 86, 3 A. L. R. 352.

The judgment of the Court of Civil Appeals is reversed and the judgment of the District Court is affirmed.

COLLINS v. PECOS & N. T. RY. CO.
(No. 2807.)

(Supreme Court of Texas. May 26, 1920.)

Appeal and error §114—Cause remanded to appellate court to determine unconsidered assignments.

Where the Court of Civil Appeals erroneously reversed the judgment of the district court on one assignment of error without considering the other assignments presenting questions on which its jurisdiction was final, the Supreme Court will not affirm the judgment of the district court, but will remand the case to the Court of Civil Appeals for the determination of those assignments.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

On motion for rehearing. Motion overruled.

For former opinion, see 212 S. W. 477.

J. Marvin Jones, L. C. Barrett, and Jas. N. Browning, all of Amarillo, for plaintiff in error. Terry, Cavin & Mills, of Galveston, Madden, Trulove & Kimbrough, of Amarillo, Carl Gilliland, of Hereford, and Black & Spedley, of Austin, for defendant in error.

PHILLIPS, C. J. The Railway Company's motion for rehearing is overruled. Whether the injuries of the plaintiff were proximately caused by the Railway Company's negligence, was a question of fact and for the jury's decision. The holding of the Commission of Appeals on the question, as reflected in its opinion, is in our view correct.

The Railway Company presented a number of assignments in the Court of Civil Appeals (173 S. W. 250), but that court disposed of the appeal on only one of them. Its decision made consideration of the other assignments unnecessary. A number of those assignments present questions of which the jurisdiction of the Court of Civil Appeals is final. The Railway Company is entitled to have those assignments determined. Instead, therefore, of affirming the judgment of the District Court, as was done on the original report of the Commission of Appeals, the cause will be remanded to the Court of Civil Appeals for the determination of those assignments.

PARK v. SWARTZ et al. (No. 2596.)

(Supreme Court of Texas. May 26, 1920.)

Brokers §11—Breach of contract for exclusive agency entitles plaintiff to probable earnings.

Where defendants breached a contract giving plaintiff the exclusive agency for the sale of

a number of lots, plaintiff is entitled to recover the amount which under the contract he would presumably have earned in the absence of showing by defendants that plaintiffs could not or would not have performed the contract, regardless of its breach by defendants.

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by A. F. Park against C. A. Swartz and others. Judgment of the district court for the plaintiff was reversed by the Court of Civil Appeals (159 S. W. 338), and plaintiff brings error. Judgment of the Court of Civil Appeals reversed, and judgment of the district court affirmed.

Alexander, Power & Ridgway, of Ft. Worth, for plaintiff in error.

Gover & Turner, of Ft. Worth, for defendants in error.

PHILLIPS, C. J. The defendants Swartz and Harris entered into a written contract with the plaintiff Park whereby he was to have the exclusive agency for the sale of certain lots belonging to the defendants in a town in Oklahoma for a stipulated compensation for each sale. According to the findings of the trial court the plaintiff entered upon the performance of the contract, expending about \$1,000.00 in advertising the lots, for traveling expenses, etc., in carrying out the contract; and making a number of sales. While the contract was in full force, the defendants breached it and made its further performance by the plaintiff impossible by selling the remaining lots themselves or through other means. The plaintiff, on his part, had faithfully performed the contract up to that time. His suit was for the breach of the contract. He was awarded judgment in the amount as fixed by the contract for the sales which the action of the defendants deprived him from making.

On the appeal, the judgment was reversed by the honorable Court of Civil Appeals for the Second District, Chief Justice Conner dissenting. Because of the dissent and our belief that the judgment should have been affirmed, we granted the writ of error.

The loss suffered by the plaintiff is the measure of his damages. That loss is the amount as fixed by the contract which he would have earned but for the wrongful conduct of the defendants in preventing him from earning it. Upon establishing the contract, his readiness and willingness to perform it, and that he was denied opportunity to perform it through its wrongful breach by the defendants, rendering its performance by him impossible, the plaintiff made out his case; and prima facie was entitled as damages to the amount which under the contract he would, presumably, have earned if his rights had been respected. If the

plaintiff could not or would not have performed the contract, regardless of its breach by the defendants, it was incumbent upon them to make the proof. This, they failed to do. Their action alone, according to the record here, was responsible for the plaintiff's being unable to perform it fully and completely. They denied him the right to perform it and are in no position to complain of the judgment.

We think Judge Conner's view of the case was correct.

The judgment of the Court of Civil Appeals is reversed and the judgment of the District Court is affirmed.

WARREN HARDWARE CO. v. DODSON
et al. (No. 2677.)

(Supreme Court of Texas. May 26, 1920.)

1. Appeal and error ⇨64—Decision of Court of Civil Appeals held final.

The decision of the Court of Civil Appeals in a garnishment proceeding based on a judgment is final, where the amount in controversy in the original suit was within the jurisdiction of the county court, and the case does not fall within any of the exceptions provided in Rev. St. art. 1591.

2. Courts ⇨247(7)—Supreme Court cannot grant writ of error, where Court of Civil Appeals has final jurisdiction.

In a case of which the Court of Civil Appeals has final jurisdiction, the Supreme Court has no authority to grant a writ of error because of conflict between the decision in such

case and the decision of another Court of Civil Appeals.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Garnishment proceeding by the Warren Hardware Company against S. J. Dodson and others. Judgment for plaintiff was reversed, and a judgment rendered in favor of certain defendants, by the Court of Civil Appeals (162 S. W. 952), and plaintiff brings error. Writ of error dismissed.

Knight & Slaton, of Hereford, and Moseley & Barcus, of Weatherford, for plaintiff in error.

Carl Gilliland, of Hereford, and S. J. Dodson, of El Paso, for defendants in error.

PHILLIPS, C. J. [1,2] The suit was a garnishment proceeding based upon a judgment. The amount in controversy in the original suit was within the jurisdiction of the County Court. The case does not fall within any of the exceptions provided in Article 1591, and the decision of the Court of Civil Appeals is therefore final. The writ of error was granted because of probable conflict between the decision and that of another Court of Civil Appeals. But the Supreme Court has no authority to grant a writ of error because of such conflict in a case of which the Court of Civil Appeals has final jurisdiction. *Gallagher v. Rahm*, 88 Tex. 514, 32 S. W. 523.

The writ was granted before the decision of *Cole v. State of Texas*, 106 Tex. 472, 170 S. W. 1036.

The case is accordingly dismissed for want of jurisdiction.

⇨ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

FITTS v. PANHANDLE & S. F. RY. CO.
(No. 139-3053.)

(Commission of Appeals of Texas, Section B.
June 2, 1920.)

Release \Leftarrow 13(6)—**Promise to employ and to pay \$1 not consideration where money not paid.**

Plaintiff's release of liability for personal injuries, made on a recited consideration of \$1 and defendant's promise to employ plaintiff as a trucker for one day at the usual rate of pay, was without consideration where the \$1 was not paid, and was properly excluded in plaintiff's action.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Action by C. I. Fitts against the Panhandle & Santa Fé Railway Company. From judgment for plaintiff; defendant appealed to the Court of Civil Appeals, which reversed and remanded (188 S. W. 528), and plaintiff brings error. Judgment of the Court of Civil Appeals reversed, and that of the district court affirmed, on recommendation of the Commission of Appeals.

E. T. Miller, J. N. Browning, L. C. Barrett, and Marvin Jones, all of Amarillo, for plaintiff in error.

Madden, Trulove, Ryburn & Pipkin, of Amarillo, for defendant in error.

McCLENDON, J. C. I. Fitts, the plaintiff, recovered judgment against the Panhandle & Santa Fé Railway Company, defendant, for the loss of his eye, alleged to have been caused by the actionable negligence of defendant. Among other defenses to the suit, defendant pleaded a release in full, the recited consideration whereof being: "An order on the treasurer of said company for \$1, the receipt of which is hereby acknowledged," and "the promise of said company to employ me for one day as trucker at the usual rate of pay, the execution thereof being conclusive evidence that said company has made me such promise." Plaintiff alleged the invalidity of said release upon several grounds, one of which was that it was without consideration. Upon the trial, plaintiff having testi-

fied that he never received the \$1 recited in the release, the court declined to admit the release in evidence. The Court of Civil Appeals reversed and remanded the cause, holding this ruling to be erroneous. 188 S. W. 528. Writ of error was granted by the Committee of Judges, in the view that the Court of Civil Appeals committed error in this holding.

The full review and discussion by the Court of Civil Appeals of the authorities upon the question at issue renders unnecessary any extended observations thereupon. The release in question is identical in its language with that in the case of *Quebe v. Railway*, 98 Tex. 6, 81 S. W. 20, 66 L. R. A. 734, 4 Ann. Cas. 545, except as to the subject-matter dealt with. The cases are practically on all fours in every particular, except that in the *Quebe* Case the \$1 was paid, whereas in the case at bar it was not paid. In the *Quebe* Case the Supreme Court, speaking through Judge Williams, says:

"The consideration was a valuable and legal one, though small. Considering the fact that the matter settled was regarded by both parties as involving no large amount, it cannot be said the smallness of the consideration, by itself, furnishes grounds for disregarding the release."

The distinguishing element in the two cases is the failure in the instant case to pay the dollar. We have the views of the Supreme Court upon the question thus presented, expressed in the following language:

"Since the recited consideration of \$1 in the release in this case was not paid, it is our opinion that the release was wholly without consideration. It seems to us that a mere promise to re-employ for one day, paying for the work done for that one day no more than the ordinary or customary rate of wages, conferred, in practical effect, no benefit upon the plaintiff, and the railway company thereby suffered no detriment, since inevitably it was to receive the day's work for the re-employment."

We conclude that the judgment of the Court of Civil Appeals should be reversed, and that of the district court affirmed.

PHILLIPS, C. J. We approve the judgment recommended in this case.

\Leftarrow For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

TEXAS EMPLOYERS' INS. ASS'N v.
ROACH et ux. (No. 142-3073.)(Commission of Appeals of Texas, Section A.
May 26, 1920.)

Master and servant \Rightarrow 416—Right to sue on claim under Compensation Act does not depend on notice of intent not to abide by award.

Under Workmen's Compensation Act (Vernon's Sayles' Ann. Civ. St. 1914, art. 5246q), right to sue, or to require suit to be brought on a claim for compensation, is not dependent on a party, before final determination by the Industrial Accident Board, giving notice that he does not consent to abide thereby; but the board's decision is not conclusive, though the parties agree to submit the matters pertaining to the injury to it, and the right to sue or require suit is by way of appeal.

Error to Court of Civil Appeals of Sixth Supreme Judicial District.

Action by T. W. Roach and wife against the Texas Employers' Insurance Association and another. Judgment for defendants was reversed as to the named defendant, by the Court of Civil Appeals (195 S. W. 328), and said defendant brings error. Reversed and remanded.

Lawther, Pope & Mays, of Dallas, for plaintiff in error.

R. D. Allen, of Sulphur Springs, for defendants in error.

TAYLOR, J. T. W. Roach and wife, defendants in error, filed this suit against the Texas Employers' Insurance Association, plaintiff in error, for compensation under the Employers' Liability Act of 1913 (Laws 1913, c. 179 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz]), claimed to have accrued to them by reason of the death of their minor son. The son's death was alleged to have resulted from injuries received while in the course of his employment as an employé of the Gulf Pipe Line Company, a subscriber to the insurance association.

Prior to filing suit, defendants in error filed their claim for compensation with the Industrial Accident Board as provided by the Liability Act. Plaintiff in error and the Gulf Pipe Line Company, outside of and independent of the act, agreed with defendants in error to submit all matters pertaining to the injuries of the deceased to the Industrial Accident Board. Upon a hearing before the board, and by its final ruling and decision, defendants in error, as beneficiaries of their son, secured an award of \$5 per week for a period of 360 weeks, against plaintiff in error.

The main object of this suit (so stated to be by defendants in error) was the enforcement of the award by "mandamus, mandatory injunction, or weekly executions, as

the court might determine"; the allegation relied upon as warranting its enforcement being that the award is res judicata between defendants in error and the insurance association.

Defendants in error pleaded in the alternative that, if it should be held that they were not entitled to the enforcement of the award, they should recover judgment against plaintiff in error on the facts in accordance with the terms of the Liability Act. Defendants in error joined the Pipe Line Company as a party defendant, and further pleaded in the alternative against it for damages under the statutes and common law.

A general demurrer on behalf of the Pipe Line Company was sustained. Plaintiff in error's demurrer to the allegations that the award of the Industrial Accident Board was res judicata was also sustained. The case was tried upon that count of the petition, seeking a recovery of compensation on the facts under the Liability Act.

The court submitted to the jury only two issues, to wit: (1) Whether plaintiff in error's son was injured while in the employment of the Gulf Pipe Line Company; and (2) whether the son's death was caused by injuries so received. The jury found upon the first issue that the son was injured while in the employ of the company, but found upon the second that his death was not due to the injuries received. Judgment was rendered upon the findings in favor of both the Pipe Line Company and plaintiff in error.

The Court of Civil Appeals held that the trial court did not err in sustaining the demurrer as to the alleged cause of action against the Pipe Line Company, and as to it affirmed the judgment, but further held that the trial court was in error in sustaining the demurrer to that count of the petition alleging that the award of the Industrial Accident Board was res judicata between the insurance association and defendants in error. 195 S. W. 328.

Writ of error was granted upon application of the association referred to the committee of judges. Two grounds of error are alleged in the application. The first relates to the holding of the Court of Civil Appeals on the question of res judicata, and the second to the question of whether the trial court had jurisdiction to try the case.

The case turns upon the construction of section 5, pt. 2, of the Employers' Liability Act, incorporated into Vernon's Sayles' Civil Statutes as article 5246q, which is as follows:

"All questions arising under this act, if not settled by agreement of the parties interested therein, shall, except as otherwise herein provided, be determined by the Industrial Accident Board. Any interested party who is not willing, and does not consent to abide by the final ruling and decision of said board on any

disputed claim may sue on such claim or may require suit to be brought thereon in some court of competent jurisdiction, and the board shall proceed no further toward the adjustment of such claim; provided, however, that whenever any such suit is brought, the rights and liabilities of the parties thereto shall be determined by the provisions of this act, and the suit of the injured employé, or persons suing on account of the death of such employé, shall be against the association, if the employer of such injured or deceased employé is at the time of such injury or death a subscriber, as defined in this act, in which case the recovery shall not exceed the maximum compensation allowed under the provisions of this act, and the court shall determine the issues in such cause instead of said board."

The Court of Civil Appeals in this case, as well as in *Fidelity & Casualty Co. v. House*, 191 S. W. 155, construe the article quoted as providing that the parties at interest may have either the courts or the Industrial Accident Board determine the merits of the claim for compensation made under the act, and that when claim is filed, unless one of the interested parties, prior to the final decision of the board, gives notice to the adverse party that he does not consent to abide thereby, he shall not be entitled to sue or require suit to be brought on the claim. In other words, that under the terms of the article quoted, the right to sue or require suit to be brought in the courts upon any disputed claim is not one by way of appeal from the final ruling of the board, but is in the nature of an option, extended to any interested party, either to have the questions arising under the act determined by the board or have them litigated in the courts. This holding is followed in *Southwestern Sur. Ins. Co. v. Curtis et al.*, 200 S. W. 1162, and in *Gen. Acc. Fire & Life Assur. Corp. v. Evans*, 201 S. W. 705.

The Court of Civil Appeals in this case say:

"When the parties at interest in the claim made under the act consent for the Industrial Accident Board to take proceedings under the act and finally determine the claim for compensation under the act, and do not withdraw consent before there has been final ruling and decision by the said board upon such claim, then in virtue of the exercise by the parties of their option, the decision of said board upon the said claim is, by the terms of the act, final."

We cannot concur in this conclusion of the court. By the provisions of the Employers' Liability Act, every employer within its terms is required to keep a record of all injuries received by his employés in the course of their employment, and to make a report thereof to the Industrial Accident Board within eight days after its occurrence. *Vernon's Sayles' Civ. Stats.*, art. 5246qqq. The board is authorized to make rules for carrying out and enforcing the provisions of the act, and authority is conferred upon the

board to require injured claimants to submit themselves before it, or some one acting under its authority, for examination. Summary process and procedure is authorized; and the board is given power to subpoena witnesses, administer oaths, and to perform those acts necessary to a determination of all questions preliminary to the making of final rulings and decisions on disputed claims. Thus an administrative agency is created for carrying out the provisions of the act. *Id.* 5246pp. The decision of the agency, or board, is not conclusive, nor does the fact that the parties agree to submit the matters pertaining to the injuries of the claimant to the board estop them from resorting to the courts. Under the express provisions of the article quoted, if the claimant "is not willing and does not consent to abide by the final ruling and decision of the board," he may sue on the claim; or if the association is not willing to abide by the decision, it may require suit to be brought.

The Court of Civil Appeals, in the *House Case*, *supra*, says:

"The right 'to sue on such claim' in the courts was intended to be made dependent upon the want of consent or objection of either party to the board's further acting and making 'final ruling and decision' being made or entered before the board in the first instance, *before the final ruling and decision is made.*" (Italics ours.)

There is no express provision in the act to this effect; nor is there in the language of the act any clear implication that the right to sue, or require suit to be brought, is dependent upon the interested party's giving notice prior to the rendering of a final decision of whether he will abide by it. In the absence of both such provision and implication there is no warrant for such limitation with respect to the right of suit.

Whether the right to require suit upon disputed claims was, under the 1913 act, in the nature of an option to be exercised prior to the final decision by the board, or was to be exercised by way of appeal from such decision, is, in our opinion, not an open question.

Middleton v. Texas Power & Light Co., 108 Tex. 96, 185 S. W. 559, states in clear and concise terms the purpose, operation, and effect of the act. The following excerpts from the opinion make clear that in the view of the court it is not necessary as a prerequisite to suit under the act, that the interested party shall give notice in limine that he is unwilling to abide by the final decision of the board:

"There is also created by the act and charged with its administration, a board of three members, whose duties are defined. In general, its province is the determination of disputed claims arising under the act. If its decision is not accepted, suit may be brought upon the claim, or be required to be brought, against the associa-

tion if the employer of the injured or deceased employé was a subscriber at the time of his injury or death, in a court of competent jurisdiction, which, however, shall adjudicate the questions of liability and compensation according to the provisions of the act. * * *

"Nor does the act impair the right of trial by jury. Trial by jury cannot be claimed in an inquiry that is nonjudicial in its character, or with respect to proceedings before an administrative board. The Accident Board charged with the administration of the act is, as we have said, not a court. In its determination of disputed claims there could be no right to a jury trial. The act authorizes appeals from the decisions of the board to the courts, where a jury trial of the matters in dispute, under the law as embodied in the act, may be had. * * *

The view that the act requires notice in limine as a prerequisite to suit is inconsistent with that of the Supreme Court as to its purpose and operation. The right to sue is by way of an appeal, and until final decision is rendered by the board there is nothing from which an appeal can be prosecuted.

Following the decision in the Middleton Case, *supra*, the Thirty-Fifth Legislature (Vernon's Sayles' Civ. Stats. 1918 Supp. vol. 2, arts. 5264-5244) amended section 5 of the 1913 act above quoted so as to provide that any interested party who does not consent to abide by the final decision of the board shall, within 20 days after the rendition of such decision, give notice to the adverse party and to the board that he will not abide by the ruling, etc., and used the same language in the amendment with respect to the consent of the parties as was used in the amended act.

The trial court was not in error in holding that the award made by the Industrial Accident Board was not *res judicata* between the parties, and the judgment of the Court of Civil Appeals should, in our opinion, be reversed.

The remaining assignment of error grows out of the suggestion in the opinion of the Court of Civil Appeals that, inasmuch as defendants in error were not entitled to recover the compensation sued for in a "lump sum," the trial court may not have had jurisdiction to try the case. The suggestion was made under the view that defendants in error were entitled to recover on that count of the petition under which they sought to enforce the award of the Industrial Accident Board, and that the amount thereof alleged to be due at the rate of \$5 per week was less than \$500.

In that count of the petition upon which the case was tried, defendants in error alleged that compensation had accrued for a period of more than 50 weeks at the rate of \$15 per week, the total sum alleged to be due being an amount within the court's ju-

risdiction. It is therefore unnecessary, in view of our holding that the award of the board was not *res judicata*, to determine the question raised by the second assignment of error.

Defendants in error in their brief filed in the Court of Civil Appeals present as their fifth assignment of error that the findings and verdict of the jury are contrary to the great preponderance of the evidence. Inasmuch as this and other assignments relating to the trial of the case on the facts were not passed upon by the Court of Civil Appeals, we recommend that the cause be remanded to that court for such action as may be deemed proper following its disposition of the assignments referred to.

PHILLIPS, C. J. We approve the judgment recommended in this case, and the holding of the Commission on the question discussed.

DURHAM et al. v. HOUSTON OIL CO. OF TEXAS. (No. 151-3110.)

(Commission of Appeals of Texas, Section B.
May 28, 1920.)

1. Injunction \S 35(2) — Party having prior possession under deed may enjoin naked trespasses.

One having actual prior possession of land under a deed fully descriptive thereof, under which it claimed title, was entitled to recover against naked trespassers in a suit for injunction to prevent trespasses and the cutting of timber.

2. Adverse possession \S 98 — Possession of improvements on league of land held not to extend beyond improvements.

One taking possession of a league of land of which 15½ acres were improved, and claiming an indefinite 640 acres not designated, but not exercising any control over, or adverse possession of, any part of the league other than that covered by the actual improvements, acquired no title by limitation to any part of the league outside of the improved land.

3. Adverse possession \S 112 — Presumption not indulged in support of party having burden.

Where the burden rests upon one asserting limitation, a presumption supporting the claim should not be indulged, especially when the evidence will not more certainly support a presumption in consonance with the right than in derogation thereof.

4. Adverse possession \S 85(3) — Evidence of taking possession under some sort of trade will not warrant finding of adverse possession.

Evidence that K. took possession of land owned by S. under some sort of a trade, the character of which is not shown, does not warrant the jury in finding that the possession

was taken under such circumstances as to set in motion the bar of limitations, especially where K. subsequently abandoned any character of occupancy for more than half a century.

5. Adverse possession §85(1) — Absence of party under whom another took possession and failure to claim raises no presumption of adverse holding.

Where K.'s possession of land owned by S. was under some sort of a trade with S., S.'s absence and failure to assert his right in opposition to K. raised no presumption of K.'s adverse right.

6. Evidence §219(1) — Absence of vendor may be considered in proper case as evidence.

Where K. took possession of S.'s land under some sort of a trade, the absence of S., who asserted no right in opposition to K., might be considered, in a proper case, by the jury as tending to show payment of the purchase money.

7. Adverse possession §60(4) — Possession by consent remains such until repudiation brought home to owner.

Where possession of land is taken with the consent of the owner, the possession is the owner's possession until repudiation is brought home to him.

Error to Court of Civil Appeals of Ninth Supreme Judicial District.

Suit by the Houston Oil Company of Texas against Ralph Durham and others. A judgment for plaintiff was affirmed by the Court of Civil Appeals (193 S. W. 211), and the defendants and certain interveners bring error. Affirmed.

O. W. Howth, W. R. Blain, R. L. Durham, and E. E. Easterling, all of Beaumont, for plaintiffs in error.

Parker & Kennerly, of Houston, for defendant in error.

SADLER, P. J. This suit was instituted May 18, 1914, by the Houston Oil Company of Texas against Ralph Durham, C. F. Howth, W. S. Bruce, and L. G. Roberts, for an injunction to prevent the defendants from trespassing upon the A. W. Smith league of land in Hardin county, and to prohibit them from cutting or removing timber therefrom, or from procuring or conspiring with others to do so.

On September 3, 1914, Mary Stockholm et al., as heirs of George Keith, intervened, setting up title in themselves to an undefined 640 acres of the league, and alleging that as such owners they placed the original defendants in possession. They made Manor Hanks, S. O. Hanks, J. S. Rice, and Hezekiah Rice defendants, but later dismissed as to them. These interveners disclaimed all title to the league against the Houston Oil Company,

except the undivided 640 acres which they claimed under the 10-year statute of limitation. The petition contains no description of the 640 acres, further than that it should be so surveyed as to include the improvements.

On June 29, 1915, George Womack and others intervened, claiming the same 640 acres under George Keith. They later dismissed their plea of intervention.

August 2, 1915, the original defendants and the interveners Mary Stockholm et al. filed their first amended answer and plea of intervention. After numerous exceptions, they specially alleged that the original defendants were in possession of the land as tenants and cotenants of such interveners, and pleaded the title in themselves to 640 acres of the league, to be so taken as to include the improvements of George Keith made on 15½ acres. They described the latter tract by metes and bounds as inclusive of the improvements. They pleaded not guilty and general denial. They prayed for a recovery of the 640 acres out of the league, and that the court have same surveyed so as to include the land on which the improvements were alleged to have been situated.

August 2, 1915, the oil company filed its supplemental petition and answer to the cross-action by these parties, wherein they set up the 5 and 10 year statutes in bar. The 10-year statute was asserted under recorded memorandum describing the whole league. The cause went to trial between the oil company on one part and the original defendants and first interveners on the other. After hearing the evidence, the court gave a peremptory instruction for the oil company, and upon verdict returned in its favor judgment was accordingly rendered. The losing parties appealed, and the judgment of the trial court was affirmed. 193 S. W. 211.

As the statement of the evidence given in the opinion by the Court of Civil Appeals is sufficient to an understanding of the questions discussed, we deem it unnecessary to restate it, further than attention may be called to it in the opinion.

The propositions which are presented by the plaintiffs in error are: First, that it was error to peremptorily charge for the oil company, because the evidence wholly failed to show title by limitation in the company as to the 640 acres claimed by plaintiffs in error; second, that there was error in not submitting to the jury the issue of title in the petitioners under the 10-year statute as to 640 acres of the survey, because the facts showed that this ancestor had perfected title to 640 acres prior to 1860, and the evidence wholly failed, to show an invasion of petitioners' possession in support of limitation title in the oil company to any part of the 640 acres; and, third, that under any view of the record,

they showed title by limitation against the oil company as to the 15½ acres.

Opinion.

A statement of the respective positions of the parties and their rights furnishes a complete answer to the propositions urged in support of the errors assigned.

[1] By the pleading and facts adduced, the Houston Oil Company was shown to have had the actual prior possession of the whole league under a deed fully descriptive thereof, under which it claimed title to the land. The plaintiffs in error subsequently invaded that possession without apparent claim. Under this state of facts, the oil company was entitled to recover against the naked trespassers. *House v. Reavis*, 89 Tex. 626, 35 S. W. 1063.

To defeat the effect of prior possession, plaintiffs in error sought to show title in themselves under George Keith by limitation as to 640 acres. They took the burden of proof. To meet this duty, they sought to show that in 1837 Smith, the patentee, was in possession of the league, living in a house situated on the 15½ acres described in their intervention; that George Keith moved on the league under some kind of a trade with Smith; that Smith moved away when Keith moved in; and that Keith held that tract, claiming 640 acres, until 1880, when it was vacated.

[2] The only evidence showing, or tending to show, any claim by Keith is that he went into possession with the consent of Smith, settled on the improvements made by Smith—being the tract of 15½ acres described by metes and bounds in the intervention—and claimed an indefinite 640 acres out of the league. There is an absence of pleading or evidence showing any character of act by Keith designating the particular 640 acres claimed, or that he ever exercised any control over or adverse possession of any part of the league, other than that covered by the actual improvements. No character of possession or occupancy by Keith or plaintiffs in error is shown subsequent to 1859, until in the spring of 1914. The plaintiffs in error showed no title by limitation to any part of the league outside of the land covered by the improvements. *Lumber Co. v. Kennedy*, 103 Tex. 297, 126 S. W. 1110; *Titel v. Garland*, 99 Tex. 201, 87 S. W. 1152; *Giddings v. Fischer*, 97 Tex. 184, 77 S. W. 209; *McAdams v. Hooks*, 47 Tex. Civ. App. 79, 104 S. W. 432; *Rice, Executor, v. Goolsbee*, 45 Tex. Civ. App. 254, 99 S. W. 1031.

We now come to consider the serious question raised by the record: Is there any evidence raising the issue of title in plaintiffs in error as to the 15½ acres alleged to have been covered by the improvements? The only reasonable conclusion to be drawn from the evidence is that A. W. Smith had already improved the 15½ acres when Keith went into

possession. The evidence shows that Smith was living on the land at the time Keith went into the occupancy of the house. How long Smith had been on the league, or the extent to which he had improved the same, does not appear. No additional improvements are shown to have been made by Keith after taking possession. It is not made to appear that he fenced any additional land after taking possession. He went into possession of this improved land with the consent of Smith. The bar of the statute is not made to appear, unless Keith's occupancy for 20 or more years under claim to the undefined 640 acres can be construed into such open and notorious adverse possession of the improved tract as charged Smith or his vendees with notice of the repudiation and adverse claim of Keith.

[3] Where the burden rests upon one asserting limitation, presumption supporting the claim should not be indulged, and more especially when the evidence will not more certainly support a presumption in consonance with the right than in derogation thereof.

[4-6] Keith took possession under some sort of trade. What was the trade? Was it some executory contract, the complete performance of which would have to be shown? Or was it a definite purchase of the 15½ acres by executed contract? *Browning v. Estes*, 3 Tex. 462, 49 Am. Dec. 760. We are left to grope in the maze of speculation as to the character of the contract under which possession was taken. Is it within the field of possibilities that a jury can, upon any reasonable hypothesis, say that Keith's possession was taken under such circumstances as to set in motion the bar of the statute? It is said that Smith's absence and want of assertion of right in opposition to Keith is presumptive of Keith's adverse right. We do not think this a sound proposition. Smith was not called upon to act until there was certainly an invasion of his possession in repudiation of the entry by consent, and notice brought home to him of such repudiation and adverse possession. His absence in proper case might be considered by a jury as tending to show payment of purchase money. *Secrest v. Jones*, 21 Tex. 121.

[7] If Keith took possession with the consent of Smith, that possession was Smith's possession until repudiation was brought home to Smith. Certainly the jury may not disregard the fact that possession was taken under some sort of trade, and treat the original entry as adverse.

We would have an entirely different question had the evidence simply showed naked possession by Keith for the statutory period under an assertion of claim to the land, or with an intention to occupy and hold it until his possession ripened into title. The presumption of claim arising from the con-

tinued occupancy, in satisfaction of the statutory prerequisites, is destroyed when the claimants' own evidence, on which they depend for the establishment of title, discloses facts which militate against the possession of the ancestor as being in opposition to and against the consent of the original title holder, and shows the abandonment by the claimant of any character of occupancy for more than a half century. The evidence shows that from 1859 to 1914 no character of occupancy was held by Keith or any claimant under him. It is shown that the improvements on the 15½ acres had disappeared, with the possible exception of some debris of an old chimney. Before the oil company took possession, nature had asserted dominion and clothed the remains of civilized occupancy in the habiliments of the forest.

Having made proper disposition of the case, the judgment of the Court of Civil Appeals should be affirmed.

PHILLIPS, C. J. We approve the judgment recommended in this case.

DAWSON v. KING et al. (No. 144-3078.)

(Commission of Appeals of Texas, Section A. May 26, 1920.)

1. Master and servant ¶114—Employé entitled to safe way of reaching floor used.

It is the duty of an employer to exercise ordinary care to furnish an employé a reasonably safe place in which to work, including a reasonably safe way or method of ascent and descent to and from a second floor, where it was necessary for him to go.

2. Master and servant ¶129(1)—Injury must be probable consequence of negligence, which ought to have been foreseen.

To entitle an employé to recover for the employer's negligence, it must appear that the injury, not necessarily the precise actual injury, but some like injury, was the natural and probable consequence of the negligence, and that it ought to have been foreseen in the light of the attending circumstances.

3. Master and servant ¶129(1)—Omission to provide way of reaching upper floor held not cause of injury.

Where no stairway or method of ascent to an upper floor of a building was provided, and an employé attempted to reach the upper floor through a hole in the floor, by climbing a post on which were cleats, and in doing so placed his hand against a rolling door to brace or balance himself, and the door fell on him, the employer's negligence did not consist in providing an unsafe way, but in failing to provide any way, and was not the proximate cause of the injury, which was due to the unsafe way provided by the employé.

4. Master and servant ¶107(2)—Employer's duty to secure rolling door defined.

An employer owed to employés generally the duty of blocking a rolling door, to prevent its falling while being used by them for its intended purpose, or to prevent its falling upon any employé working near it; and a like duty would arise toward an employé, if the employer should have anticipated that he would probably use it for other than its primary purpose in the performance of his work.

5. Master and servant ¶107(2) — Duty to provide safe place applies only to place intended for use.

The employer's duty in respect to a safe place extends only to such parts of premises as he had prepared for the employé's occupancy or use in the performance of his work, and such other parts as he knows or ought to know such employé is accustomed or likely to use in performing his work.

6. Master and servant ¶128—Employer held to owe no duty respecting door not used for intended purposes.

An employer owed an employé no duty to secure a rolling door, so that he could safely use it to brace or balance himself in climbing through an opening leading to an upper floor, unless the employer knew or should have known that he did so use it; it not being intended for that use.

7. Master and servant ¶278(3)—Evidence insufficient to show employer should have known or anticipated use of door.

Evidence held insufficient to show that an employer should have known or anticipated that a rolling door which it failed to block would be used by an employé in climbing through a nearby opening in the floor, to brace or balance himself.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by Ed. Dawson against Mrs. H. M. King and another. A judgment for plaintiff was reversed, and judgment rendered for defendants, by the Court of Civil Appeals (192 S. W. 271), and plaintiff brings error. Affirmed.

Jno. C. Scott, of Corpus Christi, Geo. P. Brown, of Edinburg, and E. B. Ward, of Corpus Christi, for plaintiff in error.

Jas. B. Wells, J. K. Wells, and Herbert Davenport, all of Brownsville, and H. R. Sutherland, of Corpus Christi, for defendants in error.

SONFIELD, P. J. Ed. Dawson, plaintiff, brought this action against Mrs. H. M. King and the Murray Company, defendants, to recover damages for personal injuries received by him while in their employ. The case was submitted on special issues, and on the findings of the jury judgment was rendered in favor of plaintiff. On appeal, the judgment

of the district court was reversed, and judgment rendered in favor of defendants. (Civ. App.) 192 S. W. 271. This is the third appeal in this case. (Civ. App.) 121 S. W. 917; 171 S. W. 257. Writ of error was granted herein by the Committee of Judges.

As grounds of recovery, plaintiff alleged in substance: That he was injured while engaged in installing for defendants a cotton gin and cotton press in a building at Kingsville, through their failure to provide him with a safe place in which to prosecute his work; that in the part of the building where plaintiff was engaged in his work there was an elevated floor, about 7 feet 2 inches from the ground; that in this floor, next to the wall of the building, there was an opening, which had been made or left for a flight of steps as means of ascent and descent to and from this floor; that steps at this place were necessary to enable plaintiff to properly prosecute his work with safety, and that defendants negligently failed to provide them, or any means of ascent and descent. It was further alleged that there was a large doorway through a side or wall of the building, the lower edge of which was about on the same level with, or just above, the surface of the upper floor, which doorway was closed by a large rolling door; that, prior to the time of plaintiff's injury, defendants had negligently rolled the door along its runway from the doorway, so that, at the time plaintiff was injured, and many days prior thereto, it remained suspended, or hung, from its runway against the wall above one of the sides of the opening through the floor; that defendants, after so placing and leaving the door above the opening, negligently failed to securely fasten it, so that it would not fall from its runway and injure plaintiff while he was engaged in the prosecution of his work; that, while he was engaged in his work in the building underneath this floor, it became necessary for him to get a hammer, which lay on the floor overhead, near one side of the edge or opening; that defendants had not provided steps or other means of ascent whereby he could have easily secured the hammer, and, in an effort to get the hammer, and in the exercise of due care and caution, and without knowing, or having reason to believe, that the door was not securely fastened, and that he was thereby incurring danger, but, on the contrary, believing that the door was securely fastened in the place where it hung, he placed one foot on a piece of plank nailed on an upright near the edge of the opening left for the stairway, caught hold of the rolling door with one hand, and slightly pulled on the door to assist him in an effort to reach the hammer with the other hand; that, as he did so, the door, or one side or end of it, gave way and fell from its runway, causing plaintiff to fall.

Defendants answered separately, urging a

general demurrer and many special exceptions. They each denied that plaintiff was in his employ, and each pleaded contributory negligence and assumed risk. We will assume, without deciding, that plaintiff was in the employ of both defendants. Plaintiff's petition properly reflects the manner and construction of the building and of the rolling door. We make this further statement of facts established by the evidence:

There was a post, 6x6, at the corner of the opening left for the stairway, running up from the first and through the second floor. Cleats or wooden crosspieces were nailed to the post by plaintiff, or under his direction, as a means or method of ascending to the second floor. On the occasion of his injury, plaintiff ascended the post to secure a hammer which he had left on the upper floor, and which was lying about 18 inches from the left edge of the opening. He did not purpose to go to the second floor, but only to ascend a sufficient height to enable him to reach the hammer. He stood with his left foot on the cleat, his right foot suspended in the air, and his left arm clasped about the post from the front. In this position, he reached over and placed his right hand on the rolling door, some 3 feet distant, and released his left arm from the post, intending to secure the hammer with his left hand. The pressure against the door, used by plaintiff as a brace or balance while he was thus suspended, caused it to roll off its track and fall; it not having been properly blocked or secured. Plaintiff had a large and extended experience in the work of installing gins and presses. He was well acquainted with the construction of buildings of the kind in question, and was in full charge and control of the work of installation in which he was engaged.

[1, 2] The duty devolved upon defendants to exercise ordinary care to furnish plaintiff a reasonably safe place in which to work, which, under the facts, would include a reasonably safe way or method of ascent and descent to and from the second floor. If the breach of this duty was the proximate cause of plaintiff's injury, defendants are liable. In this, as in all cases involving negligence, in order to liability, it must appear that the injury, not necessarily the precise actual injury, but some like injury, "was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *Milwaukee Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *T. & P. Ry. Co. v. Bigham*, 90 Tex. 223, 38 S. W. 162.

[3] No stairway was built, and no method of ascent provided, by defendants. In view of this negligent omission, plaintiff could have declined to enter upon or continue in the work. He could have insisted upon the performance of the duty imposed upon them

in this particular. He did complain of the absence of the stairway, but continued in the work; and, acting upon his own independent judgment, without the direction or instruction of defendants, adopted a way in the use of which he was injured. The negligence of defendants was negative. They omitted performance of a duty. They were negligent, not in providing an unsafe way, but in failing to provide any way. The place, in the condition in which plaintiff found it, was perfectly safe. The various parts, together constituting the place, used in the manner and for the purpose intended, in no wise imperiled plaintiff in the performance of his work. He, without the instruction or authority of defendants, knowingly—and, as we shall presently see, unnecessarily—used the door for a purpose other than that for which it was intended. Through his own act he rendered the theretofore safe place unsafe. It is obvious that plaintiff's injury was not the proximate result of the failure of defendants to provide a way, but of the unsafe way he himself provided. Having assumed to provide the way, instead of waiting upon defendants to do so, plaintiff's injury must be charged to his own conduct. He is therefore in the attitude of seeking a recovery for an act, not done or caused by defendants, but by himself. *St. L. S. W. Ry. Co. v. Highnote*, 99 Tex. 23, 80 S. W. 924; *M., K. & T. Ry. Co. of Tex. v. Graham*, 209 S. W. 399.

Plaintiff asserts that, in the absence of a way, he was within his right in devising one, and the way so devised would have been safe, but for the negligence of defendants, of which he had no knowledge. The negligence complained of was the failure to properly block the rolling door.

[4] Defendants owed to their employees generally the duty of safely securing the door, by proper blocking, to prevent its falling while used by them for its intended purpose, or to prevent its falling upon any employee whose work required him to be in proximity thereto. Under some circumstances, a like duty would arise toward an employee who it should be anticipated would probably use the door for other than its primary purpose in the performance of work to which he has been assigned.

[5, 6] The employer's duty in respect to a safe place extends only to such parts of the premises as he has prepared for the employee's occupancy or use in the performance of his work, and to such other parts as he knows, or ought to know, such employee is accustomed, or is likely, to use in the performance of his work. Considered as a part of the place, the door was not intended for use by plaintiff in ascending to the second floor, and defendants owed him no duty to so secure it that he could safely use it as he did, unless

they knew, or should have known, that he would so use it. *Morrison v. Burgess Sulphite Fiber Co.*, 70 N. H. 406, 47 Atl. 412, 85 Am. St. Rep. 634.

[7] The purpose of the door was well known to plaintiff. He testified that doors of this character were found in practically all ginhouses. Its mere presence near the opening was not evidence either that defendants intended that plaintiff should use it as he did, or that they were at fault in not knowing that he was likely to or might probably do so. The evidence wholly negatives the duty of knowledge or anticipation on the part of defendants, in that the method devised by plaintiff did not require the use of the door. He testified:

"If I had thought that the door was going to fall, I would have put my right foot on that cleat, and put my left arm around the south side of that 6x6, and pulled myself against the post, and have reached over with my right hand, and have gotten the hammer. * * * I could have gone upstairs and gotten the hammer. * * * I could have climbed up the post, and have gone on the floor myself."

Instead of this, plaintiff stood with his left foot on the cleat, his right foot suspended in the air, his left arm around the post from the front, and, while in this position, extended his right hand across the 3-foot opening, pressing against the door to balance himself, and at the same time releasing his left arm from the post, intending with the left hand to secure the hammer. Plaintiff not only devised the method of ascent, but departed from the safer manner of its use, which, under his own evidence, did not necessarily involve the use of the door. In the position assumed by plaintiff, it was almost a physical impossibility for him to have secured the hammer. It can hardly be said that his act was one which even a prudent man would have been likely to anticipate.

From the record it is clear that defendants did not know, and cannot be charged with knowledge, or a duty to anticipate, that plaintiff would make use of the door in making ascent to the second floor, especially in view of the fact that the use of the door for such purpose, even by the method provided by plaintiff himself, was not necessary. We are constrained to hold, for the reasons stated, that as a matter of law the negligence of defendants in failing to block or secure the door was not the proximate cause of the injury sustained by plaintiff, and therefore gave him no right of action. *T. & P. Ry. Co. v. Bigham*, *supra*.

We are of opinion that the judgment of the Court of Civil Appeals should be affirmed.

PHILLIPS, C. J. We approve the judgment recommended in this case.

HALL v. EDWARDS. (No. 133-3028.)

(Commission of Appeals of Texas, Section A.
May 26, 1920.)

1. Vendor and purchaser \S 39—Conveyance of land for immoral purposes held illegal.

Where grantee immediately conveyed the premises to a third person by whom the house was to be used for purposes of prostitution, and where grantee, by agreement of the parties, was a mere conduit through whom the title was to pass from grantors, who had built house to be used for such purposes, to third person, to circumvent any adverse action arising out of the immoral contract, the transaction, including grantee's execution of deed in trust to secure payment of purchase money, was in contravention of public morals, and therefore an illegal contract.

2. Contracts \S 138(1)—Illegal transaction does not preclude recovery unless part of cause of action.

The plaintiff cannot recover when it is necessary for him to prove, as a part of his cause of action, his own illegal contract, or other illegal transaction, but if he can show a complete cause of action without being obliged to prove his own illegal act, although such illegal act incidentally appears and may be important even as explanatory of other facts in the case, he may recover.

3. Contracts \S 138(2)—Immoral contracts, when executed by parties, may confer rights upon the parties.

Contracts which are illegal because of their immoral character are void in the sense that they are incapable of enforcement in courts of justice and will not support a remedy and in that no legal obligation is incurred by either party, but are not void in the sense that they can confer no rights, since they can be executed by the voluntary acts of the parties or through some means or agency other than courts, agreed upon by the parties, and, when so executed, they may confer actual and irrevocable rights upon the parties.

4. Contracts \S 138(2)—Where immoral contract fully executed, courts will enforce rights resulting therefrom.

When an illegal contract entered into for immoral purposes has been fully executed, and suit is not brought for the purpose of its enforcement, the courts will recognize and enforce any new contract right or title resulting from its execution.

5. Trespass to try title \S 6(1)—Plaintiff must establish his title.

In an action in trespass to try title, plaintiff, to recover, must establish his title.

6. Appeal and error \S 909(2)—Court denying foreclosure purchaser relief because of illegality of mortgage is presumed to have found that purchaser bought for mortgagee.

In mortgage sale purchaser's action in trespass to try title against mortgagor, where court denied purchaser relief on ground that mortgage was a part of an immoral transaction, it will be presumed in support of the judgment

that purchaser bought the property for mortgagee.

7. Contracts \S 138(3)—Vendor cannot foreclose lien or recover title where land was sold to be used for immoral purposes.

Where property was sold to be used for purposes of prostitution, vendors, having secured payment of purchase-money notes by a vendor's lien and by deed in trust, were precluded, because of illegality of the transaction, from foreclosing the liens upon or recovering title to the land through the courts.

8. Trespass to try title \S 6(1)—Trustee's sale executes immoral mortgage contract so as to entitle purchaser to relief.

Refusal of defendant, who had purchased property for immoral purposes, to yield possession to plaintiff, who had purchased at trustee's sale under deed in trust executed as a part of the immoral transaction, did not render the illegal deed of trust an unexecuted contract so as to preclude court from giving plaintiff relief in action in trespass to try title, the contract having been executed by the trustee's sale giving plaintiff a complete title, with the right of possession as an incident thereto, without reference to the original illegal contract.

9. Property \S 7—Right of possession an incident of title.

Actual entry upon land is not necessary to give seisin or investiture or to give a more perfect title; the right of possession being an incident to and growing out of the title.

10. Fraudulent conveyances \S 174(1)—Grantee may recover possession though conveyance fraudulent.

Where a conveyance has been made in fraud of creditors, and possession remains with grantor, the grantee may recover possession.

11. Deeds \S 17(1)—Reconveyance by grantee in deed executed for immoral purpose on cancellation of purchase-money notes is valid.

If land is conveyed to be used for immoral purposes, and notes are executed for purchase money, a conveyance of the land by grantee to a third party or a reconveyance to grantors in consideration of cancellation of notes would be valid and binding, and would divest grantee of all title and right to possession; the moral obligation to pay the notes or reconvey being a sufficient consideration.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Action by W. M. Hall against Lula Edwards. Judgment for defendant was reformed and affirmed by Court of Civil Appeals (194 S. W. 674), and plaintiff brings error. Reversed, and judgment rendered for plaintiff.

Nelson & Hunter, of Wichita Falls, for plaintiff in error.

T. R. Boone, of Wichita Falls, for defendant in error.

SONFIELD, P. J. Action in trespass to try title by W. M. Hall, plaintiff in error, against Lula Edwards, defendant in error.

By deed dated August 20, 1913, P. H. Pennington and Charles Hill deeded to Everett Hughes a lot in Wichita Falls upon which was situate a seven-room house. The recited consideration was \$150 cash, 56 notes for \$60 each, payable monthly, and one note for \$37, secured by vendor's lien, retained in the deed and by a deed in trust dated August 21, 1913. On August 21, 1913, Hughes conveyed the property to Lula Edwards, in consideration of \$150 cash and the assumption of payment of the notes above described. The first 13 of the notes were paid, and, default having been made in the payment of the notes subsequently maturing, the trustee sold the property under the trust deed. Plaintiff in error, Hall, was the purchaser under the trustee's sale, and the trustee delivered to him a proper deed of conveyance to the property.

The cause was submitted to a jury upon special issues. In response to such issues, the jury found that Pennington and Hill sold the property to be used for immoral purposes; that it was used for immoral purposes; that at the time plaintiff in error purchased the property under the trustee's sale he knew that the property had been sold by Pennington and Hill for immoral purposes, and was then being used for such purposes.

The Court of Civil Appeals finds further that Pennington and Hill built the house to be used for prostitution and for sale to those engaged in that business; the terms of sale being so arranged that payments might be made out of the profits of the business conducted on the premises. The evidence establishes that the property was deeded to Hughes with the understanding that it be conveyed by him to defendant in error; the object being to circumvent any adverse action arising out of the immoral and illegal contract. There is evidence that in purchasing the property at the trustee's sale plaintiff in error acted for and in behalf of Pennington and Hill, and that the purchase by him was for the use of Pennington and Hill.

The trial court rendered judgment that plaintiff take nothing by his suit, and further decreed that the cloud upon defendant's title, by reason of plaintiff's claim, be removed. The Court of Civil Appeals reformed the judgment of the district court by omitting therefrom the affirmative relief granted defendant in error, and as reformed affirmed the judgment. 194 S. W. 674. Writ of error was granted upon application referred to the Committee of Judges.

[1] As held by the Court of Civil Appeals, the transaction involving the conveyance of the property by Pennington and Hill to Hughes, the execution of the deed in trust by

Hughes, and his conveyance to defendant in error, was in contravention of public morals, and therefore an illegal contract. It is apparent that Hughes was a mere conduit through whom, by agreement of the parties, the title was to pass to defendant in error.

The authorities are agreed that a court will not lend its aid, in any manner, toward carrying out the terms of an illegal contract, and, when a plaintiff cannot establish his cause of action without relying upon such contract, he cannot recover. *Read v. Smith*, 60 Tex. 379; *Beer v. Landman*, 88 Tex. 450, 31 S. W. 805; *Wiggins v. Blasso*, 92 Tex. 219, 47 S. W. 637, 71 Am. St. Rep. 837.

[2] As stated in *Frost v. Plumb*, 40 Conn. 111, 16 Am. Rep. 18, quoted in *Beer v. Landman*, supra:

"We understand the rule to be this: The plaintiff cannot recover whenever it is necessary for him to prove, as a part of his cause of action, his own illegal contract, or other illegal transaction; but if he can show a complete cause of action without being obliged to prove his own illegal act, although such illegal act may incidentally appear, and may be important even as explanatory of other facts in the case, he may recover. It is sufficient if his cause of action is not essentially founded upon something which is illegal. If it is, whatever may be the form of the action, he cannot recover."

[3] Illegal contracts of this character are said to be void. The use of the term "void" in this connection tends to confusion. Such contracts are void in the sense that they are incapable of enforcement in courts of justice, and will not support a remedy. No legal obligation is incurred by either party. But such contracts are not void in the sense that they can confer no rights. They can be executed by the voluntary acts of the parties, or through some means or agency, other than the courts, agreed upon between the parties; and if, and when, so executed, they may confer actual and irrevocable rights upon the parties. 2 Elliott, Con. § 1061; *McBlair v. Gibbes*, 17 How. 232, 15 L. Ed. 132.

From the fact alone that a contract is unenforceable in the courts, it does not follow that an enforceable right or estate cannot result therefrom. This is illustrated in the case of a creditor who, prior to the adoption of the present Constitution, had acquired a properly executed deed in trust upon the homestead of the debtor. The Constitution prohibited a forced sale of the homestead. This was the only method by which the courts could subject such property to the payment of the debt, and the lien was, therefore, unenforceable through the courts. Yet a sale made by the trustee under the deed in trust was valid and binding. Again, where a debt secured by a deed in trust was barred by limitation, the lien could not be

foreclosed by the courts; but, until recent legislation, a sale under the deed in trust conveyed good title to the property. *Goldfrank v. Young*, 64 Tex. 432.

[4] When an illegal contract, of the character here in question, has been fully executed, and suit is not brought for the purpose of its enforcement, the courts will recognize and enforce any new contract, right, or title resulting from its execution by the parties themselves. *Wagner v. Biering*, 65 Tex. 506; *Floyd v. Patterson*, 72 Tex. 202, 10 S. W. 526, 13 Am. St. Rep. 787; *De Leon v. Trevino*, 49 Tex. 88, 30 Am. Rep. 101; *Brooks v. Martin*, 2 Wall. 70, 17 L. Ed. 732. And, to use the language of the court in *Wegner v. Biering*, *supra*:

"When the contract has been executed without the aid of courts by the voluntary acts of the parties, the profit or estate * * * is not contaminated."

[5, 6] This action is in trespass to try title. In order to a recovery, it was essential that plaintiff establish his title. He purchased under the trustee's sale with full knowledge of the illegality of the contract. It may be that there was evidence sufficient to raise the issue that he purchased for Pennington and Hill. This issue was not submitted, nor its submission requested; and, to sustain the judgment of the trial court, the presumption obtains that the court so found. In the further consideration of the case we will regard plaintiff in error as occupying the same position that Pennington and Hill would occupy, according him no different or higher rights.

[7] The deed from Pennington and Hill to Hughes reserved a vendor's lien to secure payment of the purchase-money notes; and thereby the superior title remained in them. To further secure payment of the notes, Hughes executed the deed in trust. Defendant in error took the property subject to these liens. The transaction being illegal, Pennington and Hill were precluded from foreclosing the liens upon or recovering title to the land through the courts.

[8] But the illegality of the transaction did not prevent the exercise of the power of sale conferred upon the trustee, by agreement of the parties, through the deed in trust. At this sale plaintiff in error became the purchaser, and acquired the title remaining in Pennington and Hill through the retention of the vendor's lien and that of defendant in error acquired by her deed from Hughes. The sale put an end to the illegal contract. It was fully executed by the parties themselves, acting through the trustee, who, in the execution of the trust, was the agent of all the parties thereto. Plaintiff in error's title, though arising out of the illegal contract, was not dependent upon it; that is, no action

of the court was necessary to enforce the contract, or any of its terms, in order to make the title perfect or complete.

A title or estate so resulting from, and arising out of, the illegal contract, fully executed, will be recognized by the courts; the recognition involving no reference to, or action upon, the contract itself.

Plaintiff in error not seeking the enforcement of the contract, and not invoking it to sustain a remedy, its illegality is no defense. To permit this defense, under the facts herein, would be to create a right or title in defendant in error dependent entirely upon such contract. It would, in effect, be to enforce the contract on her behalf, enabling her to reap a benefit thereunder. The same principles which govern courts in declining to enforce an illegal contract in aid of a plaintiff's title inhibit its use to create a title in a defendant. *Wooden v. Shotwell*, 24 N. J. Law, 789.

From the fact that defendant in error did not yield possession, the Court of Civil Appeals concluded that the contract was not fully executed, and that plaintiff in error, in seeking recovery of possession, invokes the aid of the court in carrying into final effect the illegal contract. We think this conclusion erroneous.

[9] Where parties to such an illegal contract, in dependence thereon, seek the aid of the court to create in them the right of possession, the court will refuse its aid. But where such parties establish an existent right of possession, needing the aid of the court, not for its creation but only for its enforcement, such aid will not be denied them. The right of possession is an incident to, and grows out of, the title. The title vested in plaintiff in error through the trustee's deed. It was as perfect, upon the due execution and delivery of the deed, as though he had been placed in actual, pedal possession of the land. Actual entry upon land is not necessary to give seisin or investiture, or to give a more perfect title. The title draws to it the legal seisin and possession. *Horton v. Crawford*, 10 Tex. 382; *Titus v. Johnson*, 50 Tex. 224. Exhibiting a perfect title, plaintiff in error established an existing right of possession in no manner dependent upon the action of the court, and sought only an enforcement of this right.

[10] Where a conveyance has been in fraud of creditors and possession remains with the grantor, the grantee may recover possession. *Hoeser v. Kraeka*, 29 Tex. 450; *Lemp Brewing Co. v. La Rose*, 20 Tex. Civ. App. 575, 50 S. W. 460.

This holding is predicated upon the fact that the conveyance, though void as to creditors, was valid and binding as between the parties and those claiming under them. The title having vested, the right of possession

followed. Herein the deed in trust was void only in the sense that it could not be enforced through the courts. It could be, and was, executed in the manner agreed upon between the parties, without the aid of the court; and thereby the title passed, and with it the right of possession.

[11] It cannot be doubted that, had Pennington and Hill conveyed the land to defendant in error, she executing notes for the purchase price, a conveyance of the land by her to plaintiff in error, or a reconveyance by her to Pennington and Hill, in consideration of the cancellation of the notes, would have been, in all things, valid and binding. In such case, had she remained in possession of the property, there would be nothing to preclude her grantee from recovering possession. The execution of the deed would be clearly within the right of defendant in error, and through its execution she would be divested of all title and the resultant right of possession. Conceding to her the right to attack the validity of the deed on the ground that it was founded upon an illegal consideration, as in the case of *Medearis v. Granberry*, 38 Tex. Civ. App. 187, 84 S. W. 1070, cited and discussed by the Court of Civil Appeals, such defense would be groundless. Despite the illegality of the transaction, there was a moral obligation resting upon defendant in error to pay the purchase-money notes or reconvey the land. While courts will not enforce the moral obligation, they will recognize it as a valuable and sufficient consideration to support the deed. *Bleocchi v. Casey-Swasey Co.*, 91 Tex. 259, 42 S. W. 963, 66 Am. St. Rep. 875; *McBlair v. Gibbs*, supra.

The deed under the trustee's sale had precisely the same legal effect as a deed executed by defendant in error would have had. As said by the Court of Civil Appeals:

"The trustee's deed executed under the authority of the deed of trust is in legal effect a conveyance by Lula Edwards herself."

There is no attack upon the regularity of the sale by the trustee, or the deed executed by him to plaintiff in error. Though the execution of the deed in trust was illegal, the sale thereunder had in it no element of illegality. It was not in contravention of public morals, nor contrary to any public policy, and the title vesting in plaintiff in error was complete without reference to the original illegal contract.

We are of opinion that the judgments of the district court and the Court of Civil Appeals should be reversed, and judgment here rendered for plaintiff in error.

PHILLIPS, C. J. We approve the judgment recommended in this case.

PECOS & N. T. RY. CO. v. HALL.
(No. 125-3004.)

(Commission of Appeals of Texas, Section A. May 26, 1920.)

1. Commerce §8(3)—State cattle quarantine regulations held not in conflict with or superseded by federal regulations as to interstate shipment.

State regulations for moving cattle from pasture in quarantined territory to station are not in conflict with, and so not superseded by, federal regulations, under the national quarantine act, relating solely to their movement in interstate shipment.

2. Carriers §215(1)—Not liable for damage from dipping cattle because of advance notice that it would not transport them unless dipped, as required by quarantine regulations before taking them to station.

Where plaintiff without dipping his cattle, in pasture in territory under quarantine, could not have taken them to defendant's station for interstate shipment, without violating quarantine regulations, defendant, because notifying plaintiff in advance that it would not transport them unless they were dipped, was not liable for the damage from dipping them, which plaintiff thereupon had done, irrespective of whether under regulations, under the national quarantine act, it would have been defendant's duty to receive them for shipment had they been moved and tendered for shipment without dipping.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Action by J. F. Hall against the Pecos & Northern Texas Railway Company. Judgment for plaintiff was affirmed by the Court of Civil Appeals (189 S. W. 535), and defendant brings error. Reversed and rendered.

Terry, Cavin & Mills, of Galveston, and Madden, Trulove, Ryburn & Pipkin, of Amarillo, for plaintiff in error.

R. R. Hazelwood and J. M. Jones, both of Amarillo, for defendant in error.

TAYLOR, J. J. F. Hall early in October, 1913, entered into a contract with Warren & Son, ranchmen, by which he agreed to take from them all their heifers of a certain class, less a 10 per cent. cut back. The cattle were located on a ranch in Farmer and Bailey counties, Tex., and by the terms of Hall's contract of purchase were to be by the owners rounded up at Cyclone Well, where Hall was to make his cut back. Following this, the cattle to be received by Hall were to be taken to Bovina, a station on the Pecos & Northern Texas Railway Company's line about five miles from Cyclone Well, and there delivered to Hall on October 24th. Hall was purchasing the cattle for shipment from Bovina to Kansas City for immediate slaughter,

and on October 14th ordered cars in which to move the shipment on the 24th.

The territory, including all of Bailey and Parmer counties, as well as the ranch upon which the cattle were located, was then under quarantine established by both state and federal authorities on account of the prevalence of a disease known as scabies.

On October 22d, before the cattle were to be rounded up for Hall to make his cut back, L. L. Jones, an inspector for both the Live Stock Sanitary Commission of Texas and the Bureau of Animal Industry for the federal government, informed the station agent at Bovina, John Lucas, that he would not issue a shipping permit for the cattle, unless they were dipped. Lucas thereupon communicated by wire with the company's general freight agent, and was advised not to receive the cattle for transportation unless they were accompanied by a shipping permit. Following this, Lucas attempted to get in telephone communication with Warren & Son's foreman, Mr. Morehead, for the purpose, according to his statement, "of not having him go to the trouble of bringing in the cattle without knowing they would be clear for shipment." Lucas failed to get in communication with Morehead, but later in the day talked to Inspector Jones, who volunteered his services in the matter of either seeing Morehead direct, or sending him word that Lucas would not receive the cattle for shipment until a permit had been issued. Morehead testified that he received the message from Jones that the cattle would not be received for shipment until they had been dipped. For that reason, he testified, he did not take the heifers to Bovina on the 24th for delivery. The night following the conversation between Jones and Morehead the latter talked with Hall over the telephone, with the result that the cattle were dipped the next day under Hall's instructions. A shipping permit was issued, and on October 31st the cattle were delivered to Hall at Bovina, and by Hall to the railway company, and shipped.

Hall sued the railway company for the damages sustained by the cattle resulting from the dipping. He states in his first supplemental petition that the gist of his cause of action "is the unlawful, illegal, and negligent requirement by the defendant that plaintiff procure a certificate of the inspection and permit, which would require dipping of the cattle in question before it would accept them for shipment."

Rule 19 of the Live Stock Sanitary Commission of Texas, promulgated under the quarantine laws of the state, and in force at the time of the transactions above detailed, recites that, whereas it had been ascertained by the Live Stock Sanitary Commission that scabies, a contagious, communicable disease, was prevalent among the cattle in the coun-

ties named, including the counties of Parmer and Bailey, that to the end the disease be eradicated from among the cattle of Texas, the movement of any cattle from, through, or into the counties named should be made in the manner and under the conditions thereafter prescribed.

The conditions prescribed by rule 20 of the commission were, in effect, that no cattle held in the counties named should be moved from the pastures where located for any purpose whatsoever without a permit issued by a duly authorized inspector of the commission, and that no cattle within the territory designated should be tendered for inspection to a federal inspector for interstate movement, unless the owner of the cattle was in possession of a certificate signed by an inspector for the commission, stating that the owner of the cattle tendered had complied with the state laws, rules, and regulations of the commission, and that his range and cattle were free of infection.

Regulation No. 21 of the Bureau of Animal Industry for the federal government, promulgated and in force at the same time, provides that cattle not visibly diseased, but which may be part of a diseased herd, may, without inspection, be shipped interstate as "uninspected exposed cattle" for immediate slaughter, from points in the quarantined area to any recognized slaughtering center where pens were provided for yarding exposed cattle, provided the officers of the transportation company fixed to both sides of the cars carrying such cattle a durable placard on which was printed in the type prescribed the words, "uninspected exposed cattle." Plaintiff contended that, inasmuch as his cattle were of the class designated, they were eligible to shipment under the federal regulation, without dipping and without the issuance of a certificate or permit.

The court received in evidence the rules of the Live Stock Sanitary Commission offered by defendant, but after the evidence was concluded withdrew them from the consideration of the jury. The charge was, in substance, that if the cattle were uninspected exposed cattle, but not diseased, and plaintiff ordered cars for their transportation on October 24th from Bovina to Kansas City for immediate slaughter, and that prior to the time for shipment defendant announced it would not receive and transport the cattle without a certificate or permit, or unless they were first dipped, and that such announcement, if any, was communicated to plaintiff, and that the only lawful way by which a shipping permit or certificate could be obtained was for the cattle to be dipped, and that in compliance with the announcement the cattle were dipped, and from the dipping as a proximate cause sustained the injuries alleged, to find for plaintiff.

The trial resulted in a verdict and judgment for plaintiff. The Court of Civil Appeals affirmed the judgment. 189 S. W. 535. The writ was granted upon application referred to the committee of judges.

[1] Plaintiff seeks to predicate liability upon the station agent's statement that he would not receive the cattle for transportation unless they were dipped and the subsequent act of dipping resulting in their injury, and attempts to discharge the burden of showing that plaintiff could have lawfully tendered the cattle for shipment without dipping on the date the cars were due to be furnished at Bovina, by invoking federal regulation No. 21.

The difficulty arises from the fact that at the time of the agent's statement, by which it is claimed he waived the company's right to an actual tender of the cattle for shipment, they were in the custody of Warren & Son in their pasture several miles distant from Bovina. They were at that time also a part of a diseased herd in infected territory, and had not been tendered to a federal inspector for interstate movement; nor had a permit or certificate been issued preliminary to such movement, as required by the state quarantine rules.

Defendant in error questions the validity of the state rules, and points out that in 1905 Congress enacted sections 8703, 8704, U. S. Comp. Stats. 1916, relating to the interstate shipment of diseased and exposed cattle from quarantine districts; that under section 8703 it is the duty of the Secretary of Agriculture to promulgate rules and regulations governing the inspection, certification, treatment, handling, and the method and manner of delivering and shipping of cattle from a quarantined state, or any portion thereof, into any other state; that section 8704 provides that cattle may be moved from such area in compliance with the rules and regulations promulgated pursuant to the provisions of section 8703, and that cattle may lawfully be moved only in compliance with the rules and regulations so promulgated. The contention is made that upon such enactment by Congress the national quarantine laws superseded those of the state.

The state quarantine laws and regulations are superseded by the federal only in case of conflict, or in the event the state rules are unreasonable and impose a direct burden upon interstate commerce. *St. L. S. W. Ry. Co. v. Smith*, 20 Tex. Civ. App. 451, 49 S. W. 627; *Id.*, 181 U. S. 248, 21 Sup. Ct. 603, 45 L. Ed. 847; *Evans v. Chicago & N. W. Ry. Co.*, 109 Minn. 64, 122 N. W. 876, 26 L. R. A. (N. S.) 278; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527; *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455, 3 Interst. Com. Com'n R. 185; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 18

Sup. Ct. 488, 42 L. Ed. 878; *Rasmussen v. Idaho*, 181 U. S. 198, 21 Sup. Ct. 594, 45 L. Ed. 820. Whether the state and federal regulations are in conflict must be determined by reference to the regulations themselves.

The federal regulation invoked relates wholly to safeguards provided to prevent the spread of the disease after the cattle have been received by the carrier and are in the process of interstate shipment. State rules Nos. 19 and 20 have to do with precautions to be exercised in moving the cattle from the pastures in which located, and the tendering of them to a federal inspector for interstate movement. They are supplemental rather than in conflict.

The state's jurisdiction over its exports until they are committed to the carrier for transportation when they are to be transported by rail, and, in any event, until they are started upon their ultimate passage from the state, is recognized by both the federal and state decisions.

In *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715, the court say:

"When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepôt for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state. Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction."

The doctrine stated has been reaffirmed in the recent cases of *McCluskey v. Marysville & Northern Ry. Co.*, 243 U. S. 36, 37 Sup. Ct. 374, 61 L. Ed. 578, and *Hammer v. Dagenhart*, 247 U. S. 272, 38 Sup. Ct. 529, 62 L. Ed. 1101, 8 A. L. R. 649, Ann. Cas. 1918E, 724. In *Houston Direct Navigation Co. v. Insurance Co. of North America*, 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713, 59 Am. St. Rep. 17, it is held that when a commodity has been delivered to a common carrier to be transported on a continuous voyage to a point beyond the limits of the state where delivered, the character of interstate or foreign commerce attaches thereto.

The mere fact that the National Quarantine Act provides for the interstate movement of cattle only by rules and regulations promulgated under its provisions does not render void reasonable state regulations touching their preliminary movement, at least in the absence of conflicting regulations; nor are such state regulations thereby rendered void so long as the national regulations relate solely to cattle in the process of interstate shipment.

In the recent case of *Carey v. State of South Dakota*, 250 U. S. 118, 39 Sup. Ct. 403, 63 L. Ed. 886, the court had under consideration the validity of the State Game Laws of South Dakota. The question involved was whether the state law, in view of the provisions of the federal Migratory Bird Act, enacted subsequent to its passage, was void. The federal act provides that all wild geese, wild ducks, and other migratory birds which in their migration passed through and did not remain permanently the entire year within the borders of any state should thereafter be deemed to be within the custody and protection of the government of the United States, and should not be destroyed or taken contrary to regulations thereafter provided for. The state law provided that no person should ship, convey, or cause to be shipped or transported, by common or private carrier, to any person either within or without the state, wild duck of any variety. Carey was convicted in the state court for violation of the state statute under a charge of shipping wild ducks from a point within the state to Chicago. He urged that, inasmuch as Congress by the language of the national act assumed exclusive jurisdiction over the class of migratory birds in question, the then existing state laws on the subject were thereby abrogated. The court in the course of the opinion upholding the validity of the state law says:

"It is, however, urged that Congress has manifested its intention to assume exclusive jurisdiction of the subject, and that the failure to make any provision in the federal act concerning shipping evidences the purposes of Congress that the shipping of game birds shall not be prohibited. This argument rests upon the clause which declares that the migratory birds 'shall hereafter be deemed to be within the custody and protection of the government of the United States.' But that clause may not be read without its context; and the words immediately following show that the custody and protection is limited to prohibiting their being 'destroyed or taken contrary to regulations' which are to fix the closed seasons in the several zones. If, reading the federal act as a whole, there were room for doubt, two established rules of construction would lead us to resolve the doubt in favor of sustaining the validity of the state law. First. The intent to supersede the exercise by a state of its police powers is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state. *Savage v. Jones*, 225 U. S. 501, 533; *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613, 623. Second. Where a statute is reasonably susceptible of two interpretations, by one of which it would be clearly constitutional and by the other of which its constitutionality would be doubtful, the former construction should be adopted."

[2] The state quarantine regulations are, in our opinion, valid, and must be looked to in

determining in the light of the facts whether plaintiff, at the time he claimed the railway company waived its right to have the cattle actually tendered for shipment, was in a position to lawfully tender them for transportation without having them dipped.

Judge Hendricks, speaking for the Court of Civil Appeals in this case, says:

"We necessarily infer that the jury believed that Jones, as federal inspector, informed Lucas, the agent, that under the federal regulations these particular cattle, purchased by Hall, had the right to go to Kansas City, Mo., for immediate slaughter. If under the federal regulations a permit for that purpose was necessary to be issued by Jones, it inferentially follows that Jones, as federal inspector, would have issued such a document. It also follows, we think, logically that the agent had no right to refuse to receive uninspected, clean cattle in the pens at Bovina for shipment for immediate slaughter at Kansas City and St. Joseph, Mo., unless the same were dipped. We infer that Jones, as state inspector, would not have issued a permit for the movement of these cattle from Warren & Son's ranch to the stock pens, but also conclude that, if a permit were necessary, he would have issued one as federal inspector, permitting the movement of the cattle to Kansas City and St. Joe, Mo., for the open market for immediate slaughter."

The inference relied upon in the foregoing excerpt cannot be indulged except upon the presumption that the inspector would have violated his official duty.

Under the provisions of rule 20 of the state live stock commission, only two ways were open to plaintiff for moving his cattle from the pasture where located, to wit: (a) By securing a certificate from the inspector stating that the owner of the cattle tendered and complied with the state laws, rules, and regulations, and that his range and cattle were free of infection; and (b) by securing a permit from the inspector. Jones stated to the station agent that the cattle "were not eligible to a certificate," and it appears from the rule that they were not. The range was not free from infection, and it is not to be inferred that a certificate would have been issued so stating. There is no basis in the record for indulging the inference that the inspector would have issued a permit to move the cattle without their being dipped, even if his statement that under the state regulations the cattle "couldn't come from the range without dipping" be disregarded. There is no ground for presuming that protection of the territory between the pastures and the shipping points, from the spread of disease therein, was not equally as important as protecting the territory along the route of shipment from the same menace.

We see nothing in the state rules to indicate that they are unreasonable, or that they were not promulgated in good faith for the protection of the live stock of the state.

Plaintiff, without dipping his cattle, could not have moved them from the pasture where located to Bovina, without violating the state quarantine regulations; and, regardless of whether after the cattle had been so moved it would have been the defendant's duty under federal regulations, to receive them for transportation without dipping, plaintiff is not entitled to recover. A cause for damages could not be founded, we think, upon an advance notice given by the defendant to the plaintiff that it would not transport the cattle unless they were dipped, when in fact the plaintiff could not have tendered the cattle lawfully for shipment without dipping them. There was no waiver by defendant of a tender which plaintiff was not in position to make.

We recommend, therefore, that the judgments of the district court and Court of Civil Appeals be reversed, and that judgment be rendered in favor of plaintiff in error.

PHILLIPS, C. J. We approve the judgment recommended in this case.

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SPEER et al. v. DALRYMPLE et al.
(No. 158-3138.)

(Commission of Appeals of Texas, Section B.
May 26, 1920.)

1. Evidence §431—Nondelivery of written instrument may be shown by parol.

A defendant being sued on a written instrument is not precluded from showing by parol evidence the fact of nondelivery to defeat the effectiveness of an obligation.

2. Bills and notes §489(1)—Pleadings held to present issue of nondelivery of commission notes secured by lien in deed.

In broker's action on commission notes secured by lien reserved in deed, pleadings held to present issue of nondelivery of notes to broker.

3. Brokers §88(5)—Whether broker participated in fraud inducing real estate exchange held for jury.

In broker's action on commission notes and to foreclose lien reserved in deed, brought after the real estate transaction had been rescinded for fraud, question whether broker who acted as agent for both parties to the transaction was a party to such fraud or had notice thereof held for the jury.

4. Brokers §65(1)—Broker not entitled to commissions after rescission for fraud to which he was a party.

If broker who acted as agent for both parties to real estate exchange transaction was a party to or had notice of the fraud that induced consummation of transaction, he is in no position to assert a lien for commissions on one of the tracts of land conveyed, reserved in

the deed after the transaction had been rescinded because of such fraud, though rescission did not specifically provide for the cancellation of commission notes.

5. Brokers §77—Broker estopped from asserting lien for commissions after rescission for his fault.

If broker who had acted as agent for both parties to real estate exchange transaction was a party to or consented to rescission of transaction on ground that it had been induced by fraud, he could not enforce the lien on land of defrauded party, reserved in the deed by which the land was conveyed.

6. Evidence §434(12)—Parol testimony as to fraud and rescission therefor held admissible.

In broker's action on commission notes and to foreclose lien reserved in deed, parol evidence that notes had not been delivered, that transaction had been induced by fraud, and had been rescinded because of such fraud, held admissible; such evidence not seeking to alter written contracts, but merely attacking their efficacy as binding because of fraud and authorized rescission.

7. Brokers §82(4)—Vendors may assert their lien in broker's action to foreclose lien for commissions.

In broker's action on commission notes and to foreclose lien reserved in deed, where broker's lien as shown by facts pleaded was inferior to vendor's lien for purchase price, vendors were entitled to show they had a lien superior to that of broker, and to have jury pass on such issue.

8. Equity §38(1)—Having jurisdiction, equity will adjust all rights of the parties.

Equity having the parties, the subject-matter, and the facts before it, will adjust, in consonance with the rules of equity, the rights of the parties arising on the pleadings and the facts.

Error to Court of Civil Appeals of Second Supreme Judicial District.

Suit by J. B. Dalrymple and another against R. M. Speer, T. J. Peniston, and another. Judgment for plaintiff was affirmed by the Court of Civil Appeals on appeal by named defendants (198 S. W. 911), and named defendants bring error. Judgment of Court of Civil Appeals and of district court reversed, and cause remanded.

W. E. Myres, of Ft. Worth, and S. C. Padelford, of Cleburne, for plaintiffs in error.

H. P. Brown and Ramsey & Odell, all of Cleburne, for defendants in error.

SADLER, P. J. This suit was filed in the district court of Johnson county by J. B. Dalrymple to recover upon two notes executed by W. R. Grice for \$300 each, with interest and attorney's fees, and for a foreclosure of a contract lien on two sections of land in Ector county. The defendants in the foreclosure were Grice, T. J. Peniston, and R. M. Speer.

The plaintiff alleged that he was the owner of the notes by transfer; that they were executed by Grice to Peniston, or order, in part payment for the land, and were secured by the liens reserved in a deed and deed of trust. Peniston and Speer were made parties to the foreclosure, as asserting some interest in the land. There was neither written transfer nor indorsement of the notes by Peniston.

The plaintiffs in error answered controverting every material allegation of the petition, and by special plea alleged that prior to and at the date of the making of the two notes Dalrymple was a real estate agent; that they were the owners of 1,280 acres of land in Ector county, described in the petition; that Dalrymple represented that Grice owned an equity of \$1,800, or more in certain land in Panola and Shelby counties; that, acting as agent for both landowners, Dalrymple was instrumental in bringing about the exchange of lands by them, upon an agreement that Grice should convey to Peniston his east Texas lands and pay \$6,000 evidenced by two notes of \$3,000 each, payable to Peniston or order, secured by a vendor's lien upon the Ector county land; that Dalrymple and Grice fraudulently represented to plaintiffs in error that Grice owned the equity in the east Texas lands, that he had good title thereto, and that such equity was of the value of \$1,800 or more; that, when the papers were drawn to close the deal, the deed from Peniston to Grice was made to recite as deferred purchase money on the Ector county land only the two \$3,000 notes secured by the contract lien retained in the instrument; but that, at the special request of and for an accommodation to Dalrymple and Grice, it was agreed that the notes in suit might be included in the deed from Peniston to Grice, and secured by the contract lien retained against the land; that these two notes did not represent any part of the consideration due for the land, were no part of an obligation of either Peniston or Speer to Dalrymple, but covered solely an amount due by Grice to Dalrymple for commissions in the deal accruing to Dalrymple from Grice; that the papers were so executed upon the distinct contract and agreement on the part of all the parties to the transaction that these two notes should be payable to Peniston or order, should be held by him, not to be delivered to Dalrymple until after the two \$3,000 notes were paid, and that the notes in suit were not to become binding as liens or obligations against the land until the payment of these two \$3,000 notes and the delivery of the commission notes by Peniston; that, while Peniston held the legal title to the land, the beneficial title was in Speer, and this was known to the parties making the deal; that the \$3,000 notes were never paid, and that

the two notes in suit were never in fact transferred and delivered by Peniston to Dalrymple; that Dalrymple obtained possession of the commission notes in breach of this agreement, and without the consent of either Peniston or Speer; that he sought to obtain a transfer of the notes from Peniston, which was refused by the plaintiffs in error. It was alleged that, after the exchange of deeds on the part of Grice and Peniston, it was discovered that Grice did not own any equity in the Panola and Shelby county lands, and in fact did not own any lands in Panola or Shelby county, and that this was known to Dalrymple; that, upon such discovery, Speer called upon Dalrymple, informed him of the facts, and he agreed to bring about a rescission of the trade; that he did so by obtaining from Peniston and Speer a reconveyance of the east Texas lands to Grice, and a conveyance of the Ector county land by Grice to Speer, in cancellation of the two \$3,000 purchase-money notes, and in full rescission of the trade; that Dalrymple was a party to, negotiated, and agreed to this rescission; that the two notes in suit were never in fact delivered to Dalrymple so as to become binding liens upon the land.

The plaintiffs in error undertook to defeat the foreclosure upon these allegations, and tendered proof of the facts alleged, which was excluded by the court.

Plaintiffs in error also sought, in an alternative plea upon the facts, to have a foreclosure of the two \$3,000 notes as prior liens against the land, in the event the lien of the commission notes should be decreed to be valid; and tendered proof upon this alternative plea, which was likewise excluded by the court.

The court excluded all evidence, save that offered by the plaintiff in support of his action.

After the evidence was in, the trial court peremptorily instructed the jury to return a verdict for the plaintiff—which was done. Thereupon judgment was rendered in favor of the plaintiff against Grice for the amount of the two notes, with a foreclosure on the Ector county land. On appeal, this judgment was affirmed by the Court of Civil Appeals (196 S. W. 911), and writ of error was granted by the Supreme Court in the view "that the evidence offered by Speer and Peniston under their special plea was admissible and that the court erred in giving the peremptory charge."

Opinion.

As the Court of Civil Appeals seems to have reached its conclusion that no error was committed in excluding the evidence offered by the plaintiffs in error upon the authority of *Holt v. Gordon*, 107 Tex. 137, 174 S. W. 1097, and (Civ. App.) 178 S. W.

902, it will not be amiss to discuss the effect of that decision before proceeding further in the case.

Holt v. Gordon is clearly distinguishable from the instant case. That decision is a correct announcement of the law with reference to the facts upon which based. On September 28, 1906, Holt conveyed to Gordon 60 acres of land for a consideration of \$2,800. The deed recited \$1,300 cash and two notes of \$750 each, payable to Holt, and secured by the vendor's lien retained. Thereafter, on November 1, 1906, Gordon executed to Holt his note for \$1,300, which was secured by a deed of trust upon another tract of 212 acres of land owned by Gordon. This \$1,300 note represented the cash consideration recited in the deed from Holt to Gordon. The deed was delivered to Gordon, and the deed of trust and notes to Holt, thus completing the transaction.

Afterwards Gordon endeavored to cancel the trade by tender of rescission. This Holt refused, and brought suit upon all the notes to foreclose his vendor's lien and deed of trust lien. Gordon defended upon the plea that it was agreed at the time of the execution and delivery of the papers between him and Holt that the transaction should not be binding upon him unless he could borrow the money upon the 212 acres of land to take up and extend the \$1,300 note. It was held to be improper to permit parol evidence of this agreement, in the absence of fraud in inducing the making of the contracts and the delivery of the papers, as it would be ingrafting new terms upon the written deed and deed of trust. The holding in that case proceeded upon the fact that delivery had been completed between the parties.

In the instant case the charge is that the notes in fact never had been delivered to Dalrymple in such manner as to make them effective against the Ector county land, and that delivery was a condition precedent to the effective obligation of the notes as liens on the land.

[1] We know of no authority, nor have we been cited to any, which precludes a defendant from showing by parol evidence the fact of nondelivery to defeat the effectiveness of an obligation. As we view Holt v. Gordon, it is authority for the admission of parol evidence to show nondelivery in fact, and to show the contract between the parties with reference to delivery. Had Gordon placed his notes and deed of trust in escrow for delivery upon the conditions pleaded by him, his right to show the facts is not denied by the holding in Holt v. Gordon, but is sustained by that decision.

[2] The pleadings of the parties in the instant case are sufficient to present an issue as to nondelivery, and to admit parol evidence upon that issue. 10 R. C. L. p. 1053, § 249.

[3] The plaintiffs in error also charged fraud in the procurement of the exchange of the lands, and laid this at the door of Dalrymple and Grice. They relied upon this fraud as vitiating the exchange and authorizing a rescission by the respective property owners without reference to the commission notes. As we understand the issue presented with regard to fraud, it is that Dalrymple, being a party to the original transaction, cannot assert the notes which he held as liens against the land where rescission has been had on account of the fraud. The rescission was alleged to have been necessitated, not only because of the failure to pay the purchase money notes by Grice, but also because of the primary fraud chargeable to both Grice and Dalrymple. On this issue the plaintiffs in error were entitled to have the facts passed upon by the jury.

[4] We are of opinion that if Dalrymple was a party to, or had notice of, the fraud which induced Peniston and Speer to act, then he is in no position to assert a lien against the Ector county land, because rescission may have been had without specific cancellation of the commission noted. Under the facts alleged by Dalrymple, the notes, as commercial paper in his hands, may be legal obligations of Grice; but as to whether they were valid liens against the land, was an issue which should have been determined by the jury upon the facts pleaded as they may have been established by the evidence.

[5] We are of opinion, also, that even though the notes may have been delivered to Dalrymple under such circumstances as made them binding liens against the Ector county land so long as the parties continued in recognition of the validity of the trade, yet, should it be determined from the pleadings and facts that Dalrymple was such a party to, and so consented to, the rescission as to evidence a waiver of the accommodation lien securing the notes, he cannot enforce such lien, and would be estopped to assert same as against the land.

We have carefully considered the authorities upon which the defendants in error rely, and are of opinion that they do not militate against, but are in support of our holdings.

The trial court erred in excluding evidence tending to establish the defenses pleaded, and deprived plaintiffs in error of substantive legal rights.

[6] The evidence offered did not seek to alter written contracts, but, recognizing the terms of the written obligations, attacked their efficacy as binding, because of nondelivery, fraud, and an authorized rescission. The defense is that the commission notes as made never became binding as liens against the Ector county land or were released by the rescission. Prouty v. Musquiz, 94 Tex. 87, 58 S. W. 721, 996.

[7, 8] Should the plaintiffs in error fail to sustain their defenses of nondelivery, fraud, and rescission, as against Dalrymple, we do not think that they are thereby deprived of their right to show that Dalrymple is the holder of a lien inferior to the lien existing in favor of plaintiffs in error to the extent of the consideration which Grice had obligated himself to pay in purchase of the land. The facts alleged in the pleadings clearly show on this branch of the case that Dalrymple was an inferior lienholder to the extent of the actual consideration for the land which Grice contracted to pay. If the evidence establishes the truth of the allegations, the Ector county land simply stood as a surety for Grice as to the Dalrymple notes, subject to the superior claim of the plaintiffs in error to the extent of the purchase price. On this issue, therefore, we think the court should have heard the evidence, and have permitted the jury to resolve the facts. So far as the foreclosure is concerned, Dalrymple is seeking the aid of equity, and a court of equity, with the facts before it, should administer equity. Having the parties, the subject-matter, and the facts before it, a court of equity will adjust in consonance with the rules of equity the rights of the parties arising on the pleadings and the facts.

The trial court committed substantial error in depriving plaintiffs in error of the right to support their defenses by proof, and in giving the peremptory charge.

The judgments of the Court of Civil Appeals and of the district court should be reversed, and the cause remanded for a new trial.

PHILLIPS, C. J. We approve the judgment recommended in this case, and the holding of the Commission on the question discussed.

BARREDA v. CRAIG, THOMPSON & JEFFRIES. (No. 156-3127.)

(Commission of Appeals of Texas, Section B. May 26, 1920.)

1. Evidence \Leftrightarrow 445(2) — Written contract of sale could not be modified as to price by parol.

In absence of allegation of fraud by the seller of cattle in procuring the written contract at a specified price by representation that his influence with the Mexican government would enable the cattle to escape export duty, plea of the buyers, setting up a verbal modification of the contract for the deduction from the price per head of the export duty exacted by the Mexican government, held not available to them as a palpable attempt to ingraft on a

written contract a parol agreement directly antagonistic to it.

2. Sales \Leftrightarrow 61—Contract for sale of Mexican cattle to Americans held executed as to seller.

Where American buyers of Mexican cattle accepted them from the seller, and moved them to a point in Mexico near the United States line, where nothing remained to be done except to pay duty, if legally imposed, drive the cattle to the American side, and pay the Mexican seller in accordance with the contract, so far as the seller was concerned, the contract was executed, and not open to abrogation as executory, to permit making of a new agreement.

3. Sales \Leftrightarrow 80—Substituted agreement, diminishing price, not enforceable, as exacted from seller.

Where American buyers of Mexican cattle, after they had accepted and driven the cattle to a point in Mexico for export to the United States, insisted they would not take the cattle unless seller reduced price by amount of what buyers claimed was the Mexican head duty, substituted agreement, embodying modification, cannot be set up by buyers against seller's action for undiminished price, having been exacted by coercion, in view of the danger of seizure of the cattle by revolutionists and other factors.

4. Sales \Leftrightarrow 89—Seller, who reduced price, could recover amount on failure of consideration for reduction.

Where the Mexican seller of cattle to Americans reduced the price to the buyers solely in consideration of an export duty claimed by them to be levied by the Mexican government, which duty was in fact not levied, the sole consideration for the reduction of price, embodied in a substituted agreement, failed, and the seller can recover the amount of the reduction.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Suit by Ramon Barreda against Craig, Thompson & Jeffries. To review a judgment for plaintiff, defendants brought error to the Court of Civil Appeals, which reversed the judgment and remanded the cause (200 S. W. 868), and plaintiff brings error. Judgment of the Court of Civil Appeals reversed, and that of the district court affirmed, on recommendation of the Commission of Appeals.

Sanford & Wright, of Eagle Pass, and Le-wright & Douglas, of San Antonio, for plaintiff in error.

Bogges & Smith and C. K. McDowell, all of Del Rio, and Ed H. Wicks, of San Antonio, for defendants in error.

MCLENDON, J. This was an action by Ramon Barreda to recover against Craig, Thompson & Jeffries a balance of \$2,394 upon a contract by which plaintiff sold defendants certain cattle. Judgment was rendered in the trial court in favor of plaintiff for the

full amount sued for upon an instructed verdict. The Court of Civil Appeals reversed this judgment, and remanded the cause for further trial. 200 S. W. 863.

The only assignments of error in the Court of Civil Appeals relate to the action of the trial court in directing a verdict for plaintiff, and the only question for determination is whether defendants can avail themselves of a subsequent agreement under which they paid a less amount for the cattle than that originally contracted for. So much of the pleading and evidence as is essential to an understanding of the case will be given.

The contract, which was in writing, was executed at Laredo, Tex., on January 9, 1914. Plaintiff was a Mexican citizen, and an adherent of the Huerta government. The cattle at that time were on plaintiff's ranch, some 40 or 50 miles from Monclova, Mexico. The contract very minutely and exactly defined the rights and obligations of the parties. It was written in the Spanish language, but there was no controversy as to the substantial correctness of the English translation attached to plaintiff's petition and introduced in evidence. It provided that the plaintiff sold, and defendants purchased, all the cattle of plaintiff situated upon his ranch Las Cabras at \$19 per head, United States currency, except calves of the previous year's breed, branded in December, 1913, which were to be paid for at \$5 per head, United States currency. Defendants were to send to the ranch a reliable party, their representative, with sufficient money, and duly authorized to hire at Monclova such men as might be necessary to gather the cattle at the ranch and take them to Eagle Pass, either by rail or driving them all the way, in case trains were not running. When the roundup was completed, the representative of defendants and plaintiff's ranch foreman were to list the cattle, specifying the number over a year old and the number of calves less than a year old; the list to be signed by defendants' representative. Defendants were to pay for the cattle as soon as they reached the American side of the Rio Grande by check on the Laredo National Bank, which bank had in writing agreed to pay the check on presentation. All expenses for gathering and bringing the cattle over, including consular papers, exportation duties, and such other as might occur, were to be exclusively for the account of defendants. If by the time of arrival at the ranch of defendants' representative and cowboys, the cattle had been taken away by revolutionists, defendants were to lose their expenses, with no right of refund from the plaintiff; and if the revolutionists should seize the cattle, taking them away from defendants, the latter agreed to make claim through the government of the United States, and pay plaintiff "when they got the money."

In compliance with the contract, plaintiffs sent their representative to the ranch, who rounded up the cattle and drove them overland to Monclova, where they were loaded upon cars and shipped to Piedras Negras, just across the Rio Grande from Eagle Pass. Upon arrival at Piedras Negras, a controversy arose between plaintiff and defendants relative to an export duty of 10 pesos, or \$4 gold, which the Mexican revenue officials either demanded or were thought to be demanding, before permitting the cattle to leave Mexico. The upshot of this controversy was that defendants refused to proceed further with the contract, unless plaintiff would scale the price for the cattle to \$12 gold around per head. There were 450 grown cattle, and 100 calves. Under this proposed alteration of the contract, the total consideration amounted to approximately the original consideration, less the supposed export duty of \$4 gold per head. Plaintiff declined this offer at first, but was given until the following morning for final decision, and upon the following morning he accepted the proposition. The cattle were then driven across the river and paid for at the rate of \$12 per head around. The export duty was in fact not paid, but plaintiff did not know this fact until after final settlement with defendants. He accepted the reduced price in the belief that defendants had been required to pay the duty.

The theory upon which plaintiff sought to recover the balance under the original contract was that the modified or substituted contract was made upon the consideration that defendants would be required to pay the ten pesos export duty; that defendants falsely represented that they were required to and did pay said duty; and that plaintiff believed same to be true, and, relying thereon, accepted the reduced price. He alleged that the original agreement "had not in any way become oppressive to defendants, and there was no consideration moving from said defendants unto this plaintiff for the alteration of the original agreement."

Defendants resisted enforcement of the original contract upon two special pleas: First, that, at the time the original contract was entered into, plaintiff represented that on account of his relations with the Mexican federal government he would be able to get the cattle to the American side without payment of an export duty. The duty was not in force at the time the contract was made, but it was in contemplation by the Mexican authorities, and it was upon this representation and warranty by the plaintiff that the defendants were induced to and did make the contract under which they agreed to pay all export and other charges; that, upon learning that the duty would be charged, the defendants opened negotiations with plaintiff, and the modified contract was made and

consummated, which amounted to a mutual accord and compromise by the parties. Second, that the defendants, apprehending and believing that the duty had been levied and would be collected, informed plaintiff that they could not and would not carry out the contract, and that thereupon the modification was mutually agreed upon, and the new contract entered into and consummated, and the consideration paid.

[1] We very seriously doubt whether the first plea of defendants would in any event be available, for the reason that it was a palpable attempt to ingraft upon a contract in writing a parol agreement directly antagonistic to the writing, and no allegation of fraud in procuring the writing was made. The pleading concedes that the 10 pesos duty was not in effect at the time the contract was made, and, under the express stipulation of the contract that the defendants were to pay all duties and charges, the 10 pesos duty, in case of its subsequent levy, was clearly within the contemplation of the parties. Moreover, by the very terms of the pleading, it is shown that the parties expected the Mexican federal government to levy some export duty. In the face of this pleading, we are at a loss to find any basis warranting the admission of this alleged parol understanding. The defendants voluntarily executed the agreement with full knowledge of its terms, and charged with knowledge that by the writing they bound themselves to pay whatever duties then existed or might be imposed before the cattle crossed the border. The most that can be said of the verbal understanding or representation was that it amounted to an agreement or representation that the plaintiff would use his influence to get the cattle across without duty, in case a duty should be imposed. Conceding, however, for the purpose of this case, that the verbal agreement or representation had sufficient force in law or in morals to form the basis of a consideration for a subsequent modification of the original contract, in the event a duty were imposed, no rights can be predicated upon this verbal arrangement in the present case, because, as a matter of fact, no duty was paid by the defendants. The whole theory, therefore, of the first defense, falls to the ground.

[2] The second defense, as construed by the Court of Civil Appeals, is in substance that while the contract was still executory, the title to the cattle being in plaintiff until they were delivered on the American side, the parties could mutually abrogate the contract and make a new one, which, when fully executed would be mutually binding, and that as the evidence presented this theory it was error to peremptorily instruct for plaintiff. We cannot agree that the testimony presents the issue that the contract was still

executory as to plaintiff. So far as he was concerned, the contract was fully executed. The cattle had been accepted by defendants and moved by them to Piedras Negras. Nothing remained to be done except pay the duty, if legally imposed, drive the cattle to the American side, and pay plaintiff in accordance with the contract. All these obligations were imposed by the contract upon defendants. The fact that plaintiff assumed the risk of having the cattle taken by revolutionists did not affect the passing of title to the cattle. That stipulation of the contract merely placed upon plaintiff any loss arising from a given contingency. The stipulation would have had no place in the contract, if the title to the cattle had remained in plaintiff until they arrived on American soil. At the time defendants repudiated the contract, the cattle had arrived at a point where all danger of loss, under the stipulated contingency, had passed.

[3] If, however, we should treat the contract as still executory, we cannot concede that the substituted agreement can be enforced under the circumstances of this case. Much has been written upon the question of the right of parties to a contract to modify it by agreements wholly unilateral. The cases upon this subject are collated in an extensive note under *Morecraft v. Allen*, 54 L. R. A. (N. S.) 1. And while the general right of modification may exist while the contract is executory on both sides, and the circumstances are such as to warrant the inference that the parties acted voluntarily, we think the great weight of authority, as well as the better reasoning, supports the view that such modifications will not be enforced, where the situation of the parties at the time of the modification is such as to negative the inference of voluntary action by the party surrendering his vested rights. It would be difficult to suppose a case where the elements of coercion, extortion, and taking advantage, without justification, of one's necessities, were more palpably in evidence than as here presented. To stamp this transaction with legal approval would violate, in our judgment, every principle of honesty and fair dealing, and place a premium upon repudiation of binding legal obligations, where to do so would be to the pecuniary advantage of the party bound. There are, it is true, some authorities which support the contrary view; but we prefer that line of authorities which under such circumstances holds the parties to their original obligations. The case of *King v. Duluth Ry. Co.*, 61 Minn. 482, 63 N. W. 1105, directly supports the views we hold upon this question. The court in that case held that one who had contracted to build a railroad under stipulations for a definite price for different characters of work could not recover under a modification of the contract raising the price for the work con-

tracted to be done merely because the contract proved a losing one. After referring to authorities which seem to support the contrary view, the court say:

"The doctrine of these cases as it is frequently applied does not commend itself either to our judgment or our sense of justice, for where the refusal to perform and the promise to pay extra compensation for performance of the contract are one transaction, and there are no exceptional circumstances making it equitable that an increased compensation should be demanded and paid, no amount of astute reasoning can change the plain fact that the party who refuses to perform, and thereby coerces a promise from the other party to the contract to pay him an increased compensation for doing that which he is legally bound to do, takes an unjustifiable advantage of the necessities of the other party. To hold, under such circumstances, that the party making the promise for extra compensation is presumed to have voluntarily elected to relinquish and abandon all of his rights under the original contract, and to substitute therefor the new or modified agreement, is to wholly disregard the natural inference to be drawn from the transaction, and invite parties to repudiate their contract obligations whenever they can gain thereby. There can be no legal presumption that such a transaction is a voluntary rescission or modification of the original contract, for the natural inference to be drawn from it is otherwise in the absence of any equitable considerations justifying the demand for extra pay. In such a case the obvious inference is that the party so refusing to perform his contract is seeking to take advantage of the necessities of the other party to force from him a promise to pay a further sum for that which he is already legally entitled to receive. Surely it would be a travesty on justice to hold that the party so making the promise for extra pay was estopped from asserting that the promise was without consideration. A party cannot lay the foundation of an estoppel by his own wrong. If it be conceded that by the new promise the party obtains that which he could not compel, viz. a specific performance of the contract by the other party, still the fact remains that the one party has obtained thereby only that which he was legally entitled to receive, and the other party has done only that which he was legally bound to do. How, then, can it be said that the legal rights or obligations of the party are changed by the new promise? It is entirely competent for the parties to a contract to modify or to waive their rights under it, and ingraft new terms upon it, and in such a case the promise of one party is the consideration for that of the other; but where the promise to the one is simply a repetition of a subsisting legal promise there can be no consideration for the promise of the other party, and there is no warrant for inferring that the parties have voluntarily rescinded or modified their contract."

The court then proceed to discuss the circumstances under which a contract may be legally modified upon the consideration that unforeseen hardships to one of the contracting parties have arisen. The court conclude:

"They must be substantial, unforeseen, and not within the contemplation of the parties when the contract was made. They need not be such as would legally justify the party in his refusal to perform his contract, unless promised extra pay, or to justify a court of equity in relieving him from the contract; for they are sufficient if they are of such a character as to render the party's demand for extra pay manifestly fair, so as to rebut all inference that he is seeking to be relieved from an unsatisfactory contract, or to take advantage of the necessities of the opposite party to coerce from him a promise for further compensation. Inadequacy of the contract price which is the result of an error of judgment, and not of some excusable mistake of fact, is not sufficient."

There is another view, however, which to our mind is conclusive of the correctness of the judgment of the trial court. We have carefully perused the entire statement of facts, and the undisputed evidence clearly shows that the theory upon which plaintiff sought recovery is the only theory presented by the evidence. Waiving aside the testimony of plaintiff and his son, which shows that the sole consideration for the modification of the contract was the supposed export duty of 10 pesos, Guy Thompson, one of the defendants, testified that at the time defendants repudiated the contract, he believed that the duty had to be paid. He testified:

"We were all over there together, the Barredas and us, when they told us—and told the Barredas—there was a duty to be paid, and we entered into the contract under the understanding gained by all of us from the Mexican authorities that the ten pesos duty would have to be paid."

[4] Plaintiff never knew that the duty was not required until after the settlement was consummated. Whether any of the defendants knew that it would not be exacted before the negotiations to reduce the price were closed may be questioned. It is undisputed that they did not pay the duty, and that when they paid plaintiff, the cattle had reached the American side without export charges. They did not communicate this fact to the plaintiff or his son, and give as their only reason therefor that plaintiff did not specifically call for the information. The undisputed fact remains that the sole consideration for the reduction in the price was as pleaded by plaintiff and as testified by defendant Thompson, "the understanding gained by all of us from the Mexican authorities that the 10 pesos duty would have to be paid," which consideration wholly failed. The trial court, in our opinion, rendered the only judgment which the pleadings and evidence would support.

We conclude that the judgment of the Court of Civil Appeals should be reversed, and that of the district court affirmed.

PHILLIPS, O. J. We approve the judgment recommended in this case.

INTERNATIONAL & G. N. R. CO. v.
EDMUNDSON. (No. 135-3038.)(Commission of Appeals of Texas, Section A.
May 26, 1920.)1. Libel and slander \S 45(1)—Communication
to one having corresponding interest is "priv-
ileged occasion."

When a communication is fairly made by one in the discharge of a public or private duty, legal, moral, or social, of perfect or imperfect obligation, or in the conduct of his own affairs, to one who has a corresponding interest to receive such communication, the occasion is privileged.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Privileged Occasion.]

2. Libel and slander \S 101(4)—Burden of
proof as to malice in case of privilege stated.

In an action for libel, malice may be inferred from the falsity of the charge or imputation, unless the occasion is privileged, but, if the occasion be privileged, a proper and sufficient motive is shown repelling the inference of malice and giving rise, in view thereof, to the presumption that the communication was made in good faith, whereupon it devolves upon plaintiff to establish malice in fact.

3. Libel and slander \S 51(1)—"Malice" avoid-
ing privilege defined.

In libel the "malice" which avoids a privilege is actual or express, existing as a fact at the time of the communication, and which has inspired or colored it, and such malice exists where one casts an imputation which he does not believe to be true, and where the communication is actuated by some sinister or corrupt motive, or motives of personal spite or ill will, or where the communication is made with such gross indifference to the rights of others as will amount to a willful or wanton act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Malice.]

4. Libel and slander \S 112(2)—Actual or ex-
press malice may be proved by circumstan-
tial evidence.

In libel or slander actual or express malice need not be proven by direct or extrinsic evidence, but it may be inferred from the relation of the parties, the circumstances attending the publication, the terms of the publication itself, and from the words or acts of defendant before, at, or after the time of the communication, but it must be evidence from which the jury may infer malice existing at the time of publication and actuating it.

5. Libel and slander \S 50—Privilege not lost
because belief of truth not based on reason-
able grounds.

In libel or slander, if one makes a statement believing it to be true, he will not lose the protection arising from the privileged occasion merely because he had no reasonable ground for his belief.

6. Libel and slander \S 44(3)—Letter from de-
fendant's superintendent causing plaintiff's
discharge for violation of rules held privi-
leged.

In a libel suit brought against a railroad company by a discharged baggageman in the joint service of an express company and defendant, based upon a letter to the express company by defendant's superintendent requesting his discharge because he had carried a passenger in the baggage car contrary to regulation, the letter was privileged; the superintendent in good faith believing the information upon which it was based to be true.

7. Libel and slander \S 101(4)—Evidence held
insufficient to justify legal inference of mal-
ice.

In a libel suit against a railroad company brought by a discharged employé based on a letter from defendant's superintendent to plaintiff's employer, charging violation of rules, the failure of defendant's superintendent to answer plaintiff's letters of inquiry and his refusal to investigate the charges in the letter held not inconsistent with the superintendent's good faith so as to justify a legal inference of malice.

8. Constitutional law \S 105—Privilege can-
not be taken away by retroactive legislation.

Where the defense of privilege in a libel suit is a vested ground of defense, it cannot be taken away by retroactive legislation, in view of Const. art. 1, § 16.

9. Constitutional law \S 105—Privilege as
vested ground of defense held protected by
statute.

Section 5 (Vernon's Sayles' Ann. Civ. St. 1914, p. 4963) of the act adopting and establishing the Revised Civil Statutes providing that the repeal of any statute or any portion thereof shall not affect any act done, vested, or accrued, held to protect privilege in a libel suit as a vested ground of defense.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by O. O. Edmundson against the International & Great Northern Railway Company. Judgment for plaintiff was affirmed on appeal (185 S. W. 402), and the defendant brings error. Reversed and rendered.

Wilson, Dabney & King, of Houston, and F. C. Davis and Marshall Eskridge, both of San Antonio, for plaintiff in error.

Ernest Fellbaum, Claude J. Carter, Perry J. Lewis, Champe G. Carter, Randolph L. Carter, and H. C. Carter, all of San Antonio, for defendant in error.

SONFIELD, P. J. Action for libel by O. O. Edmundson, plaintiff against the International & Great Northern Railway Company, defendant.

The Pacific Express Company operated in the cars and over the railway line of defendant railway company. Plaintiff was employ-

ed by the express company as express messenger, and handled the baggage of the railway company. He was required to make report after each trip. As express messenger, he reported to the express company, and, as baggagemaster, he reported the baggage handled on the trip directly to the chief baggagemaster of defendant. While employed and paid by the express company, he performed a joint service for the express and railway companies; the railway company repaying to the express company each month the proportion of his salary representing the value of his services rendered the railway company. The contract between the two companies provided that the employees of the express company must abide by the rules of the railway company, and were not to be retained in the service if they violated such rules, or were otherwise unsatisfactory to the railway company. The railway company was to report to the express company any breach of the rules or any conduct not conducive to good discipline or prejudicial to the service.

H. Martin was the superintendent of the defendant railway company, and as such superintendent he received the following report from the George A. Fields Detective Agency of St. Louis, Mo.:

"Operative's Initials. * * * A. T. P.: At 3:30 p. m. Tuesday, July 26, 1910, I left Valley Junction for Palestine on train No. 6, trip No. 34, arriving at 7:10 a. m. Wednesday, July 26, 1910. The train consisted of one engine, one combination mail and baggage; one baggage car, No. 30, one chair car, and two Pullman cars, leaving Valley Junction No. 1. I met Jim Beard and I asked him what was doing. He said, 'How much money have you?' I pulled out a \$2 bill. He said 'Get over on the other side of this baggage car [No. 30], and when we get to Palestine I will come and let you know when to get out.' The same morning the baggageman saw me, and he came to collect. He said, 'Who put you in here?' I said, 'I have already paid Jim Beard,' and he went out. At Palestine Jim Beard came and told me to stay on until the train stop at the station, and get off and walk along the side."

Acting upon this report, Martin wrote the following letter, which is the basis of this action:

"International & Great Northern Railroad Company.

"H. Martin, Superintendent.

"Palestine, Texas, Oct. 22, 1910.

"Mr. T. N. Edgell, Superintendent Pacific Express Co., Dallas, Texas—Dear Sir: Will you please relieve joint express and baggageman W. V. Buttrell from service on this line on account of carrying passenger in baggage car on train 9 July 21st, and relieve O. O. Edmundson (meaning plaintiff) from joint service on account of carrying passenger in baggage car on train No. 6 arriving Palestine July 26th.

"Please favor me with your reply.

"Yours truly,

[Signed] H. Martin."

Edgell, upon receipt of the letter, placed a copy thereof in his letter file, and transmitted the original to Beatty, route agent of the express company, upon whom devolved the duty of employing and discharging; and plaintiff was immediately dismissed from the service. Subsequently, at the request of plaintiff, Edgell sent him a copy of Martin's letter.

Plaintiff alleged that the carrying of a passenger in a baggage car was a serious breach of discipline and a serious charge against the messenger's character for honesty and fidelity to duty, being equivalent to saying that he had permitted such passenger to ride there for pay.

Martin died prior to the trial of the cause. His depositions had been taken before his death, and therein he testified that he did not, at the time of the letter to Edgell, or at any time before or after, have any ill will toward plaintiff. He had no knowledge of or acquaintance with plaintiff before the sending of the letter. The communication was made on the report received by him, which he believed to be correct. It was in good faith and with the object and for the purpose of benefiting the railroad's service. He had no ill will against the plaintiff whatever; in fact, did not know him, and to the best of his knowledge had never seen him. The letter was written because the rules of the railroad company prohibited the carrying in baggage or express cars of any one other than authorized employees. There existed between witness, as general superintendent of the railway company, and Mr. Edgell, as superintendent of the express company, a confidential business relation with reference to the employment and services rendered by plaintiff. The arrangement was that the express company employ men as joint express messengers and baggagemasters, pay them the full amount of their salaries, and bill against the railroad company each month for a certain percentage of the salaries paid. The understanding was that these men were subject to the rules and regulations of the railroad company, and were to be satisfactory to the railroad company in the manner of attending to their business and conduct, etc., while in the service on the train, and that any unsatisfactory business matters or conduct, or any other matters that were not satisfactory to good discipline or prejudicial to good service, should be reported to the express company, which had the employing of the men. The communication was intended solely for the information of Edgell as superintendent of the express company, and for no one else, save that it could be shown to plaintiff, if he desired to see it. He did not expect or authorize its contents to be communicated to any other person. The letter was written entirely upon information

furnished concerning matters of service on the trains of the railway company. He believed the statements contained therein to be true; and the same was conveyed to the superintendent of the express company without any ill feeling or malice whatever toward plaintiff, simply and truly as a business publication, and without any personal feeling or ill feeling whatever.

Plaintiff testified as follows:

"The reason I was discharged was that they claimed I carried a passenger in the car. Mr. H. Martin, superintendent and general manager of the I. & G. N. made that charge against me. * * * I never carried a passenger in the car in which I was performing my duties. * * * I know H. Martin, superintendent and general manager for the receiver of the I. & G. N. His headquarters were at Palestine, Tex., and I was at that point at times; would be in Palestine every three or four days. I met Mr. Martin there personally. His attitude toward me was cool. I met Mr. Martin a few months before this letter was written. He was always cool and distant toward me. Sometimes he would recognize me, and sometimes he would not. I was discharged on November 1, 1910. I wrote to Mr. Martin twice after I was discharged, and did not receive an answer to either letter. I addressed those letters to Palestine, Tex., in Mr. Martin's official capacity, and put a stamped, self-addressed envelope in one of them. The letters I wrote to Mr. Martin never came back to me. I wrote those about ten days or two weeks after I was discharged. I went to see Mr. Martin twice to get him to investigate the charge. I went up to see him and told him the letter was false, and I would like to get him to investigate and withdraw the charge. He treated me very cool and said he couldn't do anything for me. That was all there was to it. He would not discuss it with me at all. That was the first time I went to see him. I went back again about two weeks after that, I believe it was, and saw him again and begged him to investigate the matter; asked him to investigate it; told him the charge was false that there was nothing to it. He just told me that that was all there was to it; he wouldn't have anything more to do with it. I told him I was innocent, did not know anything about it, did not carry this party, that there was a mistake somewhere, and that I would like for him to investigate the charge. He said he was through with it, didn't have any time to talk to me anything about it, and waived me out. He never at any time gave me an investigation. These were the only two times I went to Mr. Martin. I wrote him twice and received no answer to my letters. Then I went to see him twice and begged him to make an investigation on account of my innocence. He told me he would not touch the matter, would not investigate it, and waived me out. That was the end of my transactions with him. * * * I tried to straighten it up every way I knew how with Mr. Martin, and he would not give me a hearing. I had conversations with him before I went to call on him about this matter. He was then cool toward me. I don't know what kind of a man he was, but that is the way he treated me when I saw him. * * * All

Mr. Martin said was that he would not investigate; would not have anything else to do with it. * * * Beatty told me if I would go and see Mr. Martin and straighten it up he would put me back on the run. I tried to do that. I never did anything to incur the displeasure of Mr. Martin. I went to him and begged him to put me back; told him I was innocent of the charge. Asked him for an investigation, and he would not hear to me at all."

He also testified:

"Mr. Martin's manner was not cool and dignified with others altogether. As to whether or not he was a quiet and dignified man, and had little to say to anybody, I don't know, because I never had much to do with him; just at times I would see him and that is all I know of him. * * * I never had any trouble with Mr. Martin in my life."

Parrish, the detective operative, testified by deposition to the truth of the charge.

The jury, in response to special issues submitted, found the charge against plaintiff false, that Martin was actuated by malice against plaintiff in writing the letter, that by reason of the letter plaintiff was discharged, and that the letter tended to injure his reputation, exposing him to financial injury, and placed his damages at \$6,000. Judgment was thereupon rendered in favor of plaintiff in the amount so found, and an appeal resulted in the affirmance of the judgment. 185 S. W. 402.

[1] When a communication is fairly made by one in the discharge of a public or private duty, legal, moral, or social, of perfect or imperfect obligation, or in the conduct of his own affairs, to one who has a corresponding interest or duty to receive such communication, the occasion is privileged. *Mo. Pac. Ry. v. Richmond*, 73 Tex. 568, 11 S. W. 555, 4 L. R. A. 280, 15 Am. St. Rep. 794; *Toogood v. Spyring*, 1 C. R. M. & R. 181; *Somerville v. Hawkins*, 10 C. B. 183; 18 Halsbury, Laws of England, § 1263.

[2] From the falsity of the charge or imputation, unless the occasion is privileged, malice is inferred. This inference arises from the fact that no motive other than malice appears. If the occasion is privileged, a proper and sufficient motive is shown; and thereby the inference of malice is repelled, and in lieu thereof the presumption obtains that the communication was made in good faith. It then devolves upon the plaintiff to establish, by evidence other than the falsity of the charge or imputation, that malice in fact existed. *Bradstreet Co. v. Gill*, 72 Tex. 115, 9 S. W. 753, 2 L. R. A. 405, 13 Am. St. Rep. 768; *Lewis v. Chapman*, 16 N. Y. 369; *Klinck v. Colby*, 46 N. Y. 427, 7 Am. Rep. 360; *Denver Pub. Warehouse Co. v. Holloway*, 34 Colo. 432, 83 Pac. 131, 3 L. R. A. (N. S.) 696, 114 Am. St. Rep. 171, 7 Ann. Cas. 840.

[3] The malice which avoids the privilege

is actual or express malice, existing as a fact at the time of the communication, and which inspired or colored it. Such malice exists where one casts an imputation which he does not believe to be true, or where the communication is actuated by some sinister or corrupt motive or motives of personal spite or ill will or where the communication is made with such gross indifference to the rights of others as will amount to a willful or wanton act. *Bradstreet Co. v. Gill*, supra; *Jackson v. Hopperton*, 16 C. B. (N. S.) 829; 18 Halsbury, *Laws of England*, § 1316.

[4] Actual or express malice need not be proven by direct or extrinsic evidence. It may be inferred from the relation of the parties, the circumstances attending the publication, the terms of the publication itself, and from the words or acts of the defendant before, at, or after the time of the communication; but it must be evidence from which the jury may infer malice existing at the time of publication and actuating it. *Gassett v. Gilbert*, 6 Gray (Mass.) 94; *Jackson v. Hopperton*, supra; 18 Halsbury, *Laws of England*, §§ 1304 and 1316.

[5] If one makes a statement, believing it to be true, he will not lose the protection arising from the privileged occasion, although he had no reasonable ground for his belief. 5 *Labatt's Master & Servant*, 6386; *Hemmens v. Nelson*, 138 N. Y. 517, 34 N. E. 342, 20 L. R. A. 440; *Clark v. Molynoux*, L. R. 3 Q. B. Div. (C. A.) 237; *Harris v. Thompson*, 13 C. B. 333; *Jenoure v. Delmege*, [1891] A. C. 73.

In the last-cited case Lord Macnaghten observes:

"The privilege would be worth very little if a person making a communication on a privileged occasion were to be required, in the first place, and as a condition of immunity, to prove affirmatively that he honestly believed the statement to be true. In such a case bona fides is always to be presumed."

[6] Martin's letter was clearly a privileged occasion. The communication was made by him, as superintendent of defendant, in reference to a matter in which he as superintendent was interested, to Edgell, as superintendent of the express company, who had a corresponding interest to receive the same. Martin had a right, and was under obligation, to give the information to Edgell. The evidence is undisputed that Martin believed the information true. While the charge was made without an investigation, and in reliance upon a report made by a detective agency, it is not shown that Martin at the date of the publication had any reason to doubt the correctness of the report.

Applying the language of the court in *Hemmens v. Nelson*, supra, to the present case, the question is not whether the charge was true or false, nor whether Martin had

sufficient cause to believe that plaintiff did carry the passenger, or whether Martin acted hastily or through mistake, but the question is, the occasion being privileged, whether there is evidence for the jury that Martin knew or believed it to be false. Martin may have arrived at conclusions without sufficient evidence, but the privilege protects him and the defendant from liability on that ground until the plaintiff has overcome the presumption of good faith by proof of a malicious purpose to defame him under cover of the privilege.

Martin's letter clearly and succinctly stated the cause of the request for plaintiff's dismissal from the service:

"Relieve O. O. Edmundson from joint service on account of carrying passenger in baggage car No. 6 arriving Palestine July 26th."

The language of the letter does not warrant the construction that plaintiff received pay from the person permitted to ride in the car. The report of the detective agency upon which the letter was based clearly negated such charge. The carrying of a passenger in a baggage or express car was the violation of a rule of the railway company. It is manifest from all the evidence, including that of plaintiff, that the rule was of importance, and the charge of its breach a serious charge. The collection of some insignificant sum for passage appears to have been the least consideration in the promulgation and enforcement of the rule. The rule is predicated upon the fact that many very valuable packages are transported in express cars, and it is dangerous to life and property for a messenger to permit an unauthorized person to ride therein.

At the date of the publication of the letter the act of March 20, 1909 (Laws 1909, c. 89) amending the act of April 5, 1907 (Laws 1907, c. 67), known as the "black-listing statute," had been passed, and had not then, though it has since, been declared unconstitutional. Under its provisions, certain corporations, including railroad and express corporations, were required, under heavy penalties, upon request of a discharged employé, to give a written statement of the cause of his discharge; so that the statement of the cause for the request of plaintiff's dismissal was to enable the express company to comply with a supposedly valid act then in force, as well as in virtue of the agreement between the companies. The communication does not contain intrinsic evidence of malice, stating only what was reasonably necessary and proper in conveying the information; in other words, the privilege was not exceeded by the style or language of the communication.

While plaintiff testified that he had met Martin prior to the publication, it is evident that the acquaintanceship was most casual.

He knew nothing about Martin; had had no dealings with him; there had been no trouble of any character between them. Martin had no recollection of ever having met plaintiff. He testified unequivocally that he had no ill will or malice against plaintiff before or at the date of the publication, or subsequent thereto. Plaintiff and Martin were to all intents and purposes strangers one to other, and the testimony of plaintiff that Martin treated him coolly on meeting him, standing alone, has no evidential value. From an examination of the record, we are convinced that there is no evidence of actual malice in the conduct of Martin toward plaintiff prior to or at the time of the publication.

Edgell, upon receipt of the letter, placed a copy in his file, and forwarded the original to Beatty to effectuate the discharge of plaintiff; and Beatty, upon request of plaintiff, gave him a copy. This, under the evidence, was the extent of the publication. The letter was a confidential business communication, having in view the interest of the companies and that of the public, through competent and reliable service, and was so treated by Martin and the officers of the express company. It is clear that Martin used only the ordinary and reasonable means of giving effect to the privilege; there being no excessive publication of the information, and nothing in the conduct of Martin or the express company officials evidencing an abuse of the occasion by undue publication of the charge.

In *Missouri Pacific Railway Co. v. Richmond*, supra, the railroad company was sought to be held for libel in the publication of a pamphlet by one of its officers containing a list of the men discharged and the cause of their discharge. The following passage from the opinion is applicable herein:

"There can be no pretense that the officer of the company who caused the pamphlet to be published was actuated by ill will toward or desired to injure appellee, who was a stranger to him. The evidence of that officer, uncontradicted, was in substance that he had the pamphlet published; that it was not issued with any bad feeling or malice toward plaintiff or for the purpose of injuring him or any one else; that the book was gotten up for personal convenience and private information of the officers of the company only, in order that they might protect the lives and property of the public and also the interests of the defendant by securing to the company only good, careful, and reliable men. That he did not know plaintiff; that there were about 24,000 persons in the employ of defendant at the time the pamphlet was printed; that it was necessary to have this discharge list in order to guard against re-employing men who had proved themselves incompetent or untrustworthy; that he printed about 100 copies of the book and sent them to officers of the company only, and if one ever got outside of keeping of proper officers it must have been surreptitiously obtained."

[7] The occasion being privileged, the presumption of good faith obtained. The onus was on plaintiff to overcome this presumption. There was, as we have seen, no intrinsic evidence of malice in the publication, nor any extrinsic evidence of malice on the part of Martin prior to or at the time of the publication. The conduct of Martin in failing to answer plaintiff's letters, and his refusal to investigate, is not inconsistent with bona fides. *Harris v. Thompson*, 13 C. B. 333. This subsequent conduct is the only evidence of express malice. The conduct may be regarded as a circumstance to show the existence of malice subsequent to the date of publication, and it may raise a surmise or suspicion of malice at the date of publication. It does not, however, carry with it that degree of probative force necessary to form the basis of a legal inference of the existence of malice at the time of publication, and falls short in legal contemplation of "any evidence" that Martin, in the publication, was actuated by malice.

We conclude that the evidence was not sufficient to raise the issue of actual malice existing at the date of the publication. *Joske v. Irvine*, 91 Tex. 574, 44 S. W. 1059.

The occasion being privileged, and there being no evidence of actual malice, it follows that the peremptory instruction in its favor requested by defendant should have been given, unless, as contended by plaintiff, the statutes pertaining to libel as codified in 1911, in force at the date of the trial, permitted a recovery upon proof of the falsity of the charge, without reference to malice.

The act of 1901 (Acts 27th Leg. c. 26) clearly defined actionable libel. It was a broad and comprehensive enactment, intended to cover the subject in its entirety, and materially modifying and changing the common-law doctrine theretofore recognized and enforced in this state. *Guisti v. Galveston Tribune*, 105 Tex. 497, 150 S. W. 874, 152 S. W. 187.

Section 3 of the act declared the publication of certain matters by newspapers or periodicals privileged. The act made no other or further provision for privileged communications. Section 4 of the act reads as follows:

"Nothing in this act shall be construed to amend or repeal any penal law on the subject of libel, nor to take away any existing defense to a civil action for libel, nor shall this act affect any suits now pending, or that may hereafter be brought upon a cause of action arising prior to the taking effect of this act."

In the codification of 1911 all of section 4 hereinabove quoted, was omitted, except the provision with reference to amending or repealing any penal law on the subject of libel. Article 5598, R. S. 1911. In 1917 (Laws 1917, c. 206 [Vernon's Ann. Civ. St. Supp. 1918, arts. 5598, 5598a]) article 5598 was

amended so as to expressly preserve any theretofore existing defense to a civil action for libel, either at common law or otherwise.

That the occasion was privileged was an existing defense to a civil action of libel, and as such was preserved under the act of 1901, and by the subsequently amended article 5598. The effect of the omission by the codifiers upon this defense, where the publication was subsequent to the adoption of the Revised Civil Statutes, and prior to the amendment of article 5598, need not be considered herein.

The publication which was the basis of this action was made subsequent to the passage of the act of 1901, and prior to the adoption of the Revised Civil Statutes of 1911, though suit was filed and trial had after the adoption of the Revised Civil Statutes, and before the amendment to article 5598. Construing the omission as a repeal of the omitted part of section 4 of the act of 1901, such repeal could have no effect upon the defense of privileged occasion in this action. Section 16, art. 1, of our Constitution provides that "no * * * retroactive law * * * shall be made." This provision of the Constitution, as stated in *Mellinger v. City of Houston*, 68 Tex. 37, 8 S. W. 253—

"must be held to protect every right, even though not strictly a right to property, which may accrue under existing laws prior to the passage of any act which, if permitted a retroactive effect, would take away the right. * * * It must necessarily be held that a right, in a legal sense, exists, when in consequence of given facts the law declares that one person is entitled to enforce against another a claim, or to resist the enforcement of a claim urged by another."

[8] At the date of the omission by the codifiers, the defense of privilege was a vested ground of defense. A right of defense, not technical, but substantial, resulting in immunity from liability, which has fully vested, is as sacred and as important as a right of action, and is protected from any retroactive legislation in like manner as a vested right of action. 12 C. J. 973.

[9] Aside from this, we are of opinion that section 5 (Vernon's Sayles' Ann. Civ. St. 1914, p. 4863) of the act adopting and establishing the Revised Civil Statutes protects the defense herein; that section providing in part as follows:

"That the repeal of any statute, or any portion thereof, by the preceding section, shall not affect or impair any act done, or right vested or accrued, * * * but every such act done, or right vested or accrued, * * * shall remain in full force and effect."

We are of opinion that the judgments of the district court and Court of Civil Appeals

should be reversed, and judgment here rendered for the plaintiff in error.

PHILLIPS, C. J. We approve the judgment recommended in this case.

PANHANDLE & S. F. RY. CO. v. BROOKS (No. 167-3168.)

(Commission of Appeals of Texas, Section B.
June 2, 1920.)

1. Master and servant \Rightarrow 100(1)—Contract requiring notice of injury void under federal act.

Federal Employers' Liability Act, § 5 (U. S. Comp. St. § 8661), making void any contract to exempt a common carrier from liability for injury to employes imposed by section 1 of the act (section 8657), makes void a contract by interstate railroad employe to give notice of injury and claim for damages within 30 days or his right to recover therefor would be barred.

2. Master and servant \Rightarrow 258(21)—Allegation that foreman directed work with insufficient force held not subject to exception.

An allegation that railroad employes, including plaintiff, protested to the foreman and the company against handling timbers with an insufficient force, but the foreman refused to furnish more men and directed the work to be done under his eye, thereby assuring the men that they could perform the work with safety, is not subject to an exception as stating no ground of negligence nor excuse for proceeding to move the timber with knowledge of insufficient number of men.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Action by B. F. Brooks against the Panhandle & Santa Fé Railway Company. Judgment for plaintiff was affirmed by Court of Civil Appeals (199 S. W. 665), and defendant brings error. Affirmed.

Terry, Cavin & Mills, of Galveston, and Madden, Trulove, Ryburn & Pipkin, of Amarillo, for plaintiff in error.

L. C. Barrett and J. N. Browning, both of Amarillo, for defendant in error.

SADLER, P. J. B. F. Brooks filed this suit in the district court of Potter county to recover damages for injuries alleged to have been received while he was employed in interstate commerce by plaintiff in error. He alleged that the injuries were caused by the negligence of the railway company.

The defendant company, among other pleas in bar, alleged that Brooks' employment was by virtue of a written contract; that he therein obligated himself to give notice in writing of any injuries and claim

for damages to the company, within 30 days from the time the injuries were received; that, if he failed so to do, his cause of action should be barred; that this contract was valid and reasonable; and that he wholly failed to comply with its requirements.

To this plea plaintiff interposed an exception, because it presented no defense, in that it was invalid and prohibited by law.

This exception was sustained by the district court. The trial resulted in a judgment for plaintiff. Defendant appealed, assigning among other errors that of sustaining the special exception to this plea. The Court of Civil Appeals resolved the assignment on this question as well as all other assignments against appellant. 199 S. W. 665.

The cause is before us upon the error assigned to the judgment of the Court of Civil Appeals sustaining the trial court in its ruling upon this question. For the purposes of this discussion, it must be assumed that the facts alleged in the answer are true. It remains only to determine whether under proper construction of the contract this provision is unreasonable, inapplicable, and invalid under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665).

There are other assignments presenting other questions arising on the pleading and evidence, but the prime question is that affecting the plea in bar.

Opinion.

[1] The Court of Civil Appeals held that the contract pleaded by the defendant in bar of plaintiff's suit is inhibited by the federal Employers' Liability Act, and is void. Apparently this presents a question of first impression in the American courts of last resort, except in one case decided by the Supreme Court of Arkansas.

Section 1 of the act (article 8657, U. S. Compiled Statutes) provides:

"Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier," etc.

Section 5 (article 8661, U. S. Compiled Statutes) provides:

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void."

As we construe this statute, the liability of the railway company, in event of negligent injury, arises as at common law, and is governed by the same principle, save and

except in so far as it prohibits a limitation upon liability by contract, rule, regulation, or device, and except in so far as the common law may be abrogated by the act. *Seaboard Air Line v. Horton*, 238 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475, and cases cited *supra*.

It may be as well to state here as elsewhere that we have not been cited to any decision of the Supreme Court of the United States, or any inferior federal court, construing the act as to its effect upon a contract such as is here before us. The only American case cited is *C. R. I. & P. Ry. Co. v. Pearce*, 118 Ark. 6, 175 S. W. 1160, L. R. A. 1915F, 551, by the Supreme Court of Arkansas, handed down March 29, 1915. So far as our inquiry has disclosed, this is the only case extant in which the question has been decided. We are advised that the Supreme Court of the United States has had no opportunity to review that decision. The Arkansas court holds that a contract like that here presented is void under the federal Employers' Liability Act. This holding is based upon a decision of the Supreme Court of the United States in *El Paso & N. E. Ry. Co. v. Gutierrez*, 215 U. S. 87, 30 Sup. Ct. 21, 54 L. Ed. 106.

In consonance with the indicated purpose of the Supreme Court to follow the construction which has been adopted by our state courts with reference to our state statutes on the same subject, and in the absence of authoritative expression by the Supreme Court of the United States, we approve the holding of the Court of Civil Appeals with reference to the construction to be given to the federal Employers' Liability Act and its effect in rendering void that clause of the contract sought to be interposed as a defense by the railway company. *Ry. Co. v. Hudgins*, 60 Tex. Civ. App. 344, 127 S. W. 1183; *Ry. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

There are assignments in the petition seeking review of the disposition by the Court of Civil Appeals of questions raised with reference to the pleading of the plaintiff and to the admission of evidence in support thereof. It appears from the several assignments that the plaintiff alleged:

"That said servants, including plaintiff, protested to said foreman and defendant, through its agents and servants against lifting and carrying said timbers and handling the same as they were being handled without a sufficient number of men, but defendant then and there ignored said protest and refused to furnish more men, but had plaintiff and said three other servants to perform said work under the eye and direction of said foreman, thereby assuring them that they could perform such labor with safety to themselves, by reason of which the master assumed the risk instead of the plaintiff assuming the same."

[2] The defendant excepted to this part of the petition, because it stated no ground of negligence nor any excuse for the act of plaintiff in proceeding to move the timber with the knowledge of an insufficient number of men. The exception was overruled. Testimony was offered, over objection of the defendant, in line with the pleading wherein it appears that George L. Noel, one of plaintiff's collaborators, did so protest to the foreman before proceeding with the work in which plaintiff was injured. We do not think that these assignments merit discussion.

We therefore recommend that the judgment of the Court of Civil Appeals be affirmed.

PHILLIPS, C. J. We approve the judgment recommended in this case.

EARHART et al. v. AGNEW. (No. 130-3019.)

(Commission of Appeals of Texas, Section B.
June 2, 1920.)

1. Fraudulent conveyances §57(5)—Solvent husband had right to transfer notes to wife.

A husband who was solvent when he transferred to his wife part of notes received in payment for their land claimed as a homestead had the right to do with his property as he saw fit, even to giving it to strangers, and had the right to give his wife half the proceeds of the community property sold by them by joint deed, which she demanded and received as a condition to signing.

2. Evidence §248(6)—Statement of husband in derogation of title of wife to notes received for community land could not affect her rights.

No statement of a husband, verbal or written, in derogation of title of his wife to part of the notes received by him on sale of their community land claimed as a homestead, made after the transfer to the buyer, could affect the rights of the wife in the notes received by her.

3. Husband and wife §149(1)—Wife's property not liable for husband's debts.

A wife's property, consisting of part of the notes received by her and her husband on sale of their community land, having been delivered to the wife by the husband as a condition of her joining in the deed, were not liable for the debts of the husband.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Action by J. W. Agnew against S. M. Earhart, with the Lubbock State Bank as garnishee, in which Mrs. S. M. Earhart intervened and claimed the fund impounded by the garnishment proceeding. From judgment for plaintiff, defendant and intervener

appealed to the Court of Civil Appeals, which affirmed (190 S. W. 1140), and defendant and the intervener bring error. Judgment of the district court and Court of Civil Appeals reversed, and judgment rendered for the intervener on recommendation of the Commission of Appeals.

R. A. Sowder, of Lubbock, for plaintiffs in error.

W. F. Schenk and Roscoe Wilson, both of Lubbock, for defendant in error.

Statement of the Case.

KITTRELL, J. This was an action in the form of a garnishment against the Lubbock State Bank procured for the purpose of reaching certain funds claimed to be the property of T. O. Earhart, husband of the plaintiff in error.

The number of the case on the docket of the district court of Lubbock county was 906, and it was ancillary to a case filed by Agnew, defendant in error, No. 881, in the same court against T. O. Earhart.

The basis of the action in No. 881 was a certain bond executed by one B. F. Montgomery on October 15, 1909, to Agnew to protect him against outstanding vendors lien notes against certain land which Agnew had bought of Montgomery. T. O. Earhart and one Richmond were sureties on the bond, which was for the sum of \$6,000, or double the amount of the notes.

It appears from the testimony of Agnew that he did not know that Earhart was on the bond until about two years after it was made, but supposed it was his brother, the bond having been prepared by Agnew's attorney, and he never saw it for about two years, and he had never made any demand on Earhart on account of it.

On June 24, 1913, the holders of the Montgomery notes recovered judgment, and the land was sold.

Some time prior to December 28, 1914, Agnew brought suit on the Montgomery bond against Montgomery, Earhart, and Richmond, but before judgment dismissed as against Richmond without reservation, but as to Earhart he dismissed without prejudice to maintain action at some future time. He took judgment against Montgomery alone for \$3,500.

No further action appears to have been taken against Earhart by Agnew until suit No. 881 was filed.

Earhart testified that he had never been called upon to pay the bond, and supposed the notes had been paid. He never agreed to their extension, and that the suit (the one first filed out of which he was dismissed, we construe his language to mean) was the only demand ever made on him.

Testimony to be later set forth makes an

understanding of these facts helpful, if not necessary.

The bank answered "that according to the books of said bank it is now, and was at the time said writ of garnishment was served upon it, as shown by the deposit account, indebted to said T. O. Earhart in the sum of \$1,205.20," and further stated as a part of its answer that it was "not acquainted with the title to the above said amount of money further than the same was collected upon the note and placed to the credit of said T. O. Earhart, the business having been transacted with him by letter."

S. M. Earhart, wife of T. O. Earhart, and plaintiff in error here, intervened in the action and claimed the money upon grounds that a further statement of the facts will reveal. She and her husband had owned and lived on 640 acres of land with their five children for about eight years. The land lay about 10 miles north of the town of Lubbock. They settled on it in 1901, and in 1909 they moved to Lubbock for the purpose of educating their children. Both testified very positively that up to the time they sold the land they cherished the purpose and intention of returning to it, and that they claimed no other place as their homestead.

The husband testified:

"We bought a house in Lubbock to live in while schooling our children, but sold it prior to the selling of our land."

Deeds were offered in evidence to prove this statement to have been true.

His wife testified:

"My son owned the lots at the time section 22, block D2, was sold to A. Symes. When we moved to Lubbock about three years prior to the sale of the land we owned the lots. My husband was being sued in Lubbock county, and he deeded those lots to my son Earnest."

The son testified that he owned them at the time of the trial.

Deeds offered in evidence showed that on September 19, 1910, T. O. Earhart, without being joined by his wife, conveyed the town lots to his son W. E. Earhart, and that the latter, on August 16, 1912, more than a year after the sale of the country place to Symes, conveyed the lots to his mother.

On January 28, 1910, Earhart gave a mortgage on the north 440 acres of the 640-acre tract for \$2,000, and in that instrument especially designated the south 200 acres, the improved part (which was shown to be worth more than the other 440 acres), as his homestead. This was after the family had moved to Lubbock and acquired the city lots on which they lived while there.

On June 16, 1911, Earhart and wife sold the 640 acres to A. Symes for \$8,720. \$1,400 was paid in cash, and the purchaser assumed the \$2,000 mortgage, and three notes for \$1,106 each were executed and made payable

to T. O. Earhart in one, two, and three years. Earhart used the \$1,400 cash to pay debts, or a debt, so far as the same was necessary.

The jury found in response to a special issue that Mrs. Earhart signed the deed on condition that she should have the value of the south 200 acres (the improved part). It was proved, not only by his own testimony, but by the cashier of the bank, who identified the handwriting of the attorney who wrote the transfer, and by the attorney himself, that the three notes were, pursuant to agreement, by Earhart transferred on the day they were made to his wife as the value of her half of the property. It seems that the parties by reason of some domestic infelicity (suggested rather than clearly revealed by the record) divided their property. The notes were carried to the bank by Earnest Earhart for his mother, and as they fell due they were collected by the bank. Earhart and wife had moved to California, but were not living together after their removal. The last of the three notes fell due January 1, 1915, but was paid December 26, 1914, and it is the proceeds of that note which are the subject of controversy in this action.

The cashier of the bank testified that the proceeds of the first note due January 1, 1913, were by Earhart's direction applied, so far as was necessary, to pay certain indebtedness that Earhart and his sons owed the bank; but he could not recall what became of the rest of the proceeds.

Mrs. Earhart testified that she got the proceeds of that note and bought the land she lived on in California. When the second note fell due, the proceeds, upon written direction to the bank, were sent to her in California, and when the third note was ready to be paid a release was sent to California for T. O. Earhart to sign, and he executed it. It contained the usual recitals that he was the owner and holder of the notes.

The cashier testified that the notes had never been out of the bank since they had been put there, and that the indorsement on them was there all the time. This statement seems to have been elicited by reason of an effort made to prove that the indorsement and transfer was an afterthought, and was not coincident with the execution of the notes.

Opinion.

It is obvious from the foregoing somewhat extended summary of the evidence that there is substantially but one question to be determined, and that is: In view of all the facts and circumstances in evidence and the finding of the jury on the special issues, were the proceeds of the note subject to garnishment as the property of T. O. Earhart?

We will only consider the first assignment of error contained in the application, namely:

"The court erred in not granting a motion for judgment on the special answer and verdict of the jury as is shown by her bill of exception No. 1 of this record."

The only other assignment of error brought up in the application (the ninth) is not in compliance with the rules, being too general and vague to authorize consideration.

Plaintiff rested her contention on two grounds: First, that the proceeds of the note were part of the purchase money of her homestead; second, that regardless of the homestead question her husband was solvent when he transferred the notes to her, hence by such transfer they became her property and were not liable for his debts.

The jury found: First, that at the time Earhart and wife moved off of the south 200 acres of the section, and acquired, and moved on, a place in the town of Lubbock in the year 1909, they did not intend to return and occupy said section as a homestead; second, that all of section 22 was abandoned with the intention never to return and live thereon at the time they moved off, and that they abandoned the 200 acres as a home prior to their sale to Symes; third, that the transfer of the note from T. O. Earhart to his wife was not a gift; fourth, that Mrs. Earhart signed the deed to Symes upon the condition that she was to have the value of the 200 acres out of the south one-half of section 22, block D2; fifth, that T. O. Earhart was solvent when he delivered the notes to his wife.

Speaking for himself and not intending to be understood as speaking for the other members of the court the writer feels constrained to say that a most careful and painstaking analysis of the statement of facts has led him to the conclusion that, when the law on the question of abandonment of a homestead as laid down in *Shepherd v. Cassiday*, 20 Tex. 25, 70 Am. Dec. 372, *Gouhenant v. Cockrell*, 20 Tex. 96, *Thomas v. Williams*, 50 Tex. 275, *Sanders v. Sheran*, 66 Tex. 657, 2 S. W. 804, *Armstrong v. Neville* (Civ. App.) 117 S. W. 1012, *Robinson v. McGuire* (Civ. App.) 203 S. W. 415, and many other cases is applied to the undisputed testimony, the finding of the jury is shown not only to be against the great preponderance of the evidence, but absolutely without evidence to support it.

However, as consideration of the homestead question is not necessary to a proper decision of the case, we pretermitt any further reference thereto.

The fact is apparent that plaintiff in error

was asserting a homestead right in the south 200 acres and improvements, and refused to sign the deed to Symes until she was assured that the notes representing part of the proceeds, equivalent to the value of the 200 acres, would be delivered to her as her property. Such condition and demand was complied with, and, pursuant to the contract so made, the notes made payable to her husband were by him forthwith assigned and delivered to her, and were by or for her placed in the garnishee bank.

[1] The jury found that Earhart was solvent when he transferred the notes to his wife. Being solvent he had the right to do with his property as he saw fit, even to giving it to strangers. *Reynolds v. Lansford*, 16 Tex. 286; *Higgins v. Johnson's Heirs*, 20 Tex. 395, 70 Am. Dec. 394; *Story v. Marshall*, 24 Tex. 305, 76 Am. Dec. 106; *Morrison v. Clark*, 55 Tex. 437; *Terry v. O'Neal*, 71 Tex. 592, 9 S. W. 673; *McCutchen v. Purinton*, 84 Tex. 604, 19 S. W. 710; *Willis v. McIntyre*, 70 Tex. 34, 7 S. W. 594, 8 Am. St. Rep. 574. He certainly had the right to give to his wife one-half of the proceeds of community property sold by them by joint deed, and which was claimed by both to be their homestead, and half of the proceeds of which the wife demanded and received as a condition precedent to her signing the deed.

[2] Evidently much stress was laid by the Court of Civil Appeals upon the fact that Earhart executed a release reciting that he was the legal and equitable holder and owner of the notes, but it is elementary that no statement of Earhart, whether verbal or written, in derogation of the title of his wife to the notes, made after the transfer, could affect her rights.

[3] When the notes were delivered to Mrs. Earhart and were by her or by her son as her agent placed in the bank for collection, they were her property, and in contemplation of law were in her possession, and the finding of the jury in response to a special issue which was wholly irrelevant and immaterial, that they were not in her possession, was manifestly erroneous. Being her property, they were, of course, not liable for the debts of her husband, and therefore the judgment of both the district court and Court of Civil Appeals was erroneous, and should be reversed, and judgment rendered here for the plaintiff in error, and it is so recommended.

PHILLIPS, O. J. We approve the judgment recommended in this case.

BERRY v. GODWIN et al. (No. 137-3048.)

(Commission of Appeals of Texas, Section A.
June 2, 1920.)**1. Homestead §173—Not abandoned by merely filing partition suit.**

The mere filing, by a widower, of suit to partition homestead, which was not prosecuted but abandoned and suit changed to one of trespass to try title claiming all the land, did not constitute a waiver or abandonment of homestead rights set up in reply to the answer of defendants claiming title to part of the land.

2. Homestead §181(3)—That plaintiff's children were not living with him when suit was filed did not show abandonment.

Under Const. art. 16, § 52, the fact that plaintiff's children were not living with him when suit was filed was not conclusive that he had abandoned his homestead; nor would it follow, from that fact alone, that he was not entitled to assert a homestead right in the land.

3. Depositions §91—Competency of deposition depends on status when offered as evidence and not when taken.

Where, at the time of trial, plaintiff's conviction of murder had been affirmed and motion for rehearing overruled, his deposition, taken previously, was properly quashed; the competency of his answers to the interrogatories propounded to him depending, not upon his status at the time such answers were given, but upon his status when the deposition was offered as evidence.

4. Deeds §194(5) — Recording raises presumption of delivery.

Where a duly executed and acknowledged deed had been on record for about 30 years, it was presumptively delivered.

5. Partition §95—Should make provision for possession of party as homestead.

Where party to partition suit establishes his homestead right in the land, the partition, if granted, should be decreed subject to his right to possession as long as he elects to use or occupy the land as a home.

Error to Court of Civil Appeals of Sixth Supreme Judicial District.

Action by Thomas Berry against Kirby Godwin and others. Judgment for defendants was reformed and affirmed by the Court of Civil Appeals (188 S. W. 30), and plaintiff brings error. On the recommendation of the Commission of Appeals, judgments of the trial court and Court of Civil Appeals reversed and cause remanded.

E. P. Miller, of Athens, and R. S. Neblett and Ormond Simkins, both of Corsicana, for plaintiff in error.

W. R. Bishop and J. J. Faulk, both of Athens, for defendants in error.

TAYLOR, J. This suit was an action in trespass to try title by Thomas Berry against Perry Dethridge, his son-in-law, and Bertha Godwin, his granddaughter (her husband, Kirby Godwin, being joined with her pro forma) to recover 213 acres of land in Henderson county.

The suit as filed by Berry originally was for partition against the defendants named, he alleging that Bertha Godwin owned an undivided interest of about 20 acres, that Perry Dethridge owned an undivided interest of about 10 acres, and that he (Berry) owned the remaining interest. By amendment Berry changed his suit from an action to partition the land to an action in trespass to try title, as stated above, in which he sought recovery of the entire tract.

The amended petition contained, in addition to the usual allegations in trespass to try title suits, affirmative pleas of title acquired under the three, five, and ten year statutes of limitations.

Defendants answered, pleading among other things "not guilty"; also, that Bertha Godwin owned an undivided interest of $\frac{9}{24}$; Perry Dethridge an undivided interest of $\frac{4}{24}$; and Berry an undivided interest of $\frac{11}{24}$ in the land. The defendants prayed that their respective interests be established and the land partitioned.

By supplemental petition Berry denied the allegations of the answer, pleaded his homestead right, and further that the homestead was not subject to partition, because of his right to use and occupy it.

On October 1, 1884, Berry owned as a part of his separate property the land in controversy. On that date he executed a deed reciting conveyance to his wife, Thursday Berry, of 200 acres off of the north end of the tract on which he then resided, in consideration of \$500 paid out "of her separate estate." The deed was acknowledged before the county judge of Kaufman county October 22, 1885, and a week later was duly recorded. Thursday Berry died in 1888 while she and her husband were using and occupying the land conveyed, as their homestead.

Mrs. Berry left surviving her, her husband and three children, Allen, Pearl, and Johnnie. Plaintiff, prior to the filing of this suit, acquired the interest of Pearl. Allen married. He and his wife died, leaving surviving them their only child, Bertha, one of the defendants. Johnnie married Perry Dethridge, another defendant. Two children were born to them, neither of which survived the death of the mother.

Berry, about a year after the death of his first wife, married again. His second wife

died prior to the filing of this suit, and three children of the second marriage, all minors, were living at the time suit was filed. Berry continued to reside on the homestead after the death of his second wife. Some time after her death, he moved (about 1905) to San Antonio and remained there about a year, renting out the premises during his absence. After returning from San Antonio, he continued to live on the land in controversy, until 1913, when he went to Athens, Tex., again renting it out.

A short time prior to filing this suit, Berry was convicted of the offense of murder, and sentenced to serve ten years in the state penitentiary. Pending an appeal from the judgment under which he was sentenced, plaintiff's deposition in this case was taken at his own instance, by which he sought to establish, among other things, that the deed executed by him to his first wife was never delivered. One week after the deposition was taken the judgment of conviction was affirmed. Subsequent to the affirmation, and after a motion for rehearing filed in the Court of Criminal Appeals had been overruled, and after Berry had begun serving his term in the penitentiary, this case came on for trial. On motion of defendants, Berry's deposition was quashed on the ground of his being under felony sentence, as above stated.

The jury, acting under peremptory instruction of the court, found that the parties owned undivided interests in the land sued for by Berry, as follows: Berry, $\frac{11}{24}$; Bertha Godwin, $\frac{9}{24}$; and Perry Dethridge, $\frac{4}{24}$. Judgment was rendered accordingly, and commissioners were appointed to partition the land.

The Court of Civil Appeals affirmed the judgment under the view that plaintiff in filing suit for partition, in effect, abandoned his homestead, and thereby waived his claim to its exemption. As it appeared from the evidence that the entire tract of 213 acres was a part of Berry's separate estate prior to a conveyance of the 200 acres of land to his wife, the court so reformed the judgment as to adjudge a recovery by Berry of the 13 acres not included in the conveyance, and decree a partition among him and the defendants of the 200 acres. 188 S. W. 80.

[1] The application for the writ of error contains three assignments of error, in substance as follows:

(1) That the trial court and Court of Civil Appeals erred in holding that plaintiff in error waived his homestead exemption by filing his suit first in the form of a suit to partition.

(2) That the Court of Civil Appeals erred in sustaining the action of the trial court in quashing plaintiff in error's deposition.

(3) That the trial court and Court of Civil Appeals erred in holding that the deed ex-

ecuted by plaintiff in error to his wife, Thursday Berry, was ever delivered.

The Committee of Judges in granting the writ made the following notation:

"We are inclined to think that the mere filing by plaintiff in error of his petition for partition, which was not prosecuted but abandoned and suit changed to one of trespass to try title claiming all the land, did not constitute a waiver or abandonment of homestead rights set up in reply to the answer of defendants in error claiming title to a part of the land, which included the homestead, asking partition thereof. The case is unlike *Moore v. Moore*, 89 Tex. 29, in that in the latter case the suit as begun for partition of the homestead was prosecuted by plaintiffs to final determination."

We concur in the view expressed in the notation. In *Hoefling v. Hoefling*, 106 Tex. 357, 167 S. W. 210, it is pointed out that there was neither pleading nor evidence of homestead in the *Moore Case*, supra, and that in view of this the court held there was a waiver of such claim.

This case was tried upon a pleading filed subsequent to the partition petition, specifically setting up plaintiff in error's claim of homestead. The original petition (the petition in the partition suit) having been subsequently amended by plaintiff in error, as stated above, the Court of Civil Appeals erred in holding that in filing it he thereby, as a matter of law, abandoned his homestead, or waived his right thereto.

[2] Defendants in error urged, in addition to a waiver of homestead right by plaintiff in error in filing the suit to partition, that he was not in position as head of a household to assert a homestead right, in that his minor children were not living with him.

It is uncontradicted that 200 acres of the land sued for was plaintiff in error's homestead at the time of the death of his second wife. There is evidence that his children were not living with him when suit was filed; but this fact, if established, is not conclusive that he had abandoned his homestead, nor would it follow from that fact alone that he was not entitled to assert a homestead right in the land. Const. art. 16, § 52; *Ball Hutchings & Co. v. Lowell*, 56 Tex. 579; *Eubank & Co. et al. v. Landram*, 59 Tex. 247; *Brown et al. v. Reed et al.*, 20 Tex. Civ. App. 74, 48 S. W. 537.

The issue of whether the 200 acres of land was the homestead of plaintiff was one of fact and should have been submitted to the jury.

[3] The second assignment questions the correctness of the trial court's action in quashing plaintiff in error's deposition. The purpose of the deposition was to establish that the deed executed by plaintiff in error to Thursday Berry, his wife, was never delivered. Unless delivered, the property in controversy was his separate property, and

defendants in error were without interest therein. The question presented is therefore one of substantive law.

The answers to the interrogatories propounded to plaintiff in error were not evidence at the time they were given. Their competency as such could not, under the facts, be tested by what his status then was, but was properly tested by what his status was when the deposition was offered as evidence. At that time he had not only been convicted and sentenced, but judgment had been affirmed and his motion for rehearing overruled. In fact, he was then incarcerated in the penitentiary in virtue of a final judgment of conviction and sentence duly entered and pronounced. The Court of Civil Appeals held correctly that the deposition should have been quashed. *Webster v. Mann*, 56 Tex. 119, 42 Am. Rep. 688; *Tillman v. Fletcher*, 78 Tex. 673, 15 S. W. 161; *Rogers v. Tompkins*, 87 S. W. 379.

The case of *G., C. & S. F. Ry. Co. v. Johnson*, 98 Tex. 76, 81 S. W. 4, cited by plaintiff in error, is not in point. The question decided in that case related to the sufficiency of the record introduced to establish the incompetency of the witness; the court holding that it was necessary for the record to show, not only that he was convicted, but also that he was sentenced.

[4] The question presented by the third assignment is whether the deed executed by plaintiff in error to his wife was delivered.

The evidence is uncontradicted that it was executed, acknowledged, and duly recorded, and that at the time of the trial it had been on record for about 30 years. It was presumptively delivered. There being no evidence in the record that the deed was not delivered, the trial court and Court of Civil Appeals did not err in giving it effect as a valid conveyance.

[5] Plaintiff in error does not contest the right of defendants in error to have a partition of 200 acres of the land sued for, in the event their respective interests therein are established upon another trial; but correctly insists that, in the event of a finding in his favor upon the homestead issue, the partition, if granted, should be decreed subject to his right to possession as long as he elects to use or occupy the land in controversy as a home. *Hudgins v. Sansom*, 72 Tex. 229, 10 S. W. 104.

We recommend that the judgments of the trial court and Court of Civil Appeals be reversed, and that the cause be remanded for further trial.

PHILLIPS, O. J. We approve the judgment recommended in this case, and the holding of the Commission on the questions discussed.

CRITESER et ux. v. GAFFEY.
(No. 161-3152.)

(Commission of Appeals of Texas, Section A.
June 2, 1920.)

1. Divorce \Leftrightarrow 331—Foreign decree for alimony not entitled to full faith and credit even as to alimony already due.

As the Oregon Supreme Court has construed the state statutes as clothing the court rendering judgment for alimony with power to set aside as well as to alter or modify a provision for permanent alimony or allowance, as the exigencies of the case may require, and where an allowance is made for support and maintenance, the decree of annulment may be made to operate retrospectively, a judgment for alimony granted by the circuit court of Oregon for support and maintenance is not, as to installments already accrued, entitled to be given effect under the full faith and credit clause of the federal Constitution (article 4, § 1).

2. Divorce \Leftrightarrow 331—Foreign judgment for alimony subject to modification not entitled to full faith and credit.

Where the right to installments of alimony becomes absolute and vested upon becoming due, the judgment providing therefor is protected by the full faith and credit clause of the federal Constitution (article 4, § 1) as to such installments, but that rule does not apply where, by the law of the state in which the judgment for future alimony is rendered, the right to demand and receive the same is discretionary with the court rendering the judgment to such an extent that no vested right attaches.

3. Courts \Leftrightarrow 95(2)—Decision of highest courts of state construing its statutes binding on courts of other jurisdictions.

The decision of the highest courts of the state construing its statutes is binding on courts of other jurisdictions.

Error to Court of Civil Appeals of Sixth Supreme Judicial District.

Action by L. G. Criteser and wife against O. E. Gaffey. A judgment for plaintiffs was, on appeal by both parties, reformed and affirmed by the Court of Civil Appeals (195 S. W. 1166), and plaintiffs bring error. Judgment of Court of Civil Appeals affirmed.

S. P. Jones, of Marshall, and T. P. Harte, of Douglas, Ariz., for plaintiffs in error.

F. H. Prendergast, of Marshall, for defendant in error.

SPENCER, J. L. G. Criteser and wife, Josephine Criteser, instituted this suit to recover of O. E. Gaffey upon a judgment for alimony which Josephine Criteser, the former wife of Gaffey, had obtained in the circuit court of Oregon, before her marriage to L. G. Criteser. The decree of the Oregon court allowed her \$125 attorney's fee and the sum

of \$50 per month alimony, with interest on the amounts. The district court of Harrison county rendered judgment for alimony accruing during the six months intervening between the decree of divorce and the marriage of Josephine Gaffey to L. G. Criteser, and also for attorney's fees, with interest on both amounts. Upon appeal the Court of Civil Appeals reformed the judgment so as to permit a recovery of attorney's fees with interest, but denying recovery for any alimony, and, as reformed, affirmed the judgment. 195 S. W. 1168.

[1-3] The only question for determination is: Is the judgment rendered by the circuit court of Oregon entitled to be given effect under the full faith and credit clause of the federal Constitution? The case turns, we think, upon the construction to be given the statutes of Oregon as construed by the courts of that state in connection with the rule announced by the Supreme Court of the United States in the case of *Sistare v. Sistare*, 218 U. S. 1, 30 Sup. Ct. 682, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061.

The case of *Sistare v. Sistare*, 218 U. S. 1, 30 Sup. Ct. 682, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061, lays down this general rule and exception:

"First, that, generally speaking, where a decree is rendered for alimony and is made payable in future installments, the right to such installments becomes absolute and vested upon becoming due, and is therefore protected by the full faith and credit clause, provided no modification of the decree has been made prior to the maturity of the installments, since, as declared in the *Barber Case*, 'alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is.'

"Second, that this general rule, however, does not obtain where by the law of the state in which a judgment for future alimony is rendered the right to demand and receive such future alimony is discretionary with the court which rendered the decree, to such an extent that no absolute or vested right attaches to receive the installments ordered by the decree to be paid, even although no application to annul or modify the decree in respect to alimony had been made prior to the installments becoming due."

The construction given the Oregon alimony statute by the Supreme Court of that state in the case of *Brandt v. Brandt*, 40 Or. 477, 67 Pac. 508, brings the judgment within the

exception to the general rule set forth in the *Sistare Case*. In the *Brandt Case* the Oregon court held that the court rendering judgment for alimony is clothed with power adequate to set aside as well as alter or modify a provision for permanent alimony or allowance, as the exigencies of the case may require, and where the allowance, as in this case, is made as a matter of support and maintenance the decree of annulment may be made to operate retrospectively.

The *Sistare Case* is relied upon by both parties as supporting their respective views. In that case the Connecticut court held the view that the decisions by the appellate court of New York were to the effect that the court rendering judgment for alimony had the power to set aside, to annul, vary, or modify the judgment so rendered, and that such act of the court could be made to operate retrospectively. Mr. Justice White disagreed with the Connecticut court in holding that the New York courts held to such a view. The New York statute was construed by him. That portion having reference to the question at issue reads:

"The court may, by order, upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, annul, vary or modify such directions. But no such application shall be made by a defendant unless leave to make the same shall have been previously granted by the court by order made upon or without notice as the court in its discretion may deem proper after presentation to the court of satisfactory proof that justice requires that such an application should be entertained."

In the absence of an authoritative construction of the New York statute by the New York courts Justice White concluded that authority was not given by the statute to annul or set aside installments of alimony which had already become due. Such is not the case, however, in this instance. As stated, the Oregon court has construed the statute under which the judgment for alimony was allowed, and we are bound by the construction given.

It is recommended, therefore, that the judgment of the Court of Civil Appeals reforming and affirming the case be affirmed.

PHILLIPS, C. J. We approve the judgment recommended in this case.

BAKER v. LOFTIN et al. (No. 157-3130.)(Commission of Appeals of Texas, Section A.
June 2, 1920.)**1. Negligence ⇨136(2)—Ordinarily question of fact.**

Ordinarily, negligence is a fact to be found by the jury from the testimony, yet some acts are so obviously dangerous and reckless that no court should hesitate to declare them negligent.

2. Railroads ⇨382(6)—Intoxicated person asleep on track negligent.

A railroad's section foreman, knowing the schedules of trains, by drinking to the point of stupor and falling asleep on the track in the evening, when he was passing along on his own affairs in the railroad's hand car, at a time when a train was about due to pass, was guilty of negligence contributing to his death when struck.

3. Railroads ⇨390—Knowledge of peril essential under last chance doctrine.

To recover against a railroad for death of an intoxicated person on the track, on the theory of breach of duty imposed by discovery of his peril, it is essential to show, not merely that those in charge of engine by exercise of reasonable care might have acquired a knowledge of his peril in time to avoid injury, but that they actually possessed it.

4. Evidence ⇨587—Circumstantial evidence must have probative force constituting basis of inference.

While any fact may be established by circumstantial evidence, such evidence must have probative force sufficient to constitute the basis of a legal inference, and not be such as to permit of merely speculative conclusions.

5. Railroads ⇨398(4)—Evidence insufficient to show discovered peril.

In an action against a railroad for a death on its track, evidence held insufficient to support finding of fact necessary to road's liability on theory of discovered peril, that is, fireman and engineer saw decedent and knew of his peril in time to avoid injuring him, and yet failed to use all means within their power.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Suit by Smithie Loftin and others against James A. Baker, receiver for the International & Great Northern Railway Company. From judgment for plaintiffs, defendant appealed to the Court of Civil Appeals, which affirmed (198 S. W. 159), and defendant brings error. Judgments of the trial court and Court of Civil Appeals reversed, and judgment rendered for defendant on recommendation of the Commission of Appeals.

Doremus, Butler & Henderson, of Bryan (Wilson, Dabney & King, of Houston, of counsel), for plaintiff in error.

Lamar Bethea and W. C. Davis, both of Bryan, and Ward & Bickett, of San Antonio, for defendants in error.

TAYLOR, J. This was a suit by the widow and children of Charles Loftin, defendant in error, against the International & Great Northern Railway Company, plaintiff in error, to recover damages arising out of Loftin's death, caused by his being knocked from the railroad track by plaintiff in error's passenger train.

The opinion of the Court of Civil Appeals states that the testimony developed the following facts:

"Charlie Loftin was a section foreman in the employ of appellant, and lived in appellant's section house at Fountain switch, which is about 7 miles in a northern direction from Bryan, Tex., and about 1 mile north of the bridge near which deceased was killed at the time alleged, by appellant's engine. Appellant furnished deceased with a motorcar to be used and operated by deceased on appellant's railroad track, subject to several rules known to deceased. Deceased employed laborers in the work required of him as section foreman. On Saturday, July 1, 1916, deceased, with his nephew and two Mexican laborers, were busy performing their duties for appellant on the section until 5 o'clock p. m., after which time all four went on the motorcar from the section house at Fountain switch for the purpose, among other things, of getting money for the Mexican laborers. After arrival in Bryan, the Mexicans bought provisions, and about 9:30 p. m. all the party, boss, nephew, and laborers, mounted the motorcar to return from Bryan to the section house at Fountain switch. While in Bryan deceased and his nephew drank four or five glasses of beer each. When the party left Bryan, deceased had several bottles of beer and a 50 cent bottle of whisky with him. Deceased operated the motorcar. After traveling about 5 miles from Bryan, the car stopped at Thompson Creek crossing, which was about 2 miles from the section house at Fountain switch, and about 1 mile south of the scene of the killing. Here the entire party dismounted from the motorcar and remained nearly 2½ hours. The Mexicans mounted the motor first (on returning to the car), deceased became angry with them, and required them to get off. Then deceased attempted to force them to get back on, but the Mexicans ran off along the railroad track in the direction of the section house. Deceased took his position on the motorcar and told his nephew to shove the car off, which he did. Deceased was angry with the nephew, and forced him to get off the motor while in motion. There was a lighted lantern on the frame of the motorcar visible from the rear of the motorcar. The motor was heard popping by the nephew as it went for quite a distance. The nephew made his way to the section house across the fields, where he secured a lantern for the purpose of returning to meet his uncle, but did not do so. The motor stopped near a bridge about 1,200 feet north from the Smetana Railroad crossing, a public crossing. The lighted lantern on the motor was seen burning at 12 o'clock midnight, at this point by a party of boys and girls, who also heard a man singing in the neighborhood of the lantern. The light was visible from the Smetana crossing, and was seen by the group of boys and girls

from distances of 200 to 500 yards, and seemed to be on the railroad track, near the railroad bridge."

The accident occurred on a two-degree curve of the track between Fountain and Smetana, between 1 and 2 o'clock a. m. There is evidence that between the stations named there was a well-beaten path in the middle of the track, which was used habitually both in the daytime and night by the people living in that vicinity. The curve was between a half mile and a mile in length, and the night of the occurrence was dark. There were no eyewitnesses, except the locomotive engineer and fireman, and only the latter testified to actually seeing deceased on the track at the time of the accident.

J. R. Garner, the engineer, testified that he was sitting in the engineer's seat box on the right-hand side of the cab, the side on the inside of the curve, running the train about 50 miles per hour; that the first he knew of the presence of any one on the track was when the fireman called out, "We are going to kill a man;" that he instantly applied the air and stopped the train, which was about 475 feet in length; that after he struck the man he ran the length of the train, and about 180 or 200 feet further; that 600 feet was a good stop for a train of that length; that after Loftin was seen it was impossible to stop the train with all the means at command in time to avert the injury; that the hand car, which he saw about the time the fireman saw deceased, was about 40 or 50 feet further north from where the man lay; that when he first saw it, and when the engine struck it, it was derailed, as much as half of it being off of the track; that when the fireman called out that a man was about to be killed, the engine could not have been over 60 or 70 feet from him.

P. E. Driver, the fireman, testified that he was on the left or west side of the engine, and could not see the inside of the curve; that he was leaning as far out of the cab as he could, looking ahead; that about the middle of the curve he saw a man lying on the side of the track 30 or 40 feet from the pilot of the engine, with his head on the rail and his shoulders between the ties, facing north, his feet extending out from the track; that he called to the engineer as soon as he saw him that they were going to kill a man, and that the engineer applied the air and stopped the train; that the man could not have been seen sooner than he saw him.

The crew on returning to the scene of the accident found Loftin lying on the south side of the track, parallel with it, "just off of the end of the ties," breathing but unconscious, his head pointing west. The skull seemed crushed from a wound in the back of the head, the only wound on the body. Loftin was taken to the hospital at Pales-

tine, where he died without regaining consciousness.

The fireman and engineer testified along the same line as to their inability to see deceased on the track sooner than he was discovered, and the reasons therefor. The engineer testified in part as follows:

"The reason I did not discover this man was that the curve at that particular place curves to the right, and the headlight goes straight forward past the place, and does not follow the track. There is a possibility that if I had known the man was there that I could have put my head out of the window and seen him maybe 40 or 60 feet, standing still or moving at a very low rate of speed, but the conditions that confronts an engineer going at that rate of speed cuts off the view for that distance. It would have been impossible for me to have seen him within the 60 feet, it makes no difference what I had done. The headlight of an engine throws out the light straight up the track. The rays of the light are parallel with the engine. On the engines of high rate of speed we focus the headlight out as far as possible in order to protect against persons and cattle or anything on the track as much as possible. In this instance I think we had it focused out about 700 feet. That is where it centered best on the track. * * * In going around a curve the direct rays of the headlight go out straight across the fields. As the engine comes around the rays of headlight come around too, until you get on a straight track."

Witnesses who visited the place of the accident the following morning testified that groceries of various kinds were scattered along the south side of the track, and that blood was discovered on that side of the track; that the lantern and motorcar were found on the same side of the track some distance apart; that the track was level for a long distance in the vicinity of the accident; that from Smetana crossing to the scene of the accident the elevation of the track was from 2 to 4 feet above the level of the land; that there were no objects to obstruct the view from Smetana crossing to the point on the curve at which deceased was struck, and for a considerable distance beyond.

Several of defendants in error's witnesses, after the death of deceased, made experiments in the vicinity of the scene of the accident. The observations were made by the light of passing trains while the witnesses were on and near the track. Some of the testimony was to the effect that one standing about 9 feet from the track when the train passed could plainly see a person standing on the track about 200 steps away on the curve; that one standing at the place of accident took out his watch when the train reached Smetana crossing about a fourth of a mile away, and was able to tell by the light from the engine that it was 1:25 o'clock. None of the observations were made from the cab of a locomotive, and the

witnesses, when making them, did not know the position of the deceased when injured.

Plaintiff in error's witnesses made similar experiments, taking a locomotive engine for the purpose. The substance of their testimony was that one lying on the track where deceased was struck could not be seen further than 250 feet. One of the witnesses occupying the engineer's seat stated he was within 81 steps from the object on the track before he could tell that an object was there, and that he was within 31 steps of it before he could discern that it was a man.

Defendants in error's petition contains two counts. In the first it is alleged, among other things, that the track where Loftin was struck was commonly and habitually used by the public as a highway; that he, while on the track, was from some cause unable to leave the same, and unable to realize the danger of his position; that because plaintiff in error's servants failed to keep a proper lookout deceased was run over and killed. The second count of the petition predicates liability upon discovered peril. Both theories of the case were submitted to the jury. Plaintiff in error requested a peremptory instruction in its favor, which was refused.

The court charged the jury, among other things, that Loftin was in violation of the rules of defendant company when he took the motorcar and used the same on the track of plaintiff in error in the day and night time of July 1, 1916. The jury returned a verdict, upon which judgment was rendered, in favor of defendants in error. The Court of Civil Appeals affirmed the judgment. 198 S. W. 159.

The following notation was made by the Committee of Judges in granting the writ:

"We fail to see in the evidence any negligence of the railroad company, and in our opinion the uncontradicted evidence discloses contributory negligence of the deceased."

We find it necessary to discuss only two questions:

(1) Was Loftin guilty of contributory negligence proximately resulting in his death?

(2) Was there any evidence that the railway company discovered his perilous position on the track in time to avoid injuring him?

Conceding, but not deciding, that plaintiff in error was negligent, the question first stated logically follows.

[1] Ordinarily—in fact in practically all negligence cases—negligence is a fact to be found or inferred from the testimony, "yet some acts are so obviously dangerous and reckless that no court should hesitate to declare them negligent. *G., H. & S. A. Ry. Co. v. Ryon*, 80 Tex. 59, 15 S. W. 588; *Sanches v. S. A. & A. P. Ry. Co.*, 88 Tex. 117, 30 S. W. 431. This case presents acts on the part of Loftin of that character.

Dewey Been was Loftin's nephew and the leading witness for defendants in error. According to his testimony his uncle was drunk when he and his party left Bryan for home, carrying intoxicants on the hand car with them. At a point about 2 miles from Fountain they dismounted from the car, where they remained in the vicinity of the railroad track for about 2½ hours, having a kind of "singing and a jambaree." Loftin then proceeded to run his companions off, first the Mexicans, chasing them down the track; then his nephew, who "took across the field" when Loftin drew his knife. It was then about midnight. The nephew decided after a time to return to his uncle, fearing for his safety. It is not controverted that Loftin was drunk when last seen, and no other reasonable deduction than that he was can be drawn from the testimony. The evidence bearing upon the subsequent happenings is consistent with the conclusion that he was in a drunken stupor, or asleep, when struck by the train.

The court charged the jury that his using the motorcar upon the track at the time he did was in violation of the company's rules. His presence on the track at the time he was injured can be accounted for upon no other theory than that he remained there because intoxicated and in reckless disregard for his own safety.

[2] There is no evidence that it was necessary for him to be there. The allegation is "that he, while on the track, was for some cause unable to leave the same, and unable to realize the danger of his position." There is no cause revealed by the testimony for his not leaving it, other than that stated. He was a section foreman, knew the schedules of the passing trains, and must have realized that he was in a dangerous position, unless his mental faculties, on account of drink, played him false. Under the facts stated Loftin was guilty of negligence contributing to his injury and subsequent death. *Railway Co. v. Shiflet*, 98 Tex. 102, 83 S. W. 677; *Id.*, 94 Tex. 131, 58 S. W. 945; *Id.*, 98 Tex. 102, 81 S. W. 524; *Railway Co. v. Sympkins*, 54 Tex. 618, 88 Am. Rep. 632; *Smith v. Fordyce et al.*, 18 S. W. 663; *Railway Co. v. McDonald*, 99 Tex. 213, 88 S. W. 201.

[3, 4] 2. Was there any evidence that the railway company discovered Loftin's perilous position on the track in time to avoid injuring him? It is well settled that the burden of proof was upon the defendants in error, in order to recover for a breach of duty imposed by the discovery of Loftin's peril, to show, not merely that those in charge of the engine by the exercise of reasonable care might have acquired a knowledge of his peril in time to avoid injuring him, but that they actually possessed it. *T. & P. Ry. Co. v. Breadow*, 90 Tex. 26, 36 S. W.

410; *Railway Co. v. Staggs*, 90 Tex. 458, 39 S. W. 295. The question, concretely stated, is, Did the fireman or engineer, or either of them, knowing of Loftin's perilous position, fail to use all means then available consistent with the safety of the train to avoid injuring him? There is no direct testimony that the engineer saw Loftin upon the track at any time, or that the fireman saw him in time to prevent the accident. It is not controverted that the night was dark or that Loftin was injured while upon a curve of the track. The only testimony as to his position when struck was that only his head was on the track. His shoulders were between ties, his feet extending out from the rail. His face was turned north (away from the engine). There are no circumstances connected with the actual occurrence of the injury raising the issue that those operating the engine actually saw Loftin in time to stop the train before it reached him. While, generally speaking, any fact may be established by circumstantial evidence, yet such evidence must have probative force sufficient to constitute the basis of a legal inference. It should not be of such character as to permit of purely speculative conclusions. *Mo. Pac. Ry. Co. v. Porter*, 73 Tex. 304, 11 S. W. 324.

It is urged that the circumstantial evidence growing out of the experiments made by defendants in error's witnesses is sufficient to raise the issue whether those on the engine actually saw Loftin at the time alleged. In some instances experimental evidence is of a very convincing character, but it should always be based upon facts established in connection with the occurrence involved, sufficient to show that the experiments had a substantial basis in facts, and that they were made under conditions substantially similar to those surrounding the occurrence. Defendants in error's witnesses in making the experiments were in ignorance of whether Loftin was lying upon the track or was on the hand car, or whether he was standing upon the track. Those making the observations, instead of being in the position of the engineer and fireman in a moving locomotive, were on the ground and stationary. Those taking the position supposed to be occupied by deceased were in a standing position only.

[5] Whether the evidence based upon observations made under the conditions stated could have been properly admitted as tending to reveal circumstances, which, together with others, might have tended to establish a want of care upon the part of those in charge of the engine, we need not determine; but, in our opinion, the evidence does not, standing alone, possess that degree of probative force necessary to form the basis of the fact vital to the company's liability

on the theory of discovered peril, to wit, that the fireman and engineer saw Loftin, and knew of his peril, in time to avoid injuring him, and, having such knowledge, failed to use all the means then within their power to avoid doing so.

We think it sufficient to point out without any discussion of the holdings in *Ft. W. & D. C. Ry. Co. v. Broomhead*, 140 S. W. 820, and *S. A. & A. P. Ry. Co. v. Jaramilla*, 190 S. W. 1126 (writs of error denied), relied upon by defendants in error, that both cases are distinguishable from this case in the particular, among others, that the circumstantial evidence in both, bearing upon discovered peril, grew out of circumstances surrounding the actual occurrences upon which the cases arose.

The peremptory instruction requested by plaintiff in error should, in our opinion, have been given.

We recommend that the judgments of the trial court and Court of Civil Appeals be reversed, and that judgment be rendered for plaintiff in error.

PHILLIPS, C. J. We approve the judgment recommended in this case.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. EWING. (No. 112-2967.)

(Commission of Appeals of Texas, Section A. June 2, 1920.)

1. Master and servant §124(3) — Hand car held appliance to be inspected though bought of reputable manufacturer.

A standard make hand car, purchased by a railroad from a reputable manufacturer and furnished to a section foreman, is not a simple tool or appliance, and its purchase is not the exercise of ordinary care, relieving the railroad of the duty of inspection to ascertain its fitness for use, depending on a proper adjustment of the cogwheels.

2. Master and servant §286(24)—Negligent inspection question for jury.

Where there was evidence that the derailment of a standard make hand car purchased of a reputable manufacturer and furnished to plaintiff without inspection was the result of an improper adjustment of its cogwheels, discoverable by a reasonable inspection, a peremptory instruction for defendant railroad was properly refused.

3. Master and servant §103(1)—Duty of inspection nondelegable.

The master's duty to use ordinary care to furnish reasonably safe appliances includes the duty of inspection, and such duty is nondelegable.

4. Appeal and error \Rightarrow 232(3)—Ground of objection to charge not taken in lower court waived.

Where ground of objection to a part of the charge was not the ground taken in the trial court, the assigned error, if any, must be considered as waived, under Rev. St. 1911, art. 1971, as amended by Laws 1913, c. 59.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by J. B. Ewing against the St. Louis Southwestern Railway Company of Texas. A verdict and judgment for plaintiff was affirmed by the Court of Civil Appeals (180 S. W. 300), and writ of error was granted by the Committee of Judges. Affirmed.

E. B. Perkins, of Dallas, and Scott & Ross, of Waco, for plaintiff in error.

B. Q. Evans, of Greenville, R. M. Vaughan, of Hillsboro, and H. O. Bishop, of Hubbard, for defendant in error.

SONFIELD, P. J. J. B. Ewing, plaintiff, brought this action against the St. Louis Southwestern Railway Company of Texas, defendant, to recover damages for personal injuries sustained by him while in the employ of defendant. No question is raised with reference to the pleadings. There was evidence of the following material facts:

Plaintiff was a section foreman in the employ of defendant. He was upon a hand car being operated by the section hands upon and over defendant's tracks. The car was thrown from the track by reason of the improper adjustment of the cogwheels. Being too tightly geared, they were caused to sink too deep in the grooves and to become locked. Through the derailment of the car, plaintiff received the injuries complained of. The hand car weighed between 600 and 700 pounds. It was operated by two cogwheels and a lever. One of the wheels, called the pinion wheel, was attached to the front axle under the body of the car; the other, the bull wheel, was immediately to the rear, and attached to the framework of the car. Only a part of the bull wheel was in view of those operating the car. The hand car was furnished plaintiff when new, 17 days before his injury. It was of a standard make, and purchased by defendant with a number of others in carload lots from a reputable manufacturer. The car came "set up" from the factory, and was delivered to plaintiff in the condition in which it was received from the factory, without any character of inspection by defendant; and there was no evidence of inspection by the manufacturer prior to its shipment from the factory.

Plaintiff had been in the employ of defendant for 6 years, but had used only one new car prior to this one with which he had no trouble. He had worked with hand cars for

26 years, but had no experience such as with the car in question. On several occasions prior to plaintiff's injury, the car in running made a grinding noise, which was attributed by plaintiff to the newness of the car or to the manner of its operation by the section hands. Plaintiff was not a machinist, and it was no part of his duty to inspect the car. He knew the car was tightly geared, but believed this proper, and had no knowledge of any danger from the use of a car thus geared.

A trial to a jury resulted in a verdict and judgment for the plaintiff, which was affirmed by the Court of Civil Appeals. 180 S. W. 300. Writ of error was granted by the Committee of Judges.

[1-3] It is contended by defendant that the hand car in question was a simple tool or appliance; and, being a standard make car, purchased from a reputable manufacturer, and delivered to plaintiff in the condition in which it was received from the factory, defendant will be deemed under the law to have exercised ordinary care in its selection, and thereby absolved from the duty of inspection. Predicated upon this proposition, defendant requested a peremptory instruction in its favor, which was refused; it objected to the fourth paragraph of the court's charge, wherein the jury was instructed that it was the duty of defendant "to have caused said car to be inspected in order to ascertain its condition," and requested an instruction embodying its contention, which was refused.

In support of its contention, defendant cites *Gulf, Colorado & Santa Fé Railroad Co. v. Larkin*, 98 Tex. 225, 82 S. W. 1026, 1 L. R. A. (N. S.) 944. In that case a lantern was purchased from a reputable manufacturer, and was of a standard make. Larkin was injured by the breaking of the globe of the lantern, while cleaning it. The court held this a simple appliance, and that upon such purchase it was not the duty of the employer to enter into "a minute examination of it to detect some latent defect," or after its delivery to the employé for use, "to inspect the lantern at regular times or at any time thereafter."

In *Drake v. San Antonio & Aransas Pass Ry. Co.*, 99 Tex. 240, 89 S. W. 407, which involved the duty of inspection of a simple tool or appliance, the holding in the *Larkin* Case was stated to be "that the duty of ordinary care did not require of the master that regular and careful inspection of this simple tool which is essential to such care in relation to more complicated and dangerous machinery and appliances."

We have been cited to no case which has included a car of the character here in question within the class of simple tools and appliances. There have been numerous cases in

this state involving injury through defective hand cars, wherein the employer's duty to use ordinary care in furnishing to the employé reasonably safe instrumentalities, including necessary inspection, has been applied; but in none of the cases does it appear that the proposition was advanced that the car was a simple tool or appliance. Among such cases are: *G., O. & S. F. Ry. Co. v. Silliphant*, 70 Tex. 623, 8 S. W. 673; *Railway Co. v. Blackmon*, 32 Tex. Civ. App. 200, 74 S. W. 74; *Railway Co. v. Browning*, 54 Tex. Civ. App. 52, 118 S. W. 245; *Railway Co. v. Edmunds* (Civ. App.) 26 S. W. 633.

The case of *International & Great Northern Railroad Co. v. McCarthy*, 64 Tex. 632, cited and relied upon by defendant, is not an authority for the proposition. In that case the injury resulted from the use of a velocipede hand car, then a new appliance not in general use. There was no evidence of defect of any kind or character, and the question of liability for defects and the duty of inspection were not involved. Liability was sought to be imposed on the ground that the car was a dangerous instrumentality, and McCarthy not warned of the dangers attendant upon its operation and use. The court held such dangers open and patent, and as apparent to McCarthy as to the company.

We have hereinbefore briefly described the car furnished plaintiff. Under the evidence, some degree of mechanical skill was necessary to a proper adjustment of the cogwheels and to a knowledge as to whether the adjustment was proper, and as well to an appreciation of the danger incident to its operation with the cogwheels geared too tight or too deep. The mechanism of the car is located under its floor or platform, and defects therein are thus hidden from the view of those operating or using it. While, comparatively speaking, not a complicated or dangerous machine, such car cannot be termed a simple tool or appliance. The defect and danger are not obvious and necessarily apparent to the employé in its use; hence to determine its fitness for use, an inspection is or may be necessary.

The hand car, not a simple tool or appliance, was of standard make, purchased from a reputable manufacturer, and furnished to plaintiff without inspection by defendant. Do these facts establish as a matter of law the exercise of the requisite degree of care by defendant?

The question has not been directly determined by our Supreme Court, and authorities in other jurisdictions are conflicting. The cases are collated in the note 40 L. R. A. (N. S.) 1120.

In *Alamo Dressed Beef Co. v. Yeargan*, 53 Tex. Civ. App. 92, 123 S. W. 721, in which writ of error was denied, the following proposition was advanced by the appellant:

"The fact of the appliance being of an approved pattern and having been bought from a reputable dealer relieved the defendant of the duty of inspection in the absence of some circumstance which would put a prudent man upon inquiry at the time of the purchase or afterwards."

This proposition is a statement of what has been termed the reputable manufacturer doctrine. The court held the proposition unsound, declaring that "reasonable inspection is imposed by law at all times."

The rule is thoroughly established that the duty of the employer to use ordinary care to furnish reasonably safe tools, machinery, and appliances for use by his employes—which includes inspection, where necessary—is positive and absolute, in the sense that it is nondelegable. The reputable manufacturer doctrine, broadly stated and applied, would effectually destroy the rule, by permitting the delegation of the employer's duty to the manufacturer. In effect, it would in many instances be a denial of any recovery by the employé, for ordinarily, through the absence of the necessary privity, the injured employé would have no right of action against the manufacturer. 3 *Labatt's Master and Servant* (2d Ed.) § 2786; 18 R. O. L. 564. The rule of the nondelegability of the duty of the employer in this respect is both just and salutary; it is a necessary protection to the employé, and should not be departed from to the extent of its complete abrogation.

An examination of the cases cited as supporting the reputable manufacturer doctrine convinces us that but few of them carry it to the extent contended for by defendant. In the majority of such cases, while the doctrine is broadly stated, it is applied to latent defects, requiring minute and detailed inspection, involving tests such as can and ought to be applied by a manufacturer, and for which many employers are in no manner equipped, as distinguished from defects discoverable by an external or visual inspection, an inspection compatible with the usual conduct of the ordinary business.

We are impressed that the doctrine deducible from such authorities is thus fairly stated by the court in *Reynolds v. Merchants' Woolen Co.*, 168 Mass. 501, 47 N. E. 406:

"If a machine is bought of a reputable maker, in other words, if reasonable care is used in selecting the maker, and then reasonable care was used upon the delivery of a machine, in inspecting it, in setting it up, in putting it in operation it cannot be said that the defendant, or an employer would be liable in such a case, although it might clearly appear later on that the maker of that machine was careless, and put in improper materials, or did imperfect and improper work. The law does not make the employer an insurer of the safety of his machines, nor a guarantor that due care shall be used by the manufacturer. It does require,

however, that he shall use reasonable care to provide proper machinery."

An eminent text-writer approves the above as a correct statement of the doctrine and as marking its true limits. 4 Thompson, Negligence, § 3990.

Applying what we conceive to be the correct rule of law to the facts of this particular case, we conclude that the purchase of a standard make car from a reputable manufacturer did not establish, as a matter of law, the exercise of ordinary care by defendant, relieving it of the duty of inspection. There being evidence that the derailment of the car, and consequent injury to plaintiff was the result of an improper adjustment of the cogwheels, discoverable by a reasonable inspection, the court properly refused the peremptory instruction and the special charge, requested by defendant.

[4] Both in the Court of Civil Appeals and in its application for writ of error herein, defendant under proper assignments of error complains that the court erred in the fourth paragraph of its charge, wherein the jury was instructed that it was the duty of defendant to have caused the car to be inspected to ascertain its condition, contending that the question of the duty of inspection was for the jury. This objection was not taken in the trial court, and under article 1971, R. S. 1911, as amended (Laws 1913, c. 59), the error, if any, must be considered waived. Gulf, Texas & Western Ry. Co. v. Dickey, 108 Tex. 126, 134, 187 S. W. 184.

In the trial court objection was taken to this part of the court's charge, solely upon the ground that through the purchase of a standard make car from a reputable manufacturer, defendant was relieved of the duty of inspection. This objection we have considered. The further objection sought to be raised is not properly before us.

We are of opinion that the judgment of the Court of Civil Appeals should be affirmed.

PHILLIPS, C. J. We approve the judgment recommended in this case.

MISSION INDEPENDENT SCHOOL DIST. et al. v. ARMSTRONG. (No. 154-3122.)

(Commission of Appeals of Texas, Section A.
June 2, 1920.)

1. Schools and school districts ⇨104—Tax levy for district gave it lien on personalty.

In view of Rev. St. 1911, arts. 957, 958, 961, 7626-7628, under article 2853, conferring power of taxation on trustees of independent school districts, an independent school district by levy of tax by the collector acquired a lien on personal property within the district.

2. Schools and school districts ⇨104—Tax lien attached and became incumbrance on personalty when assessment was made.

Under Rev. St. 1911, art. 2853, conferring power of taxation on trustees of independent school districts, in view of article 958, incorporated by reference, which does not fix a specific date when the lien of taxes on personalty shall attach, the lien created by a school district's tax levy attached and became an incumbrance on the property as soon as the assessment was made.

3. Schools and school districts ⇨104—Tax lien on personalty created by assessment not divested by sale under deed of trust.

Lien on personalty created by an independent school district's assessment under Rev. St. 1911, art. 2853, having attached, was not divested by sale under a deed of trust, but the buyer took the property subject to the right of the district through its collector to enforce collection by levying on and advertising the property for sale to satisfy the lien.

4. Schools and school districts ⇨106—Pur- chaser at sale under trust deed of personalty whereon district had lien for taxes held lia- ble on bond to release levy when taxes be- came due.

Where to satisfy tax lien on personalty created by independent school district's assessment, the tax collector levied on and advertised it for sale, to prevent which a purchaser at sale under deed of trust gave the bond to release levy required by Rev. St. 1911, art. 7626, on the taxes becoming due the purchaser would be liable under the bond for the amount of taxes it was given to protect.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Suit by George W. Armstrong against the Mission Independent School District and another. From judgment for defendants in plaintiff's suit and their cross-action, plaintiff appealed to the Court of Civil Appeals, which reversed and rendered (195 S. W. 895), and defendants bring error. Judgment of the Court of Civil Appeals reversed, and that of the trial court affirmed on recommendation of the Commission of Appeals.

H. F. Bishop, of Mission, for plaintiffs in error.

Geo. P. Brown, of Edenburg, for defendant in error.

SPENCER, J. The suit was by George W. Armstrong, defendant in error, to recover of the Mission Independent school district and P. W. Barron, tax collector, plaintiffs in error, the sum of \$405.60, which he had paid under protest for taxes due the district by the Mission Cotton Oil Company, a corporation, upon personal property purchased after the levy of the tax, for the years 1912 and 1913, but which were delinquent at the time of purchase. Plaintiffs in error filed a cross-action for \$150 for taxes due for 1914.

The cause was tried upon an agreed state-

ment of facts, summarized as follows: The district assessed a school tax upon the property of the oil company for the years 1912, 1913, and 1914. January 6, 1914, the First National Bank of Brownsville sold the property at a trustee's sale under the provisions of a deed of trust which the company had executed and delivered to it; and Armstrong, a stockholder in the company, became the purchaser. Subsequent to the purchase, and after the taxes for 1912 and 1913 became delinquent, and after demand for payment, the tax collector levied upon the property and advertised the same to be sold for the delinquent taxes. Armstrong, who was at that time engaged in dismantling the property, paid the amount in order that he might not be inconvenienced in the work, and in order that he could remove it out of the county. The property consisted of buildings erected upon a railway right of way, with an agreement that it could be removed.

The trial court rendered judgment against Armstrong upon his action, and in favor of the district court and the tax collector upon their cross-action against Armstrong. The Court of Civil Appeals was of opinion that the taxes assessed against the company upon the personal property created no lien, and that it was not an obligation against Armstrong. The judgment upon the cause of action and the cross-action was reversed and rendered in favor of Armstrong. 195 S. W. 895. The writ was granted upon application referred to the Committee of Judges.

[1] The sole question presented for our determination is: Did the Mission Independent school district by the levy of a tax by the collector have a lien upon the personal property within the district? Article 2853 of the R. C. S. conferring the power of taxation upon the trustees of independent school districts, reads:

"The trustees elected in accordance with the preceding article shall be vested with full management and control of the free schools of such incorporated town or village, and shall in general be vested with all the powers, rights and duties in regard to the establishment and maintaining of free schools, including the powers and manner of taxation for free school purposes that are conferred by the laws of this state upon the council or board of aldermen of incorporated cities and towns."

The article quoted adopts by reference, and incorporates into the act of which the article is a part, those articles conferring upon cities and towns the power of levying and collecting taxes. The articles pertinent to be considered here are 957, 958, and 961. The latter part of article 958 reads:

"The assessor and collector shall have full power to levy upon any personal property to satisfy any tax imposed by this title; all taxes shall be a lien upon the property upon which they are assessed, and, in case any property levied upon is about to be removed out of the city, the assessor or collector shall pro-

ceed to take into his possession so much thereof as will pay the taxes assessed and costs of collection."

Article 957 provides, in substance, that the assessor has the power to levy upon so much property liable to taxation as may be sufficient to pay the taxes due from the person owing the tax, and to advertise and sell the same to satisfy the taxes, cost, and fees. The only question of difficulty presented is, When does the lien given by article 958 attach? While defendant in error contends that the law nowhere gives a lien on personal property to secure the payment of taxes assessed thereon, he admits that it may provide a method of fixing such a lien. He relies upon articles 7626, 7627, and 7628 in support of his contention, and seems to think that these articles provide a method of fixing a lien if, in fact, one exists. These articles were incorporated by adoption into the act of which article 961 is a part, and they became likewise a part of the act now under consideration, by reason of having been adopted by article 2853. Article 7626 reads:

"If it comes to the knowledge of the collector that any personal property assessed for taxes on the rolls is about to be removed from the county, and the owner of such property has not other property in the county sufficient to satisfy all assessments against him, the collector shall immediately levy upon a sufficiency of such property to satisfy such taxes and all costs, and the same sell in accordance with the law regulating sales of personal property for taxes, unless the owner of such property shall give bond, with sufficient security, payable to and to be approved by the collector, and conditioned for the payment of the taxes due on such property, on or before the first day of January next succeeding."

The substance of article 7628 is that whenever it shall appear to the collector of taxes that any person who is delinquent in the payment of same has no property in the county to which the tax is owing, it shall be the duty of the collector to forward a certified schedule of taxes due to the collector of the county where he shall have reason to believe the delinquent has property, and the receiving collector is directed to seize and sell any property of the delinquent in the same manner as if the taxes were originally assessed and due in his county.

The provisions of these articles do not deal with the creation of liens, but were enacted for the guidance of the collector in the discharge of his duty, to the end that the power levying the tax may not suffer the loss of the assessment. Article 958 governs in so far as the creation of the lien is concerned, while article 957 provides the manner of the enforcement of the lien thus created. *Crawford v. Koch*, 169 Mich. 372, 135 N. W. 339.

[2] As article 958 does not fix a specific date when the lien given therein shall attach; and in the absence of a specific date, the lien

thus created attached and became an incumbrance upon the property as soon as the assessment was made. *Carawell & Co. v. Habberzettie*, 39 Tex. Civ. App. 494, 87 S. W. 911; *Cruger v. Ginnuth*, 3 Willson, Civ. Cas. Ct. App. § 24; 37 Cyc. 1142 (c).

[3] The agreed statement of facts shows that the taxes had been levied and assessed for 1912 and 1913, and were due and unpaid at the time of the trustee's sale under the deed of trust. The lien, thus created by the assessment having attached, was not divested by reason of the sale under the deed of trust. Defendant in error took the property subject to the right of the district, through its collector to enforce collection by levying upon and advertising it for sale to satisfy the lien. 37 Cyc. 1146.

[4] What has been said with reference to the lien for taxes for 1912 and 1913 also applies in so far as the taxes for 1914 are concerned. The assessments had been made for 1914, but the taxes were not due at the time of purchase by defendant in error. To protect the lien created by the assessment the collector levied upon and advertised the property for sale, and to prevent which, defendant in error gave the bond required by article 7626. Upon the taxes becoming due, the defendant in error would be liable under the bond for the amount of taxes which the bond was given to protect.

It is our opinion, therefore, that the judgment of the Court of Civil Appeals should be reversed, and that of the trial court affirmed.

PHILLIPS, C. J. We approve the judgment recommended in this case.

BURTON LINGO CO. v. FIRST BAPTIST CHURCH OF ABILENE et al.
(No. 166-3166.)

(Commission of Appeals of Texas, Section B.
May 26, 1920.)

1. Appeal and error ⇨76(1)—Judgment is final only when it leaves nothing further to be litigated; "final judgment."

The general rule is that a judgment is "final" only when it leaves nothing further to be litigated.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

2. Appeal and error ⇨927(1)—Presumed in support of finality of judgment that cross-action was abandoned or dismissed.

In an action on a building contractor's bond, where the contractor and the bondsmen filed a joint answer pleading the contractor's discharge in bankruptcy, and containing a suggestion by the bondsmen of suretyship, and

asked judgment over against the contractor for any recovery against them, but the issue between the contractor and the sureties was not called to the court's attention, no instruction upon it was sought, and no objection to a peremptory instruction for plaintiff against the sureties was made for failure to submit the cross-action, it may be presumed in favor of the finality of the judgment that the sureties waived and abandoned their cross-action, or that a dismissal or discontinuance was had with reference thereto.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Action by the Burton Lingo Company against the First Baptist Church of Abilene and others. A judgment for plaintiff was reversed by the Court of Civil Appeals (198 S. W. 1013), and plaintiff brings error. Reversed, and remanded to the Court of Civil Appeals.

Sayles & Sayles, of Abilene, for plaintiff in error.

G. C. Groce and J. L. Gammon, both of Waxahachie, and A. H. Kirby, of Ft. Worth, for defendants in error.

SADLER, P. J. E. S. Boze entered into a building contract with the First Baptist Church of Abilene, acting through the members of its board of trustees and building committee, for the erection of a church building; G. P. Bullard, W. A. Crow, R. C. Johnston, J. W. Harrison, and J. L. Gammon becoming sureties for Boze on his bond, insuring performance of his contract. During the construction of the building, the Burton Lingo Company furnished to Boze materials which went into the construction of the building.

Burton Lingo Company filed this suit against the church, the church trustees and committee, the contractor and his bondsmen, to recover upon an account for material furnished by it to the contractor.

The contractor and bondsmen were represented by the same counsel, and jointly answered. Among other defenses set up in the answer, it was specially pleaded that the contractor had been discharged in bankruptcy, and this was pleaded in bar to any recovery against him. The answer contained a suggestion by his codefendant bondsmen of suretyship, asking judgment over against him for any recovery had against them by plaintiff.

The cause went to trial before a jury under this state of pleading. When the evidence was in, the defendant, contractor and his bondsmen requested a peremptory instruction for a verdict in favor of the contractor on his plea of discharge in bankruptcy, and generally in favor of his bondsmen. The court refused the latter request, but granted the former, and instructed a ver-

dict discharging the contractor on his plea in bankruptcy. The sureties excepted to the refusal to give the requested charge as to them, but did not except to the giving of the peremptory instruction favorable to the contractor. The court then gave a peremptory charge in favor of the plaintiff and against the sureties alone, and in favor of all the other defendants. Verdict was accordingly returned for the plaintiff against the bondsmen alone, but discharging all other defendants.

Thereupon judgment was rendered in accordance with the verdict of the jury, which was copied into the decree, except that in the judgment the contractor was specifically discharged only as to the suit of the plaintiff, the church, and church committee. The judgment made no specific mention to the suggestion of suretyship, nor did it discharge specifically the contractor as to the cross-action of his bondsmen.

While the sureties excepted to the judgment as against themselves in favor of the plaintiff, they did not raise the question of its failure to specifically discharge the contractor or dispose of their cross-action.

In the motion for a new trial, the bondsmen treated the judgment as final, and at no time did they call the attention of the court to the failure of the judgment to dispose of the issue presented in their suggestion of suretyship.

The sureties appealed from the judgment, and assigned only the errors in refusing the requested instruction in their favor as to plaintiff's suit, and in giving a peremptory instruction for plaintiff against them. Plaintiff also appealed, but raises no question relating to the finality of the judgment but only those questions which affected its right of recovery against the church and church committee.

After the cause was submitted in the Court of Civil Appeals that court held that the judgment was not final, on account of the failure to dispose of the cross-action of the sureties against the contractor. We are thus called upon to determine whether the judgment is final or not.

Opinion.

[1] In our opinion, the judgment in this case must be treated and held to be final under all the authorities. The general rule is that a judgment is final only when it leaves nothing further to be litigated. *Ft. Worth Improvement District No. 1 v. Ft. Worth*, 106 Tex. 148, 158 S. W. 164, 48 L. R. A. (N. S.) 994. It then becomes necessary to inquire whether the judgment in the instant case leaves any issue then before the court for further adjudication.

[2] It nowhere appears in this record that the cross-action by the sureties was present-

ed to the court, or an adjudication sought thereon. It is true that it is a part of the joint answer of the contractor and the sureties. Nevertheless no act of the parties is made to appear wherein that issue was called to the attention of the court, or any character of instruction sought upon it. No objection is made to the action of the court in giving the peremptory instruction in favor of the plaintiff and against the sureties upon the ground of failure to submit the cross-action. The sureties and their principal jointly pleaded, jointly set up the discharge of the contractor in bankruptcy, and thereafter asked the court to instruct the jury to discharge the bankrupt. The court did so, and the jury so found. It is not unreasonable to presume in favor of the finality of the judgment that the sureties elected to waive and abandon their cross-action, or that a dismissal or discontinuance was had with reference thereto. *Trammel v. Rosen*, 106 Tex. 132, 157 S. W. 1161; *Alston v. Emmerson*, 83 Tex. 231, 18 S. W. 566, 29 Am. St. Rep. 639; *Gullett v. O'Connor*, 54 Tex. 409; *Houston v. Ward*, 8 Tex. 124; *Burton v. Varnell*, 5 Tex. 139; *Wilson v. Smith*, 17 Tex. Civ. App. 188, 43 S. W. 1086; *Ellis v. Harrison*, 52 S. W. 581; *Carlton v. Krueger*, 54 Tex. Civ. App. 48, 115 S. W. 619, 1178.

We therefore conclude that the judgment is final and will support the appeal.

We recommend that the judgment of the Court of Civil Appeals be reversed, and that this cause be remanded to that court for disposition of the errors assigned.

PHILLIPS, C. J. We approve the judgment recommended in this case.

HOUSTON & T. C. R. CO. v. DIAMOND PRESS BRICK CO. (No. 138-3050.)

(Commission of Appeals of Texas, Section A. June 2, 1920.)

1. Indemnity §8—Brick plant liable for negligent maintenance of spur track by railroad under contract.

Under a contract by which a brick company agreed to pay all costs of a spur track and save the railroad harmless from liability, whether caused by its negligence or not, and from all claims for damages growing out of construction, maintenance, or operation of the spur, the brick plant was liable to the railroad, which was required to pay a judgment against it for personal injuries, by reason of negligence of the railroad in maintaining a crossing.

2. Indemnity §3—Contract to indemnify railroad for negligence not contrary to public policy.

A contract by which a brick plant agreed to save a railroad harmless from all claims for damages growing out of construction, mainte-

nance, or operation of a spur track, including claims arising out of negligence of the railroad in maintaining a crossing, was not violative of the public policy of the state, in that it had a tendency to cause the railroad to omit the performance of the duties imposed by Rev. St. 1911, art. 6494.

3. Corporations — 484(2)—Contract indemnifying railroad against liability for negligence as to a spur track not ultra vires.

A contract by a corporation engaged in the brick business by which it agreed to indemnify a railroad from liability on account of claims for damages growing out of negligence in the construction, maintenance, or operation of a spur track running to the brick plant was not ultra vires.

4. Corporations — 447 — Contract to enable corporation to carry on business not ultra vires.

A corporation is empowered to enter into contract to enable it to carry on the business and accomplish the purpose of its existence, unless prohibited by law or the provision of its charter.

Error to Court of Civil Appeals of Sixth Supreme Judicial District.

Action by the Houston & Texas Central Railroad Company against the Diamond Press Brick Company. From a judgment of the Court of Civil Appeals (188 S. W. 32), affirming a judgment for defendant, plaintiff brings error. Reversed and rendered.

John H. Sharp, of Ennis, and Jno. T. Garlison, of Houston, for plaintiff in error.

G. C. Groce, of Waxahachie, for defendant in error.

SPENCER, J. The Houston & Texas Central Railroad Company, plaintiff, sued the Diamond Press Brick Company, defendant, a corporation, to recover the amount of a judgment one Henry Hamilton had recovered against it. Hamilton's action was based upon plaintiff's negligence in permitting a crossing on a spur track running to defendant's brick plant to become unsafe, alleging that in attempting to drive over it in its dangerous condition his team became frightened and ran away, resulting in personal injuries.

The railroad company based its action for recovery upon a contract entered into with the brick company under the terms of which the railroad company had built and was maintaining a spur track to the plant of the brick company for the convenience of the latter. The material provisions of the contract necessary to a decision of the case are:

"Fourth. It is agreed and understood that the said party of the second part shall bear the expense of keeping the said spur track in good condition, and that it will, upon receipt of bills therefor, promptly reimburse the party of the first part for any and all expense incurred by

it for material and labor furnished in making such repairs as may be necessary to keep the said spur track in first-class condition."

"Seventh. The party of the second part further agrees and obligates itself to save the party of the first part harmless from any and all claims for damages arising from any cause whatsoever growing out of the construction, maintenance, and operation of said spur track, including damages for injury to or killing of stock belonging to the party of the second part, its employes or tenants, whether such claim is made by any person, firm, corporation, or municipality. The party of the second part further agrees and binds itself to reimburse the said party of the first part for any and all amounts it may be compelled to pay in settlement of any claim for which, under the terms of this agreement, the party of the second part would be liable."

The defendant contended (1) that it was not within the contemplation of the parties that the brick company was to be responsible for the negligence of the railroad company in this character of case; (2) that if the contract be construed as requiring reimbursement to the railway company, it would be against public policy and therefore void; and (3) that the same is an ultra vires act on its part, and hence unenforceable. The court, upon motion of defendant, sustained exceptions to plaintiff's petition, and, plaintiff refusing to amend, judgment was rendered in favor of defendant. Upon appeal, the Court of Civil Appeals affirmed the judgment. 188 S. W. 32. The writ was granted upon application referred to the Committee of Judges.

The proximate cause of the damages suffered by plaintiff, as shown by the pleadings, and for which it seeks indemnity under the contract, was due to its negligence in failing to maintain the crossing in first-class condition; but plaintiff insists that, though it was negligent in this respect, nevertheless it is entitled to indemnity under the provisions of article 7 of the contract.

[1] In our opinion section 7 of the contract is a positive agreement to indemnify the railroad company against such a claim as the one here involved. Under this section the obligation was to save the railroad company "harmless from any and all claims for damages" arising, not only out of the construction and operation of the spur track, but out of its maintenance as well. This section would be inoperative and rendered meaningless if construed to exclude negligence, as a claim for damages against the railroad company growing out of any of these things could have no standing in a court unless predicated upon the negligence of the railroad company, or its servants. The section must, we think, be construed as contemplating claims for damages founded upon such negligence.

The absolute agreement embodied in the seventh section is not to be nullified because of the fourth section. The agreement in the latter section that the railroad company shall bear the expense of keeping the spur track in good condition is not inconsistent with the agreement of the brick company in the seventh section to hold the railroad company harmless against any claim for damages growing out of the maintenance of the track if it were not kept in good condition. The contract, as a whole, simply means that the expense of keeping the spur track in good condition was to be borne by the railroad company, but the brick company was to hold the railroad company harmless against claims for damages founded upon any negligent condition in the construction, operation, or maintenance of the track.

[2] The contention that section 7 is contrary to public policy is based upon the theory that if a railroad company be reimbursed for its negligent act in the maintenance of the crossing it will have a tendency to cause the railroad company to omit the performance of the duties imposed by article 6494, Revised Civil Statutes, which requires railroad companies to keep that portion of their roadbed and right of way over or across which any public roadway runs in proper condition for the use of the traveling public. The contract does not undertake to relieve the railroad company from the duties imposed by the article, nor free it from liability for damages occasioned to others as the result of its failure to perform those duties. We cannot assume that because the agreement has been made the railroad company will violate the statute. We conclude that the contract is not violative of the public policy of the state, but is one which the parties were at liberty to make. *M., K. & T. Ry. Co. v. Carter*, 95 Tex. 461, 68 S. W. 159.

[3, 4] The defense by the brick company that the contract is an ultra vires act on its part is likewise unavailing. A corporation is empowered to enter into contract to enable it to carry on the business and accomplish the purpose of its existence, unless prohibited by law or the provision of its charter. The language of the agreement now under consideration leaves no room to doubt that the contract was made in order to accomplish the purpose for which the corporation was created. The spur track was constructed solely for the promotion of the private interests of the brick company, and out of its construction, operation, and maintenance grew increased risks which it was not otherwise required to assume. The benefits secured to the one and the increased risk to the other is the basis for the provision, justifying in its inclusion in the agreement. The making of it was, under the circumstances, an incidental power of the corporation, appropriate

to the execution of the specific power granted by the charter, and hence not an ultra vires act.

We recommend that the judgments of the Court of Civil Appeals and the district court be reversed, and judgment rendered for plaintiff for the sum of \$1,430, the amount paid Hamilton by the railroad company, with interest thereon from the 15th day of February, A. D. 1914.

PHILLIPS, C. J. We approve the judgment recommended in this case.

PANHANDLE & S. F. RY. CO. et al. v.
VAUGHN. (No. 129-3018.)

(Commission of Appeals of Texas, Section A.
May 26, 1920.)

1. Trial \S 244(2)—Requested instruction authorizing consideration of possible recovery of cattle from effects of delay in feeding properly refused.

In an action for damages to a shipment of cattle caused by delay in feeding in transit, though defendant's evidence that the cattle were shipped for range feeding and that the cattle recovered their normal condition soon after being placed on the range was admissible on the issue of damages, it was not error for the court, after properly charging the measure of damages to be the difference in value thereby occasioned on arrival at destination, to refuse a requested charge to consider the temporary nature of the injuries.

2. Appeal and error \S 1082(1)—Assignment of admission of testimony held not to present substantive question within Supreme Court's jurisdiction.

Since an action for damages to cattle in shipment does not turn on the admission or rejection of testimony relating to the extent of the damage, an assignment complaining of the admission of such testimony does not present a question of substantive law, and the Supreme Court is without jurisdiction to review it under *Vernon's Sayles' Ann. Civ. St.* 1914, art. 1521, subd. 6.

3. Trial \S 191(6)—Charge exonerating railroad from liability for loading cattle properly refused as assuming plaintiff's negligence.

In an action for damages to a shipment of cattle which were loaded by the shipper, a requested charge not to consider damage caused by loading cows and calves in the same cars was properly refused as assuming that it was negligence to load the cattle in that manner.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Action by Tom Vaughn against the Panhandle & Santa Fé Railway Company and others. Judgment for the plaintiff was affirmed by the Court of Civil Appeals (191 S.

W. 142), and defendants bring error. Affirmed.

Baker, Botts, Parker & Garwood, of Houston, Terry, Cavin & Mills, of Galveston, H. S. Garrett, of San Angelo, C. E. Mays, Jr., of Sweetwater, and Madden, Trulove, Ryburn & Pipkin, of Amarillo, for plaintiffs in error.

Mathes & Williams, of Plainview, for defendant in error.

TAYLOR, J. Suit by Tom Vaughn, defendant in error, against the Kansas City, Mexico & Orient Railway Company of Texas, and Panhandle & Santa Fé, and the Galveston, Houston & San Antonio Railway Companies to recover damages to a shipment of cattle from Marfa, Tex., to Plainview, Tex.

Plaintiff alleged a delay of 26 hours upon the part of the Galveston, Houston & San Antonio Railway Company, at Marfa, in loading out the cattle after they were received at the pens; five hours' delay on the part of the Panhandle & Santa Fé Railway Company, at Sweetwater, before unloading there, and five hours after reloading and before forwarding; failure to feed and water the cattle, or furnish facilities therefor; and delay generally en route.

The railway companies, in addition to a general denial, alleged the following special defenses: (1) The weak and impoverished condition of the cattle, and that the damages sustained, if any, resulted from their inherent condition; (2) the provisions of the contract providing that (a) the shipper would look after, feed, and water his cattle en route, (b) the liability of each road should be limited to its own line; (3) the neglect of plaintiff to feed and water his cattle while awaiting shipment and while being held in the pens; (4) that the shipment was not made to market, but to range; and that the injuries sustained, if any, were of a temporary nature, and that the cattle soon after arrival recovered their normal condition.

Plaintiff pleaded by supplemental petition an oral contract of shipment; also, that the written contract was signed after the cattle were loaded and the train was about to depart; that he had no knowledge of the contents of the contract, or opportunity to read it, etc. There was evidence along this line in support of the pleadings. The court submitted to the jury the question of defendants' common-law liability. The question of whether the shipment was made under the parol or written contract was not submitted. Appellant's brief assigns no error as to any omission on the part of the trial court to submit this issue, nor does it call attention to any request for its submission.

A requested peremptory instruction in favor of defendants was denied.

Trial before a jury resulted in a verdict and judgment for plaintiff against the Galveston, Houston & San Antonio Railway Com-

pany, for \$286.25, against the Panhandle & Santa Fé Railway Company for \$795, and in favor of the Kansas City, Mexico & Orient Railway Company, which was affirmed by the Court of Civil Appeals. 191 S. W. 142.

The two companies against which judgments were rendered made application for writ of error, submitting five grounds of error. Upon reference to the Committee of Judges the writ was granted under the view that the Court of Civil Appeals erred in its decision of the questions presented in the second and third grounds.

[1] The first ground of error complains of the refusal of the court to give a special charge instructing the jury that, although they believed the cattle were injured as a result of defendant's negligence, yet, if they further believed that such injuries were temporary, they should take into consideration the temporary nature of the injuries and the degree to which the cattle would have recovered after arrival at Plainview, with the exercise of proper care and handling by plaintiff.

Testimony was admitted tending to show the recovery of the cattle while on the range after arrival, from the effects of shipping. The main charge of the court contained an instruction to the effect that the amount of plaintiff's damage was the difference between the market value of the cattle in the condition in which they were upon arrival at Plainview and what their market value would have been upon arrival there, except for defendant's negligence, if any.

We find no warrant in the decisions of the Supreme Court for concluding that an additional charge of the character requested should be given in those cases in which the cattle are shipped for the range rather than for the market. *G., C. & S. F. Ry. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109 (citing *Railway v. Estill*, 147 U. S. 591, 13 Sup. Ct. 444, 37 L. Ed. 292); *G., C. & S. F. Ry. Co. v. Hume Brothers*, 87 Tex. 211, 27 S. W. 110.

We think the following excerpt from an opinion by Judge Rasbury in *M., K. & T. Ry. Co. of Texas v. Mulkey & Allen*, 159 S. W. 111 (writ of error refused), is a clear statement properly sustaining the court's action in refusing such additional charge:

"The court below correctly charged the jury on the measure of damages, and permitted the broadest kind of inquiry into the condition of the cattle at the time of their shipment, at the time of their arrival, as well as their condition and improvement while being fed and before they were sold. As we understand it, these are inquiries going to prove or disprove the actual damage, and may be, and doubtless were, considered by the jury in the instant case; but we do not understand that proof of such matters is authority for the court to suggest to the jury in his charge that such facts have been proven and may be considered by the jury in estimating the actual loss. Their admission in

evidence is the warrant for their consideration, but the court may not single out that particular fact, and especially direct the attention of the jury to the fact that that particular testimony may be considered."

A contrary view is expressed in *Ft. W. & D. C. Ry. Co. v. Shank & Dean*, 167 S. W. 1093, and *Guinn v. P. & N. T. Ry. Co.*, 142 S. W. 63; but the later case, *P. & S. F. Ry. Co. v. Norton*, 188 S. W. 1011, as well as this case, all by the same court, indicate that the contrary view is no longer adhered to.

We think the holding of the Court of Civil Appeals on the assignment contained in the first ground of error is correct.

[2] The second ground of error sets out an assignment complaining of the admission of certain testimony relating to the extent of the damage of the cattle. As the case does not turn upon the admission or rejection of such testimony, the assignment does not present a question of substantive law. The Supreme Court is therefore without jurisdiction to review it. *Vernon's Sayles' Ann. Civ.* 1914, art. 1521, subd. 6; *Browder et al. v. Memphis Independent School District*, 107 Tex. 538, 180 S. W. 1077.

[3] The third ground of error is based upon an assignment of error to the court's action in refusing to instruct the jury that, although they should find that plaintiff's cattle were injured and damaged on account of defendant's negligence, yet they should not consider such damage as "might have been caused" by reason of the cows and calves being loaded and mingled in the same cars.

The testimony showed that the shipment contained 229 cows and 62 calves. It is undisputed that they were loaded by plaintiff, and that the cows and calves were mingled in the same cars. There is testimony that when so loaded there is a probability that the calves will be trampled to death by the cows. There is no evidence that such loading would cause injury to the cows. The agent of the initial carrier testified that he did not know of the shipper's intention to include calves in the shipment, and that he did not know they were in the cars with the cows until they were loaded; that he protested when he discovered it. A number of both cows and calves died en route.

While it is true that defendants were liable for only such damages as resulted from their negligence, the charge requested should not have been given.

The requested charge assumes as a matter of law that plaintiff was negligent in loading the cattle in the manner stated. That is the effect of the charge. It authorizes the jury to eliminate, from the sum total of damages which resulted *prima facie* from defendant's negligence, such damage as might have resulted from plaintiff's manner of loading the cattle, regardless of whether he was negli-

gent. The damage which defendant was entitled to have the jury "not to consider," or eliminate, if any, was such as resulted from plaintiff's negligence. The charge does not require a finding as to whether the loading constituted negligence on plaintiff's part, and is therefore incorrect. The court did not err in refusing it.

The principal question presented under the fourth and fifth grounds of error is that of the liability of the Galveston, Houston & San Antonio Railway Company, the initial carrier. It is the same question raised under appellant's ninth and tenth assignments of error in the Court of Civil Appeals, and, in our opinion, was correctly disposed of by that court.

We recommend that the judgments of the district court and Court of Civil Appeals be affirmed.

PHILLIPS, C. J. We approve the judgment recommended in this case.

**NORTH BRITISH & MERCANTILE INS. CO.
OF LONDON & EDINBURG v.
KLARAS. (No. 169-3179.)**

(Commission of Appeals of Texas, Section A.
May 26, 1920.)

1. Courts \S 480(2)—District court may perpetually enjoin enforcement of county court judgment.

Where creditor of insured garnisheeing insurer, which paid amount of policy into district court after insured had sued on the policy in county court, and the creditor got judgment which was paid, the district court may perpetually enjoin enforcement of the county court judgment against the insurer, notwithstanding Rev. St. art. 4653, requiring writs of injunction to stay execution of a judgment to be returnable in the court where the judgment was rendered.

2. Garnishment \S 157—Garnishee may deposit money, require defendant to interplead, and restrain enforcement of judgment in another court.

A garnishee may file an answer in a garnishment suit admitting the debt and make the defendant, judgment plaintiff in another court, a party to the garnishment suit, deposit the money in the registry of the court in which the garnishment is pending, and enjoin the enforcement of the judgment in the other court.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Suit by the Texas Exchange National Bank of Waco against B. Klaras, wherein the North British & Mercantile Insurance Company of London and Edinburg was garnisheed, and prayed that an action by B. Klaras against it be enjoined. From a judgment

of the court of Civil Appeals (200 S. W. 584) affirming in part and reversing in part a judgment for plaintiff and an order that the injunction issue as prayed, the plaintiff brings error. Judgment so reformed as to affirm the judgment of the trial court.

Locke & Locke, of Dallas, for plaintiff in error.

W. L. Eason, of Waco, for defendant in error.

TAYLOR, J. This is a garnishment case. The North British & Mercantile Insurance Company of London and Edinburg issued a \$400 fire insurance policy covering a house in Waco, Tex. The property and policy were subsequently transferred to B. Klaras. Shortly thereafter the house was destroyed by fire. A few days later, to wit, June 25, 1915, the Texas Exchange National Bank of Waco instituted suit in one of the district courts in Waco against Klaras, and others on notes and for a foreclosure of lien. The amount involved was in excess of \$1,000. The bank, at the time of filing the main suit, filed in connection therewith a garnishment suit, causing the writ to be served on the insurance company with the view to ascertaining whether the company was indebted to Klaras. On August 7, 1915, the insurance company answered in the garnishment suit, but did not implead Klaras. On August 25th Klaras instituted suit in the county court at Waco, seeking a recovery on his policy. The company then filed an amended answer in the garnishment case, admitting its indebtedness for the full amount of the policy, alleging the institution by Klaras of the suit in the county court, and on the basis of the foregoing, and other allegations, impleaded Klaras, asking that he be compelled to assert his rights in relation to the policy in the garnishment suit, and that he be restrained from further prosecuting his suit in the county court. The company also filed an answer in the county court, in which it set forth the facts concerning the garnishment suit and of having admitted therein the indebtedness on the policy. The company also averred in its answer that an injunction was sought in connection with the garnishment, and prayed that the county court suit be abated, or stayed pending the proceeding in the garnishment suit.

On the call of the appearance docket in the county court judgment was entered in favor of Klaras for the amount sued for. On the following day a temporary restraining writ was issued by the district court in the garnishment suit, enjoining Klaras from proceeding further with the county court suit. Klaras was duly served with the writ.

The bank thereafter recovered judgment in the main suit against Klaras and the other defendants for \$1,134.75, exclusive of inter-

est and costs. After entry of judgment in the main case, the garnishment case was tried; all parties, including Klaras, being before the court.

The trial court found as a conclusion of law in the garnishment suit that the garnishee, in order to protect itself from the vexation and expense of double litigation and the possibility of double recovery, was entitled to make Klaras a party to the garnishment suit; that the indebtedness owing by the insurance company to Klaras was duly garnished by the bank; and that the bank was entitled to the benefit of the indebtedness. The insurance company paid into the registry of the court the sum of \$400, and it was decreed that this sum, less an attorney's fee of \$25, be paid to the bank on its judgment against Klaras, and that such payment should be in full satisfaction of the indebtedness of the company to Klaras on the policy. The temporary restraining order was made permanent, and subsequently the clerk paid out, pursuant to the decree, the sum deposited in the registry of the court.

The insurance company appealed by writ of error to the Court of Civil Appeals from the judgment in the garnishment suit. The judgment was affirmed in part, but so much of the decree appealed from as enjoined Klaras from the enforcement of his county court judgment was set aside, and that part of the case was dismissed. 200 S. W. 584.

Defendant in error has filed a motion to dismiss the petition for the writ, urging that, while the injunction suit was tried in and the restraining order perpetuated by the district court, the county court would have had jurisdiction to try a separate suit filed in that court to restrain enforcement of its judgment.

The reasons for overruling the motion will be apparent in the opinion.

The Court of Civil Appeals was of opinion that the district court was without jurisdiction to perpetually enjoin the enforcement of the judgment of the county court in view of the following provision of article 4653, R. S. 1911:

"Writs of injunction granted to stay proceedings in a suit, or execution on a judgment, shall be returnable to and tried in the court where such suit is pending, or such judgment was rendered."

The court cite in support of the holding, among other cases, Baker v. Crosbyton Ry. Co., 107 Tex. 566, 182 S. W. 287, and say in connection therewith:

"We do not think the case at bar falls within any of the exceptions which have been, or should be, made to the statute. It is not claimed that the judgment of the county court is void for want of jurisdiction, or for any other reason; nor is it claimed that an execution issued upon that judgment had been levied upon property exempt from forced sale, as was the case

in *Leachman v. Capps & Canty*, 89 Tex. 690, 36 S. W. 250, and *Van Ratcliff v. Call*, 72 Tex. 491, 10 S. W. 578."

Was the district court without authority to perpetuate the temporary restraining order in view of the provisions of article 4653?

[1] The district court had exclusive jurisdiction both of the main suit and of the garnishment suit. Being clothed with power to do whatever was reasonably necessary for the administration of justice within the scope of its jurisdiction and prevent any abuse of its process, it had authority to issue the temporary restraining order. The power to issue is conceded, but the power to perpetuate is denied by the Court of Civil Appeals, under the view that the writ, being for the purpose of restraining the enforcement of a judgment rendered in the county court, should have been returned to, and the injunction case tried in, that court.

Power to issue the temporary writ presupposes the power to perpetuate it, if necessary to the granting of complete relief. Unless it was the intention of the Legislature in the enactment of the article referred to to take away such power, the district court did not err in making perpetual the temporary order.

We find no evidence of such intention in the language of the statute. One of the evident purposes of its enactment was to afford a means for putting an end to litigation by preventing a defeated party from proceeding from one court to another, after his defeat, or in the hope of avoiding defeat, in an attempt to relitigate the case. It is applicable, as has been often held, in these cases, the sole object of which is to enjoin the enforcement of a judgment. The cases cited by the Court of Civil Appeals in which it was applied are of this character.

It is a material, and perhaps controlling, fact in this case, that it was not the sole purpose of the injunction suit to restrain the enforcement of the county court judgment, especially in the sense of seeking to impair or destroy it. In fact, the garnishee, in seeking the injunctive relief ancillary to the garnishment suit, admitted liability on the policy sued on in the county court. The primary purpose, from the standpoint of the district court, in issuing the writ, was not to restrain the enforcement of the judgment, but to enforce its own jurisdiction to the end that it might dispense complete justice between the parties and prevent its decrees in the garnishment suit from being rendered ineffectual. It had the right independent of article 4653 to issue the writ for the purposes stated, and we think it was not within the purview of that article to take away or impair that right.

Suppose it should be held that the writ was returnable to the county court, and that court should hold the garnishee not entitled

to have the restraining order perpetuated; and should proceed, as it did in this case, to render judgment against the garnishee as defendant. Suppose the district court then orders by its judgment in the garnishment suit, as it did, that the amount due on the policy and held in the registry of the court, be paid to the plaintiff in the main suit. Irreconcilable conflict in the trial court judgment would be the result. In such case should both judgments be appealed from by the garnishee, or should he be required to choose one at his peril?

The law does not contemplate that such an anomalous situation should be made possible in the administration of justice; yet it is not impossible that it should arise if article 4653 is held applicable in the case of an ancillary proceeding such as is before us in this case.

In the case of *Baker v. Crosbyton South-plains Ry. Co.*, 107 Tex. 566, 182 S. W. 287, relied upon by the Court of Civil Appeals, the effect of applying article 4653 was not to oust the court having exclusive jurisdiction of the subject-matter of the injunction suit, of such jurisdiction, but to protect the court having exclusive jurisdiction, in the exercise thereof. The holding in that case does not militate against the holding in this. One reason for the application of the statute in that case—a reason in consonance with the purpose of the Legislature in enacting it—was to prevent the possibility of a conflict of judgments.

The Legislature, having in mind to prevent conflicts in the trial court judgments, did not intend that the statute should apply when the effect might be to produce a conflict. Nor did it intend that it be applied when to do so might render ineffectual existing remedies. The case we think is not of the class requiring its application.

[2] Plaintiff in error's resorting to the remedy of interpleader in this case was not an innovation upon the procedure of this state. It has long been recognized as correct practice for the garnishee to file an answer in the garnishment suit, admitting the debt, and make the judgment plaintiff in another court a party to the garnishment suit, deposit the money in the registry of the court in which the garnishment is pending, and enjoin the enforcement of the judgment in the other court. *Dobbin v. Wybrants*, 3 Tex. 457; *Westmoreland v. Miller*, 8 Tex. 168; *Iglehart v. Moore*, 21 Tex. 501; *Iglehart v. Mills*, 21 Tex. 545; *Moton v. Hull*, 77 Tex. 80, 13 S. W. 849, 8 L. R. A. 722; and numerous other cases. This practice grew up after the passage of the act of which article 4653 was a part (*Gammel's Laws*, vol. 2, p. 1711, § 152), and we think it should not now be rendered impracticable by the application of the article insisted on by defendant in error. The decisions of the Supreme Court following

soon after the passage of the act indicate clearly that the Supreme Court did not recognize that such application was intended. *Allen v. Menard*, 5 Tex. 376; *Brady v. Hancock*, 17 Tex. 361.

We are of opinion that the district court had the power to perpetually enjoin the enforcement of the county court judgment independent of article 4653. It follows that the Court of Civil Appeals erred in setting aside so much of the decree of the trial court as enjoined defendant in error from the enforcement of his judgment.

We recommend that the judgment of the Court of Civil Appeals be so reformed as to affirm the judgment of the trial court.

PHILLIPS, C. J. We approve the judgment recommended in this case.

McPHERSON v. CAMDEN FIRE INS. CO. (No. 118-2983.)

(Commission of Appeals of Texas, Section A.
May 19, 1920.)

1. Statutes \Rightarrow 105(1) — Intention of Legislature to be ascertained, and statute upheld if possible.

In ascertaining whether a statute is violative of Const. art. 3, § 35, providing that no bill shall contain more than one subject, which shall be expressed in its title, it is incumbent on the court to ascertain the intention of the Legislature, and, if possible by fair construction, to uphold it.

2. Statutes \Rightarrow 105(1) — Constitutional provision as to title of acts liberally construed.

Const. art. 3, § 35, providing that no bill shall contain more than one subject, which shall be expressed in its title, should be liberally construed, rather than embarrass the Legislature by a construction the strictness of which is unnecessary for the accomplishment of the beneficial ends for which it was adopted.

3. Statutes \Rightarrow 116 — Title of statute, making breach of immaterial provision of policy no defense, held sufficient.

Laws 1913, c. 105 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 4874a, 4874b), entitled "An act to prevent fire insurance companies from avoiding liability for loss and damage to personal property under technical and immaterial provisions of the policy or contract of insurance where the act breaching such provision has not contributed to bring about the loss, and declaring an emergency," providing in section 1 (art. 4874a) "that no breach or violation by the insured of any of the warranties, conditions or provisions" of any policy shall render the policy void, or constitute a defense unless the breach contributed to bring about the loss, *held* not violative of Const. art. 3, § 35, providing that no bill shall contain more than one subject, to be expressed in its title; the statute having reference only to immaterial provisions.

4. Statutes \Rightarrow 105(1) — Title viewed as part of law and body of act referred to in construing title as to expressing subject.

In ascertaining whether a statute is violative of Const. art. 3, § 35, providing that no bill shall contain more than one subject, which shall be expressed in its title, the title of a statute will be viewed as a part of the law, and the body of the act will be referred to in construing the title.

5. Insurance \Rightarrow 308 — Statute as to breach of immaterial provisions not applicable where risk is affected.

Laws 1913, c. 105, § 1 (Vernon's Sayles' Ann. Civ. St. 1914, art. 4874a), providing that no breach of "any of the warranties, conditions or provisions" of any fire policy, or application therefor, shall constitute a defense to a suit for loss thereon unless the breach contributed to bring about destruction of the property, *held* to have reference only to immaterial provisions, the breach of which could in no way affect the merits of claims for losses under them, in view of section 3 and the title of the act.

6. Insurance \Rightarrow 308 — Statute as to breach of immaterial provisions held inapplicable to certain clauses.

Laws 1913, c. 105, § 1 (Vernon's Sayles' Ann. Civ. St. 1914, art. 4874a), making the breach of an immaterial provision of a fire policy not contributing to the destruction of the property no defense to suit thereon, *held* not applicable to the proof of loss clause of standard policy, the three-fourths value clause, the coinsurance clause, the incumbence clause, or any other clauses, the breach of which could not bring about a loss by fire.

7. Insurance \Rightarrow 335(4) — Breach of iron-safe clause held good defense.

Breach of the "iron-safe clause," requiring inventory books, etc., to be kept in fireproof safe, required to be inserted in all policies covering stocks of merchandise by the Fire Commission Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 4876a-4904), *held* a good defense in action on policy insuring stock of millinery, notwithstanding Laws 1913, c. 105, § 1 (Vernon's Sayles' Ann. Civ. St. 1914, art. 4874a), making breach of immaterial provision in policy not contributing to loss no defense in action on policy; such statute having no application to the iron-safe clause.

8. Insurance \Rightarrow 308 — Statute as to breach of immaterial provisions applicable only to breaches which did not in fact contribute to loss.

Laws 1913, c. 105, § 1 (Vernon's Sayles' Ann. Civ. St. 1914, art. 4874a), providing that breach of immaterial provision of policy not contributing to destruction of property shall constitute no defense in action on policy, *held* applicable only to those warranties and provisions the breach of which might have contributed to bring about the loss, but which in fact did not, and not to such provisions the violation of which could not have contributed to bring about the loss in view of Insurance Act of 1903, and Fire Insurance Commission Act,

§§ 18, 19 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 4892, 4893).

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Suit by Electra McPherson against the Camden Fire Insurance Company. Judgment for defendant was affirmed by the Court of Civil Appeals (185 S. W. 1055), and plaintiff brings error. Affirmed.

Seay & Seay, of Dallas, for plaintiff in error.

Thompson, Knight, Baker & Harris, and Will O. Thompson, all of Dallas, for defendant in error.

TAYLOR, J. Electra McPherson sued the Camden Fire Insurance Company on its policy of insurance covering her stock of millinery at Jacksonville, Tex. By agreement the case was withdrawn from the jury and submitted to the court. The court found that the company on March 20, 1914, delivered to plaintiff its policy for \$3,000, and that the first annual premium, in the sum of \$76.50, was paid; that on the night of the 17th of April following, plaintiff's entire stock of millinery, valued at \$1,563.40, was destroyed by fire. The record warranty clause of the policy, sometimes called the "iron safe clause," the breach of which was interposed by the company as a defense, is set out in full in the court's findings. By its terms, plaintiff agreed to take a complete inventory of the stock, keep a set of books showing clearly all purchases, sales, and shipments, keep and preserve the books and inventories, and at night, and at all other times when the store was not open for business, keep them locked in a fireproof safe, or in some secure place; and in the event of loss or damage insured against, to deliver both the inventories and books to the company for examination. The clause stipulated, among other things, that its requirements were an inducing cause to the acceptance of the risk.

The court found that the clause was a reasonable and material provision of the policy, and stated as a conclusion of law that it was not an immaterial and technical provision; that plaintiff, having failed to comply with its terms, was not entitled to recover against the defendant in any amount, except the sum of \$76.50, tendered into court by the company as the premium paid. Judgment was rendered in favor of the company, in keeping with the court's findings and conclusion, and on appeal was affirmed. (Civ. App.) 185 S. W. 1055. The writ was granted upon application referred to the Committee of Judges.

The case turns upon the construction of an act of the Thirty-Third Legislature (Gen. Laws 1913, p. 194), section 1 of which has been brought forward in Vernon's

Sayles' Civil Statutes as article 4874a. The act, including the title and emergency clause, and omitting section 2 of the enacting clause, is as follows:

"An act to prevent fire insurance companies from avoiding liability for loss and damage to personal property under technical and immaterial provisions of the policy or contract of insurance where the act breaching such provision has not contributed to bring about the loss, and declaring an emergency.

"Section 1. That no breach or violation by the insured of any of the warranties, conditions or provisions of any fire insurance policy, contract of insurance, or application therefor, upon personal property, shall render void the policy or contract, or constitute a defense to a suit for loss thereon, unless such breach or violation contributed to bring about the destruction of the property. * * *

"Sec. 3. Whereas, under the existing laws, insurance policies and contracts may be defeated upon purely technical provisions and defenses that in no way affect the merits of the claim against the insurance company, and such defenses have been upheld to the extent of making it almost impossible for an insurance policy upon personal property to be collected by suit, creates an emergency and imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and that this act take effect and be in force from and after its passage, and it is so enacted."

If the act is not in contravention of the Constitution of the state, and embraces within its provisions the record warranty clause of the policy sued upon, plaintiff is entitled to recover; otherwise the judgments of the trial court and Court of Civil Appeals should be affirmed.

It is urged that the act is violative of section 35, article 3, of the Constitution, providing that no bill shall contain more than one subject, which shall be expressed in its title.

[1, 2] This position, in the view we take of the purpose and scope of the act, is not tenable. It is incumbent upon the court to ascertain the intention of the Legislature, and, if possible by fair construction, uphold it. The constitutional provision referred to should be construed liberally, rather than embarrass legislation by a construction the strictness of which is unnecessary to the accomplishment of the beneficial ends for which it was adopted. *Morris v. Gussett*, 62 Tex. 741; *City of Austin v. McCall*, 95 Tex. 575, 68 S. W. 791.

[3] The subject as expressed in the title, without relation to the purpose of the act, is the technical and immaterial provisions of fire insurance policies or contracts, or, more briefly expressed, without material change of meaning, the immaterial provisions of fire insurance policies. The end to be reached through the subject, or the subject stated in relation to the purpose of the

act, is to prevent fire insurance companies from avoiding liability under such provisions. The purpose expressed in the title, and no other, in our opinion, is effectuated by the provisions of the act.

[4] Viewing the title as a part of the law (*M., K. & T. Ry. Co. v. Mahaffey*, 105 Tex. 394, 150 S. W. 881), and referring to the body of the act in construing the title, which is permissible (*Austin v. McCall*, supra), we have concluded that they are not necessarily in conflict, and that neither is broader than the other. So viewed, the act is not subject to the constitutional objection urged.

Several of the Courts of Civil Appeals have applied the act in cases in which its constitutionality was questioned, usually upon the ground stated above. While holding different views as to the proper interpretation of the act, none have expressed any doubt as to its constitutionality. *Commonwealth Insurance Co. v. Finegold* (Civ. App.) 183 S. W. 833; *Camden Fire Insurance Co. v. McPherson* (Civ. App.) 185 S. W. 1055; *Westchester Fire Insurance Co. v. McMinn* (Civ. App.) 188 S. W. 25; *M. & M. Ins. Exchange v. So. Trading Co.* (Civ. App.) 205 S. W. 352; *Allemania Fire Insurance Co. v. Angler* (Civ. App.) 214 S. W. 450; *Ætna Insurance Co. v. Lewis* (Civ. App.) 204 S. W. 1170; *Ætna Ins. Co. v. Waco Co.* (Civ. App.) 189 S. W. 315; *Westchester Fire Insurance Co. v. Roan* (Civ. App.) 215 S. W. 985.

[5] The purpose of the act is not to prevent fire insurance companies from incorporating in their policy contracts provisions of any character or class, but to prevent such companies from avoiding liability under immaterial provisions. Only such provisions, it is clear from the language of the title, are embraced within its terms. It is thus apparent that the scope of the act is not unrestricted, and that not all policy provisions are intended to be brought within its purview. It is apparent also from section 3, containing the emergency clause, that the Legislature intended to bring within the terms of the act only that class of fire policy provisions the breach of which could in no way affect the merits of claims for losses under them. It should not be assumed, we think, in view of the limitation of the scope of the act expressed in the title, and the implication of its restricted application as pointed out in section 3, that the Legislature intended the act to embrace all stipulations of the policy, or that it intended that a test, in no way related to the legitimate purposes of a limited class of stipulations, should be applied after the fire, as a measure of the materiality of all the stipulations. To so construe the act is to have it say in effect that no breach of a stipulation of a certain class shall render the policy void, unless such breach contributed to do that which it could not do.

The difficulty in construing the statute invoked in this case, in view of the limitations pointed out, is in determining what provisions of fire policies are within its terms. The class to which it is applicable is not defined except upon the basis of materiality, which is to be determined in each individual case after the loss has occurred, by the test of whether the breach of the provision interposed as a defense contributed to bring about the destruction of the insured property. The logical inquiry is therefore whether there is a class of provisions to which the test referred to is peculiarly applicable in determining their materiality, and whether there is a class to which such a test is wholly inapplicable.

The policy sued on contains a clause which is termed a "gunpowder and kerosene permit." Under its terms, the amount of powder or kerosene allowed to be kept on the premises is limited, and the number of feet from an artificial light at which it is permitted to be handled is specified. The permit provides that failure to comply with its conditions shall render the policy void. The limitations were inserted to decrease the likelihood of fire, and failure to observe them would have increased the probability of its occurrence, and might have contributed directly to bring it about.

In the *Finegold* Case, supra, the court found as a fact that the keeping of gasoline on the insured premises was a breach of the insurance contract by the insured, but further found that such breach did not contribute to bring about the destruction of the property insured. The Court of Civil Appeals applied the act under consideration, being of the view that the stipulation as to keeping gasoline was immaterial, in that its breach did not contribute to bring about the loss, and that the act had for its object the denial of such defense to the company as a means of escaping liability.

Many policy provisions of the class referred to are used in the standard policy forms prescribed by the state fire insurance commission; such as, provisions restricting the use of gasoline stoves, acetylene gas, limiting the amount of calcium carbide, benzine, etc., that are permitted to be stored on and in the vicinity of the insured property, and other provisions the evident purpose of which is fire prevention. To this class of warranties, conditions, and provisions the test prescribed by the act is peculiarly applicable in determining whether they are immaterial within its meaning, therefore within its purview.

[6] The policy sued on contains the standard form of proof of loss clause. It has no such relation to the causes of the loss of goods by fire as that its breach could bring about such loss. Fire prevention is not its purpose. It is evident from its stipulations that its materiality cannot be measured by

whether, if breached, it could have contributed to destroy the property. The Court of Civil Appeals in this case held the act not applicable to proof of loss clauses because they cannot be reached until after the fire. We concur in the conclusion reached, but think the primal reason upon which it rests is that a breach of the clause could not contribute to bring about the loss. Its materiality is not dependent upon the time of breach.

Again applying the test as a basis of classification for determining the policy provisions within the purview of the act, it excludes the three-fourths value clause, the coinsurance clause, the incumbency clause, or any other clauses of fire policies, the breach of which could not bring about a loss by fire.

It is apparent from the respective functions of the policy stipulations pointed out that there is a class of fire policy provisions to which the test referred to is wholly inapplicable, as well as a class to which it is peculiarly applicable.

The "iron-safe clause" of the policy sued on is the provision with which we are immediately concerned. It has no direct relation to fire prevention. Its purpose in policies covering stocks of merchandise is to furnish the insurer the most reliable sources of ascertaining the amount and value of the goods destroyed, and the extent of its liability; to provide business methods whereby the rights of the parties may be determined and adjusted; and also to afford the insurer protection against misrepresentation and fraud. *Joyce on Insurance* (2d Ed.) vol. 3, § 2063a; *Teutonia Insurance Co. v. Tobias* (Civ. App.) 145 S. W. 251.

In this case, plaintiff in error issued and delivered its policy, covering defendant in error's stock of millinery, for a premium, the amount of which was based, among other things, upon her agreement to make an inventory, keep books, preserve them in a fire-proof safe, or some other place secure from fire, and produce them for inspection in the event of loss. The stock was valued at \$3,000 when insured. When destroyed by fire, it had been considerably reduced. The books were neither kept nor preserved. The breach of the stipulation had the effect of depriving plaintiff in error of the sources for ascertaining the amount and value of the goods destroyed, and bears directly upon the merits of the case.

[7] The state fire insurance commission, whose duty it is under the Fire Commission Act, later referred to, to prescribe all standard forms, clauses, etc., used in connection with insurance policies, requires that the "iron-safe clause" be inserted in all policies covering stocks of merchandise. Its use in such policies tends to stabilize the fire insurance business, and to promote honesty and fair dealing. Our courts recognize it

as a reasonable and material provision of such policies, and hold that it must be substantially complied with by the assured. *Assurance Co. v. Kemendo*, 94 Tex. 371, 60 S. W. 661; *Insurance Co. v. Willock* (Civ. App.) 29 S. W. 219; *Insurance Co. v. Center* (Civ. App.) 33 S. W. 555; *Couch v. Insurance Co.*, 32 Tex. Civ. App. 44, 73 S. W. 1077. The act was framed in view of settled judicial construction, and the Legislature, we think, did not intend by its enactment to provide for determining the materiality of the "iron-safe clause" after the fire, the test of whether its breach brought the fire about, a criterion wholly unrelated to its function, or the function of any provision, other than those concerned with fire prevention.

The Court of Civil Appeals, in construing the act in its relation to the "iron-safe clause" in the case of *Westchester Fire Insurance Co. v. McMinn*, supra, held that its purpose could not properly be said to limit the right of the contract respecting stipulations not bearing upon the peril of fire itself, and that it goes no further than to place a limitation upon the effect of such stipulations, saying that the evident aim of the law was to so far modify the rule respecting stipulations of fire hazards as not to make a forfeiture of the policy depend, as before the passage of the act, upon merely the question of compliance or noncompliance with the particular stipulation; but, instead, to make the effect of such breach dependent on its materiality to the question of actually contributing to bring about the loss.

In the case of *Commonwealth Insurance Co. v. Finegold*, supra, the court passed directly upon the question of whether the "iron-safe clause" is embraced within the terms of the act under consideration. Judge McMeans, speaking for the court, said:

"But quite a different question is presented * * * as to the iron-safe clause. The statute, we think, has reference to only those warranties and provisions in policies, the breach of which might have contributed to bring about the loss, but which in fact did not, and was passed, we think, with the sole purpose of preventing insurance companies from escaping liability for the violation of a provision of the policy where the breach could have, but in fact did not, contribute to bring about the destruction of the insured property. In regard to other warranties or conditions in the policy, the violation of which could not have contributed to bring about the loss, such, for instance, as the iron-safe clause, the statute does not apply."

[8] The foregoing excerpt is, in our opinion, a correct and succinct statement of the scope and effect of the act. The holding there expressed has been followed substantially by the Amarillo court in this case, and by the Texarkana court in *Westchester Fire Insurance Co. v. McMinn*, supra. The cases

of *Ætna Insurance Co. v. Waco Co.* (Civ. App.) 189 S. W. 315, *Ætna Insurance Co. v. Lewis* (Civ. App.) 204 S. W. 1170, *Allemania Fire Insurance Co. v. Angler*, supra, *Westchester Fire Insurance Co. v. Roan*, all by the Austin court, *Camden Fire Insurance Co. v. Bond* (Civ. App.) 202 S. W. 220, Dallas court, and *Insurance Co. v. Nelms* (Civ. App.) 184 S. W. 1094, M. & M. Ins. Exchange v. So. Trading Co., supra, Ft. Worth court, are cited in support of defendant in error's contention that the act applies to all promissory warranties, conditions, and agreements, regardless of whether their breach could contribute to the destruction of insured property.

In the case last cited, the court, being of the view, notwithstanding the limitation placed upon the scope of the act by the language of the title, and the implied restriction in section 3 pointed out, that it applies to all promissory fire policy warranties, conditions, and provisions, of whatever class, relied to some extent in ascertaining the legislative intent upon an exhaustive research of the judicial decisions relating to insurance contracts, antedating the passage of the Insurance Act of 1903 (General Laws 1903, p. 94).

The body of the 1903 act, as of the act under consideration, construed apart from its connection with the title, was susceptible of an all-inclusive interpretation as to the warranties, etc., within its purview, but, in view of the language of the title, was construed, in accordance with the legislative intent, as not embracing promissory warranties, or agreements to perform acts in the future, such as are contained in the "iron-safe clause." We think the evils remedied by its passage afford no index to the legislative intent in the passage of this act.

The act of 1903 is not unimportant, however, as an aid in the construction of the statute invoked in this case, marking as it does the beginning of the legislative policy of restricting the effect of certain policy stipulations. After its enactment and construction, the breach of material promissory provisions of fire policies, regardless of whether contributing to bring about fire losses, continued to constitute a valid defense to recovery under such policies. Speaking generally, the act did not affect the validity or materiality of the two general classes of promissory warranties of fire policies, above pointed out, to wit: (a) Those the breach of which could bring about a loss of fire; and (b) those the breach of which could not.

Ten years later, 1913, the Thirty-Third Legislature at its regular session passed two acts relating to fire policy contracts, to wit, the act invoked in this case, passed March 29, 1913, and the Fire Insurance Commission Act, passed two days later. General

Laws 1913, p. 195 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 4876-4904). The effect of the former, as stated above, was to render invalid all defenses to suits on fire policies covering personal property, based on any of their provisions the breach of which could bring about the loss, unless such breach actually contributed to bring it about. Policy provisions, the breach of which could not in any event bring about the loss, were unaffected by the act.

That the Legislature intended not to include such stipulations within the act is apparent from those provisions of the Fire Insurance Commission Act, which expressly prohibit the use of two fire policy stipulations of the class not affected by the former act. Section 18 of the Fire Commission Act (section 4892) declares void any fire policy provision stipulating that the existing incumbrances on the property insured, or any subsequent incumbrance, shall render the policy void. Section 19 (section 4893) prohibits the issuance of a policy containing any provision requiring the insured to maintain a larger amount of insurance than that expressed in the policy, or making the insured liable as coinsurer (except in policies covering grain, cotton, and other products). Both sections 18 and 19 prohibit the use of policy provisions, the breach of which could not in any event bring about the destruction of the property. If provisions of this class were within the purview of the former act, and in effect nullified by its terms, then the enactment of sections 18 and 19 as a part of the latter was useless, or, to say the least, a work of supererogation not to be attributed to the Legislature. The two acts, being passed at the same legislative session, should be construed each in the light of the other. *H. & T. C. Ry. Co. v. State*, 95 Tex. 507, 68 S. W. 777. So construed, and viewed in the light of the intrinsic aids to construction herein applied, it seems conclusive that no promissory warranties, conditions, or provisions of a fire policy, the breach of which could in no event contribute to bring about the loss of the property insured, are within the purview of the act invoked. The "iron-safe clause" is not an immaterial provision of the policy sued on, and its breach, in our opinion, constitutes a valid defense to a claim for loss under it; and defendant in error, having failed to comply with its provisions, is not entitled to recover more than the premium paid.

The case has been considered by the Commission as a whole in connection with *Ætna Insurance Co. v. Waco Co.* (Civ. App.) 139 S. W. 315, referred to Section B. The writ was granted in that case, as stated in the notation made by the Committee of Judges, for the reason that a writ had been granted in this case involving the construction of the same statute. The view herein expressed as

to the scope and effect of the statute referred to, and its proper construction, is that of both sections of the commission, and is unanimous.

We recommend that the judgments of the district court and the Court of Civil Appeals be affirmed.

PHILLIPS, C. J. We approve the judgment recommended in this case.

PROVIDENCE-WASHINGTON INS. CO. v. LEVY & ROSEN. (No. 140-3062.)

(Commission of Appeals of Texas, Section A. May 26, 1920.)

Insurance — 336(1)—Provision of fire policy against other insurance not within Anti-Technicality Act.

The provision of a fire policy that it should be void if insured made or procured any other insurance, whether valid or not, on property covered by the policy was not within the Anti-Technicality Act (Gen. Laws 1913, c. 105, § 1 [Vernon's Sayles' Ann. Civ. St. 1914, art. 4874a]), and it was incumbent upon insured to comply with its terms, being material.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by Levy & Rosen against the Providence-Washington Insurance Company. To review judgment for plaintiff, defendant brought error in the Court of Civil Appeals, which affirmed (189 S. W. 1035), and defendant brings error. Judgments of the trial court and Court of Civil Appeals reversed, and cause remanded for new trial on recommendation of the commissioner of appeals.

Thompson, Knight, Baker & Harris, of Dallas, for plaintiff in error.

W. L. Eason, of Waco, for defendant in error.

TAYLOR, J. This is a companion case to *Etna Insurance Co. v. Waco Co.*, 189 S. W. 315. The writ was granted in that case, as in this, for the reason that a writ of error had been granted theretofore in the case of *McPherson v. Camden Fire Insurance Co.*, 185 S. W. 1055, involving the construction of the Anti-Technicality Act (Gen. Laws 1913, p. 194), section 1 of which is brought forward as article 4874A of Vernon's Sayles' Civil Statutes 1914.

In view of the decision in the *McPherson* Case, a statement of the facts of this case is unnecessary further than to point out the provision of the policy, the breach of which was relied upon as a defense by the insurance company, the pleadings, and the disposition made of the case.

The policy sued on contains the following provision:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

The defendant company pleaded a breach of the foregoing stipulation; also that it was not within the purview of the act referred to. The district court, being of the view that the stipulation was within the act, instructed the jury to return a verdict for plaintiffs, Levy & Rosen. The Court of Civil Appeals, controlled by its decision in the *Waco Company* Case, *supra*, affirmed the judgment. 189 S. W. 1035.

This section of the Commission (Section A) in its recent examination and report in the *McPherson* Case, *supra*, reached the conclusion jointly with Section B, that the iron-safe clause of the policy sued on in that case was not within the purview of the act invoked; it being held not applicable to those stipulations, the breach of which could not in any event contribute to bring about the destruction of the insured property.

The provision of the policy above quoted is not of the class embraced within the act invoked, and is therefore, in our opinion, not within its purview. It is a material provision, and it was incumbent upon defendants in error to comply with its terms. *Insurance Co. v. Griffin*, 66 Tex. 232, 18 S. W. 505; *Insurance Co. v. Blum*, 76 Tex. 653, 13 S. W. 572; *Insurance Co. v. Prather*, 25 Tex. Civ. App. 446, 62 S. W. 89; *Keller v. L. L. & G.*, 27 Tex. Civ. App. 102, 65 S. W. 695; *Insurance Co. v. Post*, 25 Tex. Civ. App. 428, 62 S. W. 140. The court erred in giving the peremptory instruction.

Levy & Rosen by supplemental petition alleged that the company consented that the amount represented by all of the outstanding policies be carried, and that the company, subsequent to the fire, knowing the full amount of insurance carried by them, and with knowledge of all the facts, recognized the validity of the policy sued on. The company denied the allegations.

In view of the error pointed out and the issue raised by the supplemental pleadings, we recommend that the judgments of the district court and Court of Civil Appeals be reversed, and that the cause be remanded for further trial.

PHILLIPS, C. J. We approve the judgment recommended in this case, and the holding of the Commission on the question discussed.

ÆTNA INS. CO. v. WACO CO.
(No. 140-3061.)(Commission of Appeals of Texas, Section B.
May 26, 1920.)

1. Insurance ⇨308—Statute, making breach of immaterial provision of fire policy no defense, held inapplicable to provisions material to the risk.

Acts 33d, Leg. (1913) c. 105 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 4874a, 4874b), providing that a breach of an immaterial provision of fire policy shall not invalidate policy or constitute a defense to a suit for loss thereon unless it contributed to bring about the destruction of the property, held not applicable to a breach of those provisions which are material to the risk, but a violation of which could not, from their very nature, contribute to bring about the destruction of the property.

2. Insurance ⇨336(6)—Additional insurance in excess of that allowed held a good defense.

The taking out of additional insurance in excess of that allowed under a concurrent insurance clause, in violation of provision of fire policy making policy void if insured procured other insurance on the property covered by the policy, held a good defense in action on the policy, notwithstanding Acts 33d Leg. (1913) c. 105 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 4874a, 4874b), making breach of an immaterial provision of policy not contributing to bring about the destruction of the property no defense in action on policy, such statute having no application to breach of such provision of policy; it being material to the risk.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by Levy & Rosen against the Ætna Insurance Company, in which the Waco Company intervened. Judgment for intervener was affirmed by Court of Civil Appeals (189 S. W. 315), and defendant brings error. Reversed and remanded.

Thompson, Knight, Baker & Harris, of Dallas, for plaintiff in error.

W. L. Eason, of Waco, for defendant in error.

MCLENDON, J. This case is ruled by the decisions in McPherson v. Camden Fire Insurance Co., 222 S. W. 211, and Providence Washington Insurance Co. v. Levy & Rosen, 222 S. W. 216, decided by Section A of the Commission of Appeals. The questions involved are the constitutionality of chapter 105 of the Thirty-Third Legislature (Vernon's Sayles' Ann. Civ. St. 1914, arts. 4874a, 4874b), and the applicability of said act to the defense relied on to defeat the insurance policy sued on, namely, that the insured had taken out additional insurance in excess of that allowed under a concurrent insurance clause, in violation of a provision of the policy reading as follows:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure, any other contract of insurance, whether valid or not, on the property covered, in whole or in part, by this policy."

The Court of Civil Appeals, Third District, held the act constitutional, and construed it as rendering void the provision quoted. 189 S. W. 315.

[1] In the opinion in the Camden Fire Insurance Company Case above, the act in question is held to be constitutional, and is construed as having no application to a breach of those provisions of a policy which are material to the risk, but a violation of which could not, from their very nature, contribute to bring about the destruction of the property. The opinion in that case represents the mature judgment of all the judges of both sections of the Commission.

[2] The defense relied upon in this case is identical with that relied upon in the Levy & Rosen Case above. The clause of the policy relied upon is material to the risk, and it is not of a class embraced within the act invoked. The questions arise in this case upon the exclusion by the trial court of testimony offered to substantiate the defense.

We conclude that the judgments of the Court of Civil Appeals and district court should be reversed, and the cause remanded to the latter court for a new trial.

PHILLIPS, C. J. We approve the judgment recommended in this case, and the holding of the Commission on the question discussed.

PECOS & N. T. RY. CO. v. MALONE et al.
(No. 128-3016.)(Commission of Appeals of Texas, Section A.
June 2, 1920.)

1. Eminent domain ⇨172—District court has no jurisdiction to enter judgment of condemnation except in cases stated.

The district court has no jurisdiction to enter a judgment of condemnation, except in cases falling within the terms of Rev. St. art. 6531, providing that, in suit against a railroad for property occupied for railroad purposes or for damages thereto, the court may determine all matters in dispute, including the condemnation of the property, upon petition or cross-bill asking such remedy by defendant.

2. Eminent domain ⇨167(1)—Gas, electric current, and power companies cannot litigate question of condemnation in suits against them by landowners.

Vernon's Sayles' Ann. Civ. St. 1914, arts. 1283a-1283f, as to the incorporation of gas, electric current and power companies, in providing, by article 1283, for condemnation by

such company in the same manner and method as is provided by law in the case of railroads, pipe lines, and telegraph and telephone lines, does not extend to gas, electric current and power companies the benefits of article 6531, allowing a railroad, in a suit against it by the owner of land, to litigate the question of condemnation, in view of Rev. St. arts. 1232, 1306; article 6531 being a special provision, and therefore not included by the adoption by article 1283d of general provisions as to condemnation by railroads, etc.

Error to Court of Civil Appeals, of Seventh Supreme Judicial District.

Action by the Pecos & Northern Texas Railway Company against C. A. Malone and another. From the judgment plaintiff appealed, and to review its affirmance by the Court of Civil Appeals (190 S. W. 809) brings error. On recommendation of the Commission of Appeals, judgment of the district court and Court of Civil Appeals reversed and remanded, with instruction.

Terry, Cavin & Mills, of Galveston, and Madden, Trulove, Ryburn & Pipkin, of Amarillo, for appellant.

H. C. Randolph and P. B. Randolph, both of Plainview, for appellees.

SPENCER, J. On May 6, 1912, plaintiff, the Pecos & Northern Texas Railway Company, filed suit in the ordinary form of trespass to try title, seeking to recover of the Malone Light & Ice Company, a corporation, and C. A. Malone, the land described in plaintiff's petition. The Malone Light & Ice Company in erecting an ice and power plant extended, by mistake, the east side of the building, which was 74 feet in length, onto plaintiff's right of way. The extension was 6.4 feet at the south end and 8 feet at the north end. The right of way runs north and south. The building was commenced in 1909 and completed in 1910. Plaintiff, by an amendment filed February 7, 1916, in the form of an action to try title, sought to recover the strip of land upon which the building, by mistake, had been rested.

The Texas Utility Company, a corporation, under and by virtue of chapter 21A, title 25, of Vernon's Sayles' Ann. Civ. St. 1914, organized for the purpose of generating and selling electric current and power, purchased the physical properties, franchises, and easements of the Malone Light & Ice Company, and assumed all the duties and obligations, among which was the duty and obligation to operate and maintain an electric light and power plant in the city of Plainview, Tex. It filed its plea of intervention on the 10th day of May, 1916, admitting the title of the land to be in plaintiff, and sought in its plea to condemn not only the land upon which the building rested, but also an additional strip of 9 feet, alleging that this additional strip was comprehended within the

description of the land sued for by plaintiff, and that it was necessary for the protection of the wall and building, and for a passage along beside the building.

The case was tried before the court, without the aid of a jury, and judgment rendered decreeing the land described in plaintiff's amended petition to be the property of the plaintiff, and condemning the land, including the 9-foot strip, to the use and benefit of the intervenor. Upon appeal to the Court of Civil Appeals the judgment of the district court was affirmed. 190 S. W. 809. The writ was granted upon application referred to the Committee of Judges.

[1, 2] It is clear, since the decision in the case of Wharf Co. v. Railway Co., 72 Tex. 454, 10 S. W. 537, that the district court has no jurisdiction to enter a judgment of condemnation, except in those cases falling within the terms of article 6531 of the Revised Civil Statutes of 1911, which reads:

"When any railroad company is sued for any property occupied by it for railroad purposes, or for damages thereto, the court in which such suit is pending may determine all matters in dispute between the parties, including the condemnation of the property, upon petition or cross-bill asking such remedy by defendant, but the plea for condemnation shall be an admission of the plaintiff's title to such property."

Intervenor's right of condemnation is secured to it by virtue of article 1283d of Vernon's Sayles' Ann. Civ. St. 1914, which article provides:

"That the manner and method of such condemnation shall be the same as is provided by law in the case of railroads, pipe lines, and telephone and telegraph lines."

The question then arises: Was it the intention of the Legislature in granting the right of eminent domain to corporations chartered under and by virtue of chapter 21A, title 25, of Vernon's Sayles' Civil Statutes, to extend to them the benefits of article 6531?

The general law outlining the manner and method of condemnation by railroad companies was incorporated in the Revised Civil Statutes of 1879, title 74, chapter 8, articles 4178 to 4208, inclusive. The directions therein contained for obtaining right of way and condemning lands for the corporation's use are full, explicit, and complete.

Article 6531 was passed by the Legislature March 19, 1889, as an added section or amendment to article 4205 of the Revised Civil Statutes of 1879. The law of 1879, with this amendment, was carried into the revision of 1895 as articles 4443 to 4475, inclusive. Article 1232 of the Revised Civil Statutes of 1911, which is article 5085 of Paschall's Digest, carried forward in the revision of the Code, gives telephone and telegraph companies the right of condemnation, directing

that they "may proceed to obtain the right of way and condemn lands for the use of the corporation in the manner provided by law in the case of railway corporations." Article 1306 of the Revised Civil Statutes of 1911, enacted in 1899, gives the right of condemnation to pipe lines in this language: "The manner and method of such condemnation shall be the same as is provided by law in the case of railroads."

It is clear from a reading of these several statutes, giving the various corporations organized under them the right of eminent domain, that it was the legislative intent to provide a direct method of obtaining the requisite lands and right of way to transact the business of the corporation, and one in which the initial steps to condemn were to be taken by the corporation; and not that condemnation should proceed by the indirect method of unauthorized entry, by the corporation, upon the land of the citizen, thus encouraging the institution of a suit by the owner in order to lay a predicate for condemnation by the corporation. It will be observed that in each of the adopting statutes, the adopted statute is referred to in words describing its general character. Article 6531 is a special provision of the statute, as contradistinguished from its general provisions, and in our opinion the authority therein given is to be confined exclusively to railroad corporations. There being an absence of a clear intention on the part of the Legislature to adopt the whole act, including the special provision, only those parts of it which are of a general nature will be incorporated. 36 Cyc. 1152 (v).

We recommend, therefore, that the judgments of the Court of Civil Appeals and of the district court be reversed, and the cause remanded to the district court, with instruction to dismiss, for want of jurisdiction, that part of the intervenor's plea seeking condemnation.

PHILLIPS, C. J. We approve the judgment recommended in this case.

MURRAY v. HOUSTON CAR WHEEL & MACHINE CO. (No. 109-2954.)

(Commission of Appeals of Texas, Section B.
June 9, 1920.)

Master and servant §278(20)—Evidence held to show breach of duty to warn.

In an action by a foundry employé, injured while standing on a ladder shaken by a crane, so that he caught the rail on which the crane traveled with his hand, to save himself from falling, evidence held to warrant a finding that plaintiff's injury was due to the breach by defendant

employer of its nondelegable duty to give warning of the crane's approach.

Error to Court of Civil Appeals of Eighth Supreme Judicial District.

Action by W. W. Murray against the Houston Car Wheel & Machine Company. From a judgment for plaintiff, defendant appealed to the Court of Civil Appeals, which reversed and remanded (181 S. W. 241), and plaintiff brings error. Judgment of the Court of Civil Appeals reversed and remanded, on recommendation of the Commission of Appeals.

Presley K. Ewing, of Houston, and L. E. Blankenbecker, of New York City, for plaintiff in error.

Andrews, Streetman, Burns & Lague, of Houston, for defendant in error.

SADLER, P. J. We will refer to the parties as they were designated in the trial court. The plaintiff recovered judgment in the district court against the Houston Car Wheel & Machine Company, from which an appeal was perfected by defendant.

The Court of Civil Appeals first affirmed the judgment, holding that the evidence amply sustained the findings of the jury as to the violation of a nondelegable duty of the defendant in failure to warn plaintiff of the danger resulting in the injury. On rehearing, Judge Walthall dissenting, it set aside its former judgment, holding that Brown was not a vice principal as to plaintiff, and that the duty to warn did not rest upon defendant as nondelegable. 181 S. W. 241.

A careful reading of the opinions upon which the judgment is based manifests that the Court of Civil Appeals finds that the evidence on the issue of Brown's vice principalship is sufficient to support the finding of the jury as to those servants employed in his department. We construe the opinion on rehearing to be that on the facts disclosed Brown was not a vice principal as to Murray solely because his power to employ and discharge him was lacking.

A very careful review of the authorities touching the question of vice principal has satisfied us that the Court of Civil Appeals has failed to give the full legal effect to the evidence, and has been too restrictive in an application of the law to the facts. We will premit a discussion of this question, as we think that the more important question arises on the breach of a nondelegable duty to warn the injured party of the act of defendant which rendered unsafe the place assigned for his work.

On the question of the nondelegable duty of the defendant to furnish the plaintiff a safe place to work, and whether that duty incorporated within it the further duty of the master to warn the servant before doing any

act which rendered his position dangerous, we think the evidence presents the issue of a breach of that duty. It is true that Murray was using tools of the master which he selected, and was pursuing his own judgment in the manner of the performance of the work. However, the master had assigned the place where the work should be done. In the performance of that assignment it was incumbent upon Murray to be at the place and in the position occupied at the time of the injury. The master knew, or could have known, that the work was being done at this place and in the manner pursued. Murray was instructed to do this work at this place. The master knew, or could have known by the exercise of proper care, that, when the crane was in operation in the usual course of the business of the foundry, it would render unsafe the place at which Murray was working under the circumstances surrounding his position and the character of work being done.

The place and the manner of doing the work threatened no danger to Murray, so long as the crane was motionless. The place and position of Murray were rendered perilous only when the master, in the performance of the ordinary business of his foundry, used the crane in the performance of that business in its usual way. When the crane was moved, it caused the station where Murray was working to jar and shake to such an extent as to render insecure the ladder upon which he was standing and to make his position perilous. The master had knowledge of this fact, or could have known it. Murray did not know it. He had worked on the north side of the building in safety. He did not know of the effect produced upon the south side by the operation of the crane; nor did he know that the crane was to be moved while he was in the place assigned him to work.

Conceding that the building was safe for the ordinary purposes for which intended, and for the use to which it was being put, this will not relieve or excuse the master from the performance of a duty which he owed to an employé whom he placed at work under the circumstances surrounding Murray. The place where Murray was working was safe, so long as the crane was not in operation. This will not excuse the master for changing that condition of safety into one of peril, without exercising care for the servant. The place being safe when Murray began his work, he had the right to rest in confidence that it would so remain, or that, should the master desire to do some act rendering it un-

safe to him, he would be given an opportunity to take steps for his protection.

As we understand the doctrine of safe place, the master cannot change its character of safety to the peril of the unsuspecting servant, without presenting him with an opportunity to avoid the consequences which might result from the changed conditions. 51 L. R. A. 593, note at bottom first column; Jacques v. Mfg. Co., 66 N. H. 482, 22 Atl. 552, 13 L. R. A. 824. The duty devolved upon the company to protect Murray from transitory dangers which were brought into existence by the master in the usual course of operation of the plant, or at least to warn him of such danger in time to permit him to provide against it or escape its effect. *Railway Co. v. Garrett*, 73 Tex. 262, 13 S. W. 62, 15 Am. St. Rep. 781; *Railway Co. v. Watts*, 63 Tex. 549; *Id.*, 64 Tex. 568; *Railway Co. v. Hall*, 78 Tex. 657, 15 S. W. 108; 16 R. C. L. p. 568, § 78.

We are of the opinion that under the facts of this case the evidence raised the issue of the duty of the master to exercise reasonable care to keep the place where Murray was working safe; also the duty to warn him of the contemplated movement of the crane, that he might have an opportunity of taking steps to avoid the consequences of the danger arising therefrom; that these duties are non-delegable; that they were incumbent upon the master. *Houston Light & Power Co. v. Conley* (Civ. App.) 171 S. W. 561.

On rehearing, the Court of Civil Appeals did not pass upon the sufficiency of the evidence, or hold that the judgment of the trial court is against the weight of the evidence, but erroneously applied the law to the facts.

We therefore recommend that the judgment of the Court of Civil Appeals be reversed, and the cause remanded to that court for further proceeding in accordance with this opinion. *Tweed v. W. U. T. Co.*, 107 Tex. 247, 168 S. W. 696, 177 S. W. 957.

PHILLIPS, C. J. We agree with the conclusion of the Commission of Appeals that there was evidence warranting the finding of the jury that the plaintiff's injury was due to the breach by the defendant of a non-delegable duty, and rest the decision upon that ground.

This holding makes immaterial the question as to whether the foreman was a vice principal, and we express no opinion upon that question.

The judgment of the Court of Civil Appeals is reversed and the case remanded to that court.

**HARRELL et ux. v. ST. LOUIS & S. W. RY.
CO. OF TEXAS. (No. 147-3093.)**(Commission of Appeals of Texas, Section B.
June 9, 1920.)**1. Railroads ⇨350(13) — Evidence held to
raise an issue of contributory negligence of
automobile driver.**

In an action by husband and wife for injuries to the wife and her automobile in a crossing collision, evidence held sufficient to support finding either for plaintiffs or for defendant railroad on the issue of contributory negligence of the wife in failing to discover the railroad's approaching motorcar in time to have stopped her automobile.

**2. Railroads ⇨351(12) — Requested special
charge on contributory negligence held cor-
rect.**

In an action by husband and wife for injuries to the wife and her automobile in a crossing collision, requested special issue whether a reasonably prudent person in the exercise of ordinary care under the same circumstances would have driven across the track as did plaintiff wife held to have correctly presented the issue of contributory negligence.

**3. Trial ⇨352(1) — Special issue in action
for crossing collision misleading as assuming
fact.**

In an action by husband and wife for injuries to wife and her automobile in a crossing collision, special issue whether plaintiff wife by the exercise of ordinary care would have seen the approaching train in time to have stopped before collision had she been keeping a lookout held erroneous as misleading and confusing, and as assuming that the wife was not keeping a lookout.

**4. Judgment ⇨256(2)—Findings held not to
warrant judgment for plaintiffs in view of an-
swers to issues.**

In action by husband and wife against a railroad for injuries to the wife and her automobile in a crossing collision, error in instructing the jury as a matter of law that it was the duty of plaintiff wife to keep a lookout held not to warrant trial court in rendering judgment for plaintiffs in face of answer of jury that plaintiff wife would have seen the approaching train in time had she kept a lookout, and that her failure to keep a lookout caused or contributed to the accident.

**Error to Court of Civil Appeals of Ninth
Supreme Judicial District.**

Action by C. H. Harrell and wife against the St. Louis & Southwestern Railway Company of Texas. From judgment for plaintiffs, defendant appealed to the Court of Civil Appeals, which reversed and rendered judgment for defendant (194 S. W. 971), and plaintiffs bring error. Judgment of the trial

court and Court of Civil Appeals reversed, and cause remanded for new trial on recommendation of the Commission of Appeals.

Woods, King & John, of Houston, and I. D. Fairchild, of Lufkin, for plaintiffs in error.

E. B. Perkins, of Dallas, Daniel Upthegrove, of St. Louis, Mo., Marsh & McIlwaine, of Tyler, and Denman & Thomas, of Lufkin, for defendant in error.

McCLENDON, J. C. H. Harrell and wife brought this suit against the St. Louis & Southwestern Railway Company of Texas to recover for personal injuries sustained by Mrs. Harrell, and for damages to an automobile belonging to her. The accident occurred at about 11 o'clock a. m., May 21, 1915, and was the result of a collision between the automobile, which was being driven by Mrs. Harrell in a northeasterly direction along Abney avenue, a public street in the city of Lufkin, and a motorcar traveling in a southeasterly direction on the main line of defendant railway. The cause was submitted to a jury upon special issues, and upon the jury's findings both sides moved for judgment and in the alternative for a new trial. Defendant's motions were overruled, and judgment was rendered for plaintiffs. The Court of Civil Appeals reversed the judgment of the trial court and rendered judgment for defendant, in the view that the findings of the jury supported defendant's plea of contributory negligence. 194 S. W. 971. Writ of error was granted by the Committee of Judges upon a notation that in their opinion the cause should have been remanded to the trial court for further trial, instead of rendered in favor of defendant.

The findings of the jury upon the question of primary negligence on the part of defendant were in favor of plaintiffs upon two grounds: (1) That the motorcar was traveling at a rate of speed in excess of six miles an hour, in violation of a city ordinance; and (2) that the operatives of defendant's motorcar failed to keep the proper lookout to discover Mrs. Harrell. The negligence in each of these respects was found to be the proximate cause of the damages sued for. The correctness of these findings is not assailed. The questions presented here relate only to the defense of contributory negligence. Upon that issue the court submitted and the jury answered three questions, as follows:

"Special Issue No. 11. Did Mrs. C. H. Harrell, plaintiff, see the approaching train in time to have stopped her automobile before the same collided with the train?" Answer: "No."

"Special Issue No. 13. Would the plaintiff,

Mrs. C. H. Harrell, by the exercise of ordinary care, have seen the approaching train in time to have stopped her automobile before the same collided with said train if she had been keeping a lookout for said train." Answer: "Yes."

"Special Issue No. 14. Did the failure of Mrs. C. H. Harrell to keep a lookout for said train cause or contribute to the injury, if any, to her automobile and to herself?" Answer: "Yes."

[1] We do not deem it necessary to make an extended statement of the facts in the case. The evidence was sufficient to support a finding either for the plaintiffs or the defendant upon the issue of contributory negligence on the part of Mrs. Harrell in failing to discover the motorcar in time to have stopped her automobile. At the street crossing in question, Abney avenue runs in a slightly northeasterly direction, and is intersected by eight tracks of defendant. Numbering these tracks from west to east, the accident occurred on track No. 7. Track No. 1 is about 200 feet to the west of track No. 7, which intersects Abney avenue at an angle of about 68 degrees 18 minutes. This angle of intersection would throw a motorcar approaching the crossing from the north slightly to the rear of one on Abney avenue approaching from the west. The automobile was a left-hand drive; consequently, Mrs. Harrell was on the north side of the auto and the approach side of the motorcar. She was accompanied by two of her lady friends, all of whom were on the front seat of the auto. She testified that just before reaching track No. 1 she looked north towards Tyler, as well as south towards Lutkin, and saw no car approaching. She again looked north just after crossing track No. 1, and saw no car. She did not look again until just before getting to the main line track, when she discovered the motorcar within a few feet of her. Her first impulse was to stop; but, realizing that she could not do so in time to avoid a collision, she made every effort to cross in front of the car, which struck the rear left wheel of the auto, turning it partially around, and causing the injuries and damage complained of. At the two points where Mrs. Harrell claims to have looked towards the north, there were some obstructions that would prevent a clear view of the main line track. How far she could have seen the motorcar from either of these points was a disputed question. Her testimony placed this distance at about 300 feet north of the crossing. The testimony placed the speed of the motorcar at as high as 24 miles an hour, while Mrs. Harrell's testimony was that she was not exceeding one-third of that rate. Mrs. Harrell was familiar with this crossing, and familiar with the fact that the motorcar was due to arrive at Lutkin at about the time she approached the crossing.

As above stated, the evidence raised the issue of contributory negligence on Mrs. Harrell's part, and would have warranted a finding thereon either for the plaintiffs or defendant.

Plaintiffs objected to the charges above quoted upon contributory negligence upon various grounds, which we need not set out in full. Among them, it is claimed that special issue No. 13 assumes that Mrs. Harrell was not keeping a lookout for the train, and further assumes that it was her duty under the law to keep such lookout. Plaintiffs requested, but the court refused to give, the following special issue:

"Would a reasonably prudent person, in the exercise of ordinary care, under the same or similar circumstances, have driven across the railroad track as did Mrs. Harrell?"

[2, 3] The action of the trial court in overruling plaintiffs' objections to special issue No. 13, and in refusing the special charge last quoted, were cross assigned as error in the Court of Civil Appeals. We think these grounds of error are well taken. The special charge requested correctly presents the issue of contributory negligence. Special issue No. 13 is, to say the least, misleading and confusing, and in our opinion susceptible of the construction placed thereon by plaintiffs. We are clearly of opinion that the Court of Civil Appeals committed error in rendering judgment for defendant.

It is earnestly insisted by plaintiffs that the action of the trial court in rendering judgment in their favor upon the verdict of the jury should be affirmed. This contention is based upon the proposition that the findings of the jury upon the special issues are not susceptible of the construction that there was an affirmative finding in favor of defendant upon the issue of contributory negligence, and that, as the defendant made no request for a correct instruction upon this issue, it was within the province of the trial court to make a finding thereon not inconsistent with the evidence; and that court having rendered judgment for the plaintiffs, its judgment in that regard should not be disturbed. We are not able to accede to this reasoning. Special issue No. 13, in our opinion, is not free from ambiguity. If we resolve this ambiguity in favor of plaintiffs, and read the issue in the light most favorable to defendant, it may be paraphrased as follows:

Gentlemen of the Jury: You are instructed that Mrs. Harrell did not keep a lookout for the train, and that it was her duty under the law to keep such lookout. Now, bearing in mind these instructions, you will answer this question: If she had been keeping a lookout for said train, would she by the exercise of ordinary care have seen it approaching in time to have stopped her automobile before the same collided with said train?

[4] We agree with the contention of plaintiffs that under the evidence in this case it was not the duty of Mrs. Harrell, as a matter of law, to keep a lookout, and that the instruction as paraphrased was erroneous. The evidence of Mrs. Harrell, as above shown, is that she looked twice in the direction of the train, and failed to see it. Under all the evidence, we think the jury would have been warranted in finding that she took such precautions as an ordinarily prudent person would have taken under the same or similar circumstances. We think the contrary conclusion is likewise one which the jury might reasonably have drawn from the evidence. It was therefore error for the court under these circumstances to charge the jury as a matter of law that it was the duty of Mrs. Harrell to keep a lookout; but this error of law would not warrant the trial court in rendering judgment for the plaintiffs in the face of the answer of the jury to that issue and special issue No. 14 to the effect that, if she had been keeping a lookout, she would, by the use of ordinary care, have seen the approaching train in time to have stopped her automobile before the collision, and that such failure caused or contributed to the injury. To so hold would deprive the defendant of any right to have the issue of contributory negligence submitted to the jury. Where the trial court has committed an error of law in peremptorily instructing the jury upon the duties and obligations of one of the parties, and has then submitted an issue based upon this erroneous instruction, it would not be correct practice to hold that the court would have the power, after this issue is answered favorably to one of the parties, to then disregard the verdict of the jury and render judgment for the other party, upon the theory that the finding of the jury based upon an erroneous instruction as to the law of the case was tantamount to a complete absence of finding upon the issue.

It is earnestly urged by plaintiffs that the action of the trial court in rendering judgment in their favor upon the verdict is supported by the cases of *Hovey v. Sanders* (Civ. App.) 174 S. W. 1025, and *Turner v. M. K. & T.* (Civ. App.) 177 S. W. 204. We do not deem it necessary to review those cases. Their careful perusal will fail to disclose any conflict between their holdings and the views we have herein expressed.

We conclude that the judgments of the trial court and Court of Civil Appeals should be reversed, and the cause remanded to the district court for a new trial.

PHILLIPS, C. J. We approve the judgment recommended in this case, and the holding of the Commission upon the question discussed.

WILSON v. J. W. CROWDUS DRUG CO.
et al. (No. 125-3003.)

(Commission of Appeals of Texas, Section B.
June 9, 1920.)

1. Principal and surety ⇐14—Where debt of another assumed, such other becomes surety as to the creditor.

Where an assumption has been accepted by the payee, the assumpor becomes the principal and the original debtor is surety as to the creditor, unless otherwise specially contracted by the parties.

2. Principal and surety ⇐97—Surety whether injured or not is discharged by unauthorized change of contract.

Whether injury results to the surety or not, the creditor has no right to make any contract with the principal changing the contract without the consent of the surety to the contract actually made.

3. Principal and surety ⇐14—For debtor to become surety, assumption of debt by another must be accepted by creditor.

For a debtor to obtain the advantage that may have accrued to him as surety by reason of the fact that the extension actually given by the creditor to the purchasers of the debtor's stock of goods assuming the debt was different from that consented to by the debtor, it was incumbent upon the debtor to establish an unconditional acceptance by the creditor of the assumption by the purchasers of the debt.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Action by the J. W. Crowdus Drug Company and others against Howard T. Wilson. Judgment for plaintiffs was affirmed by the Court of Civil Appeals (190 S. W. 194), and defendant brings error. Affirmed on the recommendation of the Commission of Appeals.

Ben H. Stone, of Amarillo, for plaintiff in error.

Reeder & Dooley, of Amarillo, for defendants in error.

SADLER, P. J. The material assignment in this case calls in question the correctness of the trial court's action in giving a peremptory instruction in favor of defendant in error against plaintiff in error, and the judgment of the Court of Civil Appeals affirming the judgment of the trial court on a verdict returned in response to the peremptory instruction.

To an understanding of the case, it is necessary to recur to the pleadings and evidence, for the purpose of ascertaining the issues made and the evidence affecting them.

Plaintiff's original petition was filed January 28, 1915. It was introduced in evidence on the trial by the plaintiff, to show that the cause of action declared upon in the original petition is declared upon in the amended pe-

tion. It is there alleged that, beginning with the 30th day of August, 1913, and to June 22, 1914, plaintiff in error, Howard T. Wilson, was engaged in the retail drug business at Sweetwater, Nolen county, Tex., and during said time purchased from plaintiff the J. W. Crowds Drug Company certain goods, wares, and merchandise, aggregating \$2,050; that Wilson sold his business to T. B. Holman and C. W. Carder, and at that time took a chattel mortgage on certain fixtures to secure the payment of this amount to the plaintiff; that plaintiff accepted the assumption by Holman and Carder of the amount due it on Wilson's account; but that it did not release Wilson from his original liability. It is alleged that, after the assumption of the account, it was renewed and extended, with the express consent of Wilson, by the acceptance of \$250 cash from Holman and Carder and 12 notes of Holman-Carder Drug Company, payable to plaintiff, all dated Amarillo, Tex., October 1, 1914, 11 for \$157.50 each, and the last note for \$157.33, all bearing 10 per cent. interest from date, providing for 10 per cent. attorney's fees, and containing conditional maturity clauses, the first note due on the 1st day of November, 1914, and one on the first of each following month; alleging the maturity of the first note and failure to pay same, and the exercise of the option by plaintiff of declaring all of said notes due. Judgment is prayed against Holman and Carder and Wilson.

After answer by the defendant Wilson pleading his release as surety by reason of the extension, and also alleging his discharge on account of the acceptance by the plaintiff of the cash and notes of Holman-Carder Drug Company in payment and novation of the original account, an amended petition was filed by plaintiff setting up practically the same facts as alleged in the original petition, pleading the insolvency of Holman and Carder, and seeking judgment against Howard T. Wilson alone for the sum of \$1,800, with interest as due upon the original account, and asking for a foreclosure of the mortgage against all of the defendants.

It developed on the trial that Howard T. Wilson sold his drug business to Holman and Carder on June 22, 1914; that as a part of the consideration for the sale the purchaser assumed the indebtedness due by Wilson to the Crowds Drug Company. Thereafter, some time in September, demand was made by the plaintiff on Holman and Carder for payment of the account. They requested an extension. On the 25th day of September, 1914, R. E. Bramlett, acting as agent for plaintiff—having in his hands the accounts for collection—wrote to Howard T. Wilson:

"I have after making thorough inquiries about Mr. Carder recommended that Holman and Carder be given additional time—the account to be settled by a cash payment of \$250 on October

1st and the balance to be paid in twelve equal monthly installments."

Ben H. Stone, acting for Wilson, replied to that letter by telegram of September 29, 1914, addressed to Crowds Drug Company:

"Replying to Bramlett's letter to Howard Wilson am authorized to wire you to give additional time on basis of \$250 cash balance in twelve equal monthly payments."

Thereafter the extension agreement was made and consummated. Holman-Carder Drug Company paid \$250 cash and executed the notes described in the pleading, which were by Bramlett delivered to the plaintiff and the account credited with the cash and notes. The notes were charged to Holman-Carder Drug Company. The \$250 cash and the notes were credited by the Crowds Drug Company upon the account of Howard T. Wilson.

After the evidence was in, the court instructed the jury peremptorily to return a verdict for the plaintiff against Wilson for \$1,772.39, and a like verdict for Wilson against Holman and Carder. The Court of Civil Appeals sustained this action of the court, and affirmed the judgment. 190 S. W. 194. Writ of error has been granted to the judgment of affirmance.

We have not undertaken to give any further statement of the pleading or evidence than as same may be necessary for the decision of the question before us. The real question is whether there were any issues presented by the pleading and raised by the evidence touching the liability of Wilson which should have been submitted to the jury for its decision.

[1] It is urged by the plaintiff in error, Wilson, that the pleadings and evidence showed his release by virtue of the renewal and extension transaction consummated between the Crowds Drug Company and Holman-Carder Drug Company, and that judgment should here be rendered discharging him; or, alternately, that the peremptory charge was error, and that he should have been permitted to go to the jury on the issues raised. It is well established that, where an assumption has been accepted by the payee, the assumpor becomes the principal and the original debtor is surety as to the creditor, unless otherwise specially contracted by the parties. *Hill v. Hueltdke*, 104 Tex. 594, 142 S. W. 871, 40 L. R. A. (N. S.) 672; *Hardware Co. v. Wells*, 90 Tex. 110, 37 S. W. 411, 59 Am. St. Rep. 783; *Benson v. Phipps*, 87 Tex. 578, 29 S. W. 1061, 47 Am. St. Rep. 128; *Dean & Co. v. Collins*, 15 N. D. 535, 108 N. W. 242, 9 L. R. A. (N. S.) 49, 125 Am. St. Rep. 610, 11 Ann. Cas. 1027; 21 R. C. L. 955, § 10.

[2] Whether injury results to the surety or not, the creditor has no right to make any contract with the principal changing the contract, without the consent of the surety to the

contract actually made. *Casey-Swasey Co. v. Anderson*, 37 Tex. Civ. App. 223, 83 S. W. 840.

[3] In passing upon the question of suretyship, the Court of Civil Appeals holds that, by the transaction between Wilson and Holman and Carder, the latter became the principals, and Wilson a surety between themselves, but that this did not necessarily render Wilson a surety as to appellee, so as to entitle him to the treatment and protection of a surety for the debt; that this will depend upon whether appellee consented to change the character of Wilson's liability from principal to surety.

In the view of the record as here disclosed, the Supreme Court has indicated that it is of the opinion that—

"In this case there was no change in Wilson's relationship to the debt through the drug company's acceptance of Holman's and Carder's assumption of it. The allegation in the original petition relied on as the evidence establishing that the assumption had the effect to make Wilson merely a surety, expressly states that the plaintiff accepted the assumption 'without in anywise releasing the said Howard Wilson, the original debtor, from his liability, which still continues.'"

In this view of the record, the acceptance pleaded being a conditional acceptance, it is treated as insufficient to establish the relationship of surety as between the Crowder Drug Company and Wilson; his primary liability continuing. In order to obtain the advantage which may have accrued to him as a surety, by reason of the extension actually given to Carder and Holman, being different from that consented to by Wilson, it was incumbent upon him to establish an unconditional acceptance of the assumption by the purchasers of the stock of goods of the debt which he owed to the Crowder Drug Company.

In this view the Court of Civil Appeals correctly disposed of the case, and its judgment should be affirmed.

PHILLIPS, C. J. We approve the judgment recommended in this case.

MOSS et al. v. RISHWORTH. (No. 132-3025.)

(Commission of Appeals of Texas, Section A.
June 2, 1920.)

1. Appeal and error ⇨1094(1)—Conclusion of Court of Civil Appeals on facts will not be disturbed.

Where the Court of Civil Appeals reversed and remanded a judgment on the theory that the verdict was unauthorized by the evidence, its conclusion on the facts will not be disturbed on writ of error.

2. Physicians and surgeons ⇨12—Before operating, physician must obtain consent of patient or one authorized to give consent.

Before performing an operation, a physician must obtain the consent of his patient if competent to give it, or, if not, of some one under the circumstances who would legally be authorized to give the requisite consent, though, of course, if a person be injured to the extent that he is unconscious and his injuries require prompt surgical attention, a physician may be justified in applying such treatment as is reasonably necessary for the preservation of life or limb, and consent will be implied.

3. Parent and child ⇨12—Sister having temporary custody of minor does not have authority to give consent to operation.

The sister of a minor who was intrusted with the child's temporary custody does not have authority to give consent to an operation, but only the father of the child may give consent.

4. Death ⇨15—Unauthorized surgical operation held actionable.

Where surgeons operated on a child without authority, so that it amounted to a technical assault for which the child could have recovered had she survived, the parent has a cause of action under Rev. St. 1911, § 4695, giving an action for death resulting from injuries where the injured person could have maintained an action if death had not ensued, and it is not dependent on the extent of the injury to the minor child.

5. Physicians and surgeons ⇨12—Operation performed without consent of minor's parent not justified because necessary.

Where surgeons, without obtaining the consent of a minor's parents, but with the consent of the sister of the child in whose custody she temporarily was, operated on the child for diseased tonsils, the failure to obtain the parents' consent cannot be justified on the ground that the operation was necessary, and that if the tonsils were not removed serious results might have followed; it not appearing that there was any emergency.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by William H. Rishworth against Robert E. Moss and another. Judgment for defendants was on plaintiffs' appeal reversed and remanded by the Court of Civil Appeals (191 S. W. 843), and defendants bring error. Judgment of Court of Civil Appeals affirmed.

See, also, 159 S. W. 122.

H. C. Carter, Champe G. Carter, Randolph L. Carter, and Perry J. Lewis, all of San Antonio, for plaintiffs in error.

Leo Tarleton and Ryan & Matlock, all of San Antonio, for defendant in error.

SPENCER, J. Defendant in error, William H. Rishworth, sued plaintiffs in error, Robert E. Moss and Lewis K. Beck, for performing an operation upon his eleven year

old child, Imogene, alleging that the operation, which resulted in the death of the child, was performed without his consent.

Imogene lived with her parents at Center Point, 60 miles distant from San Antonio. On May 8, 1910, the father placed her in the immediate care and custody of her adult sister, Clara, and permitted her to go with her to San Antonio. Clara, who had had three years' experience in training to become a graduate nurse, took Imogene to Dr. Moss, stating to him that she had brought her down to have her examined to ascertain whether an operation was needed for the removal of adenoids, explaining that the child had difficulty in breathing and was subject to attacks of rheumatism. An examination by Dr. Moss disclosed badly diseased tonsils and the appearance of adenoids, and he informed them that a real necessity existed for an operation to remove the diseased tonsils and adenoids.

Having agreed upon a date for the operation, Imogene returned with Clara and another sister, Nellie, who had had two years' training as a nurse. After an examination of the heart, an anesthetic was administered, and the tonsils and adenoids removed; but, before coming from under the influence of the anesthetic, the child died.

Defendant in error by amended pleading abandoned all allegations of negligence and unskillfulness, and relied for recovery solely upon the ground that the operation was without his consent. The court instructed the jury that if plaintiffs in error, without the consent of the parents, operated upon the child, using an anesthetic, and that she died as the result of the operation or the effect of the chloroform or both, to find for the defendant in error, without regard to any question of negligence or unskillfulness.

The jury returned a verdict for the plaintiffs in error, and a judgment was rendered in their favor. Upon appeal the Court of Civil Appeals held that the plaintiffs in error failed to show that the adult daughters or either of them had any authority, expressed or implied, to have the operation performed upon the minor sister. The court also held that, as the child, on account of her minority, could not, and the parents did not, give consent, had she survived the operation, she would have had a cause of action as for a technical assault and battery, and that therefore the parents, in virtue of article 4695, R. S. 1911, have a cause of action. 191 S. W. 843. The writ was granted upon application referred to the Committee of Judges.

[1] The Court of Civil Appeals in the exercise of its power having reversed and remanded the judgment of the trial court upon the theory that the verdict in favor of plaintiffs in error was unauthorized by the evidence, its conclusion on the facts will not be disturbed, nor will its judgment be reversed, unless it has committed errors of sub-

stantive law rendering its conclusion on the facts immaterial.

[2] This leads us to consider whether the sisters as temporary custodians of the child had the right to give consent to the operation; or whether the physicians' act in performing it was justified, regardless of the parent's consent, upon the ground that the paramount interest of the child demanded the operation. The authorities are unanimous in holding that a surgeon is liable for operating upon a patient, unless he obtains the consent of the patient, if competent to give such consent, or, if not, of some one who, under the circumstances, would be legally authorized to give the requisite consent. If a person should be injured to the extent that he is unconscious, and his injuries of such nature as to require prompt surgical attention, a physician called to attend would be justified in applying such treatment as might reasonably be necessary for the preservation of his life or limb, and consent on the part of the injured person would be implied upon the ground of an existing emergency. *Mohr v. Williams*, 95 Minn. 261, 104 N. W. 12, 1 L. R. A. (N. S.) 439, 111 Am. St. Rep. 462, 5 Ann. Cas. 303; *Pratt v. Davis*, 224 Ill. 300, 79 N. E. 562, 7 L. R. A. (N. S.) 609, 8 Ann. Cas. 197; *Rolater v. Strain*, 39 Okl. 572, 137 Pac. 96, 50 L. R. A. (N. S.) 880; *Schloendorff v. Society of New York Hospital*, 211 N. Y. 125, 105 N. E. 92, 52 L. R. A. (N. S.) 505, Ann. Cas. 1915C, 581.

[3-5] The evidence is to the effect that the germs, seeping from the diseased parts, and carried by means of the circulation of the blood, permeate and poison the system, and unless arrested by an operation such as was had in this case will eventually undermine the whole constitution and result in death. The evidence shows that there was an absolute necessity for a prompt operation, but not emergent in the sense that death would likely result immediately upon failure to perform it. In fact, it is not contended that any real danger would have resulted to the child had time been taken to consult the parent with reference to the operation. Therefore the operation was not justified upon the ground that an emergency existed.

The physicians, acting in good faith, in assuming the sisters had authority to give consent, undertook to perform the operation, and, although the operation was skillfully performed and without negligence, death ensued, either as the result of the operation or of administering the anesthetic, or both. The sisters were but the temporary custodians of the child, and as such temporary custodians had no authority to give consent to perform the operation in the absence of an emergency. The parent was the only one who could legally give consent to perform it, and, if not given, the physicians' act in performing it was a legal wrong. If performed without the consent of the parent, it would amount to

a technical assault for which the child could have recovered had she survived the operation, and it follows that, under article 4695, the cause of action would survive to the defendant in error, not dependent, however, upon the extent of the injuries to the minor child.

It is insisted that the paramount interest of the child alone must be considered in determining whether such an operation shall be performed, and that if health demanded an operation, and that, if skillfully performed, no cause of action would arise, even though it resulted disastrously. The law wisely reposes in the parent the care and custody of the minor child, and neither a physician nor those in temporary custody of the child will be permitted, in a case of this character, to determine those matters touching its welfare.

We recommend, therefore, that the judgment of the Court of Civil Appeals reversing and remanding the cause be affirmed.

PHILLIPS, C. J. We approve the judgment recommended in this case.

KINNEY v. TRI-STATE TELEPHONE CO. et al. (No. 175-3199.)

(Commission of Appeals of Texas, Section B.
May 26, 1920.)

1. Divorce \S 156 — Interlocutory judgment does not dissolve marriage.

Interlocutory divorce order, "that when one year shall have expired after the entry of this interlocutory judgment a final judgment and decree shall be entered granting a divorce herein," etc., held not to have dissolved the bonds of matrimony.

2. Judgment \S 216—"Interlocutory judgment" defined.

A judgment which leaves something further to be determined and adjudicated by the court in disposing of the parties and their rights is "interlocutory."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interlocutory Decree or Judgment.]

3. Judgment \S 217—Requisites of a "final judgment" stated.

A "final judgment" should contain the judicial ascertainment of the facts, together with the manner of their ascertainment and a recorded declaration of the court pronouncing the legal consequences upon the facts thus ascertained.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

4. Marriage \S 40(6, 10)—Presumption that first wife has been divorced on proof of a second marriage.

On proof that deceased had been married to both women claiming to have been his lawful

wife at time of his death, the presumption, in absence of other proof, is that the subsequent marriage was lawful and that he had obtained a divorce from wife by first marriage; but such presumption is rebutted by proof that no divorce has been granted.

5. Divorce \S 156—Final judgment after death of husband for whom interlocutory decree had been rendered held not valid.

Where husband for whom interlocutory divorce judgment had been rendered died before entry of final judgment but after expiration of the year he was required to wait before final judgment could be entered, the final judgment where not entered nunc pro tunc had no validity as a judgment.

6. Marriage \S 40(10)—Interlocutory divorce decree from first wife held to rebut presumption of validity of second marriage.

In an action for death benefit, involving question of whether deceased's first or second wife was entitled thereto, evidence of interlocutory divorce judgment against first wife held to break down prima facie case for second wife established by proof of her marriage and to present issue as to whether deceased had married second wife without being divorced from first wife, in rebuttal of presumption of validity of second marriage; such judgment not severing bonds of matrimony with first wife and negating any presumption that divorce had been obtained in any other jurisdiction.

7. Appeal and error \S 1082(1)—Holding of Court of Civil Appeals as to inadmissibility of evidence held reviewable by Supreme Court.

Holding of Court of Civil Appeals that judgment roll was inadmissible in evidence to prove no divorce had been granted from deceased's first wife, under allegation that she was his lawful wife at the time of his death, held reviewable by Supreme Court, being based upon a legal conclusion in contravention of established rule in the state.

8. Marriage \S 39—Judgment roll held admissible under the pleadings to prove no divorce.

In an action for death benefit involving issue of whether deceased's first or second wife was entitled thereto, judgment roll in divorce action against first wife held admissible to prove first wife was not divorced, under allegation that she was his lawful wife at time of his death.

Error to Court of Civil Appeals of Eighth Supreme Judicial District.

Action by Elsie Kinney and another against the Tri-State Telephone Company, in which Nellie Kinney intervened. Judgment for intervenor was reversed and judgment was rendered for named plaintiff by Court of Civil Appeals (201 S. W. 1180), and intervenor brings error. Judgment of Court of Civil Appeals reversed, and that of trial court affirmed.

Charles H. Haines, of Denver, Colo., and Archibald Dorman, and Joseph M. Nealon, both of El Paso, for plaintiff in error.

Jno. T. Hill, Leigh Clark, Dell W. Harrington, and Turney, Culwell, Holliday & Pollard, all of El Paso, for defendants in error.

SADLER, P. J. This case is before us upon writ of error to the judgment of the Court of Civil Appeals, in which the judgment of the trial court is reversed and judgment rendered for the appellant, Elsie Kinney. 201 S. W. 1180. The statement and findings of fact by the Court of Civil Appeals are as follows:

"Elsie Kinney and Nellie O'Favenger brought this suit as the wife and mother of H. B. Kinney, deceased, against the Tri-State Telephone Company for \$3,060, being the amount of a benefit fund in the latter's hands, due, under a plan of insurance to be hereinafter described, to them as the beneficiaries therein. Nellie Kinney intervened and claims the fund, alleging that she was the lawful wife of said Kinney, and, further, that she had not been divorced from deceased. The telephone company answered that it had the money; that, by the terms of the contract, it was payable, first to the wife of deceased, second to the children, and third to the dependent relatives, and that in the absence of either to lapse, tendered the money into court, to be paid to the party to whom the court determined by its judgment it should be paid. This appeal is from a judgment in favor of intervenor, Nellie Kinney, for the entire fund.

"Findings of Facts.

"The findings of facts by the trial court are very lengthy, so we make such statement of the undisputed facts as are, in our judgment, pertinent to the issues raised by the assignments and counter propositions of appellee.

"Harry B. Kinney and Nellie Flaherty were married June 16, 1909, separated October 5, 1911, and never lived together afterwards. She continued to live in the state of Colorado to the date of the institution of this suit. March 26, 1914, he filed his complaint for divorce in the court of Los Angeles county, Cal. Service was had by delivering a summons to Nellie Kinney in Colorado, and on August 19, 1914, the following judgment was entered:

"In the Superior Court of the State of California in and for the County of Los Angeles. "Harry B. Kinney, Plaintiff, vs. Nellie Kinney, Defendant. Interlocutory Judgment by Default in Action for Divorce.

"This cause came on regularly to be heard the 19th day of August, 1914, before the said superior court, in department 5 thereof; Geo. S. Richardson appearing as attorney for plaintiff herein, and no one appearing for said defendant. And it appearing that the defendant was duly served with process herein, and said defendant not having answered plaintiff's complaint herein, within the time provided by law or otherwise; and the default of the defendant for not answering the said complaint having been duly entered herein in the manner provided by law; and evidence having been introduced on behalf of said plaintiff at said hearing of this cause; and said cause having been submitted to the court for its consideration and decision:

"Now therefore said court, having duly considered the same, makes its findings of fact and decision as follows. The court finds that all of the allegations contained in the complaint are true, and that a divorce ought to be granted as prayed for in said complaint. Wherefore it is hereby ordered, adjudged, and decreed that the said plaintiff is entitled to a divorce from the defendant; that when one year shall have expired after the entry of this interlocutory judgment a final judgment and decree shall be entered granting a divorce herein, wherein and whereby the bonds of matrimony heretofore existing between said plaintiff and said defendant shall be dissolved, and at that time the court shall grant such other and further relief as may be necessary to complete disposition of this action.

"Done in open court this 19th day of August, A. D. 1914. Charles Wellborn, Judge."

"On November 14, 1914, Harry B. Kinney and Elsie Kinney were married and lived together as husband and wife to his death. She believed that he had obtained a divorce, though she later and before his death, found and read the above decree. Concerning the matters next above she testified:

"We became engaged some time about the first of December, 1912. I knew he had been married. He told me he had been married and he intended getting a divorce when I first met him—when I had known him about a week. I learned that he actually instituted a suit for divorce. I did not understand that an interlocutory decree had been entered before our marriage. I did not know anything about what happened to the case. I thought I knew he had been divorced because he told me he had. I did not see a copy of the decree before we were married, but I did before Harry's death see a copy of the interlocutory decree. I read it. It was about December 1, 1912, when we became engaged. That was during his first trip to Raton."

"On January 14, 1916, Harry B. Kinney was accidentally killed while in the service of the telephone company.

"On February 10, 1916, deceased's attorneys of record appeared in the court of Los Angeles, and upon motion the above decree was made final by the following decree: * * *

"Harry B. Kinney, Plaintiff, vs. Nellie Kinney, Defendant. Final Decree of Divorce.

"This cause came on regularly to be heard the 19th day of August, A. D. 1914, Geo. S. Richardson appearing as attorney for plaintiff herein, and not any one appearing for said defendant, and said defendant having been duly served with summons and copy of complaint herein, and said defendant not having answered plaintiff's complaint herein within the time provided by law or otherwise, and the default of said defendant for not answering said complaint having therefore been duly entered herein in the manner provided by law, and evidence having been introduced on behalf of said plaintiff herein on said 19th day of August, A. D. 1914, and said cause having been submitted to the court for its consideration and decision, and the court having duly considered the same, filed its findings of fact and decision in writing therein on said 19th day of August, 1914, and on said 20th day of August, 1914, entered its interlocutory decree ordering and decreeing that upon

the expiration of the period of one year from the date of entry of said interlocutory decree a final judgment and decree be entered herein ordering and decreeing that the bonds of matrimony heretofore existing between said plaintiff and said defendant be dissolved, and freeing them and each of them from each and all of the obligations thereof, and said findings of fact and conclusions of law, and said interlocutory decree, having been duly filed and entered, and said period of one year having elapsed since the entry of said interlocutory decree, and no appeal having been taken from said interlocutory decree, and said interlocutory decree not having been modified or set aside, and the same being in full force and effect, and said plaintiff, Harry B. Kinney, through his attorney, Geo. S. Richardson, having in open court on this day, to wit, the 10th day of February, A. D. 1916, moved said superior court in and for the county of Los Angeles, is department 5 thereof, for a final order, judgment, and decree in accordance with said findings of fact and conclusions of law, and said interlocutory decree and said motion having been duly heard and no one appearing to contest the same, said motion was duly granted by said court, and said court having made its order that a final order, judgment, and decree be made and entered herein in accordance with said findings of fact and conclusions of law and said interlocutory decree:

"Now, therefore, it is hereby ordered and decreed that the bonds of matrimony heretofore existing between said plaintiff, Harry B. Kinney, and said defendant, Nellie Kinney, be and the same are hereby dissolved, and that said plaintiff and said defendant, and each of them, be and they are hereby freed from each and all of the obligations thereof.

"Done in open court this 10th day of February A. D. 1916.

"Charles Wellborn, Judge."

"Nellie Kinney had known nothing of the whereabouts of her husband from October, 1912, until she learned of his death. She appeared in the court of Los Angeles by attorney by motion to set aside the two decrees, and her motion was overruled. She did not appeal.

"January 16, 1914, Harry B. Kinney went into the service of the Tri-State Telephone Company, and at this time it had in effect the plan of disability and death benefits to its employees as follows:

"Plan for Employees' Pensions, Disability Benefits and Death Benefits.

"Sec. 8. *Death Benefits.* (1) In the event of the death of any employé, resulting from accidental injury, on or after January 1, 1913, arising out of and in the course of employment by the company, there shall be payable to the employé's beneficiaries, as provided in paragraph 3 of this section (subject, however, to the conditions elsewhere imposed in these regulations), a death benefit which shall equal three years' wages, as hereinafter in this section defined, which shall in no case exceed five thousand dollars. In addition to the death benefit, the necessary expenses of the burial of the deceased employé, not exceeding one hundred and fifty dollars (\$150.00), shall be paid from the fund. * * *

(3) The death benefit, in case of an employé's death by either accident or sickness, shall be paid only to the wife (or husband) or dependent relatives of the employé, and such

payment shall be made in the following order: Provided, however, that upon written application of an employé, and good cause shown, the committee may authorize a change in such order of payment, but no persons other than the beneficiaries herein designated shall receive payment on account of such benefit: First, to the wife (or husband) of the employé. * * *

"At the time Kinney entered the employment of the company he designated his mother as the beneficiary. After his marriage he, in the manner provided, designated Elsie Kinney as his beneficiary."

We, however, desire to add to the above the following additional statement:

The judgment roll in the case of Kinney v. Kinney in the superior court of the state of California for the county of Los Angeles was introduced in evidence by the plaintiff in error, over the objection made by defendants in error. Thereafter, and without any limitation as to its purpose, counsel for Elsie Kinney introduced and read in evidence the entire judgment roll in said cause, *Dohoney v. Womack*, 1 Tex. Civ. App. 354, 19 S. W. 883, 20 S. W. 950; *Panhandle National Bank v. Emery*, 78 Tex. 498, 15 S. W. 23; *Sanger v. Craddock* (Sup.) 2 S. W. 196. The uncontradicted evidence is that H. B. Kinney filed suit for divorce against Nellie in Colorado, and dismissed it on his own motion; that the Colorado and California suits were the only actions begun for divorce by H. B. Kinney. Nellie Kinney testified that she never had been divorced from H. B. Kinney; that she never had any notice of any other suits for divorce than as above stated; that she never sought to obtain a divorce from H. B. Kinney.

The trial court found these facts, and the Court of Civil Appeals does not make any finding of fact adverse to those by the trial court.

The uncontradicted evidence is that H. B. Kinney did not make any written application showing good cause for change of beneficiary as provided by the plan, and designated no beneficiary other than his lawful wife. The committee having charge of the management of the fund so found, Howard C. Vaille so testified, and the trial court so found.

The Court of Civil Appeals disposed of every assignment by appellants, and the case is before us solely upon the assignments raised by plaintiff in error in application for the writ of error.

The real parties to the appeal and to this writ of error are Elsie Kinney on the one part, and Nellie Kinney on the other; each claiming to be the lawful wife of H. B. Kinney at the date of his death. The Court of Civil Appeals rendered judgment in behalf of Elsie Kinney for the fund involved.

Opinion.

As we construe the opinion of the Court of Civil Appeals, it is not a finding that the evi-

dence is insufficient to support the judgment of the trial court, or that the judgment is against the weight of the evidence. It is rather a holding that, although the judgment roll was introduced in evidence, yet, as a matter of law, it did not prove anything, and that therefore there was no evidence to sustain the judgment of the trial court; that on the uncontradicted facts which the evidence established in law Elsie Kinney should recover. The whole question, therefore, is with reference to the soundness of the propositions of law on which the Court of Civil Appeals bases its conclusion that there is no evidence to support the judgment of the trial court, and that the uncontradicted evidence authorizes the judgment which it renders.

The uncontradicted and undisputed facts are that H. B. Kinney married Nellie Flaherty June 16, 1909; that they separated October 5, 1911, and never thereafter lived together; that on August 19, 1914, in a divorce suit filed by H. B. Kinney against Nellie Kinney in California, an interlocutory order was entered which was not made final until February 10, 1916, subsequent to the death of Harry B. Kinney; that in 1914 H. B. Kinney married Elsie, and they lived together to his death.

The Court of Civil Appeals takes the position that the introduction of these orders of the California court does not constitute evidence which negatives the presumption of a lawful marriage between deceased and Elsie Kinney. In other words, that although this judgment roll is in evidence, yet that it has no probative force, because Nellie Kinney failed to plead the law of the state of California with reference to the effect of these orders; and further that, not having done so, it is presumed that the law of California with relation to the subject is the same as that of Texas.

[1] Whether we undertake to construe the effect of the court proceeding in California under the law of California or under the laws of Texas is, in our judgment, immaterial. In our opinion, under the laws of Texas the interlocutory judgment rendered August 19, 1914, possessed no power destructive of the relation existing between Nellie Kinney and H. B. Kinney until it later should be strengthened by a final judgment pronouncing the decision of the court with reference to the rights of the parties. The interlocutory order did no more than to announce the conclusion of the court on the value of the facts proved, and to determine that under those facts a divorce ought to be granted. The order does not of itself, either by its terms or under any known rule of interpretation, pronounce the judgment of the court dissolving the bonds of matrimony. It specially excludes the idea of its finality or definiteness as an adjudication of the final status of the parties. It provides:

"That when one year shall have expired after the entry of this interlocutory judgment a final judgment and decree shall be entered granting a divorce herein, wherein and whereby the bonds of matrimony heretofore existing between said plaintiff and said defendant shall be dissolved, and at that time the court shall grant such other and further relief as may be necessary to complete disposition of this action."

This order shows, therefore, on its face, that the court held within its bosom the final judgment to be rendered, and that it was postponed, subject to rendition of final decree at some future date.

[2, 3] As announced in *Linn v. Arambold*, 55 Tex. 611, *Fitzgerald v. Evans*, 53 Tex. 461, and *Easthan v. Sallis*, 60 Tex. 576, a judgment which leaves something further to be determined and adjudicated by the court in disposing of the parties and their rights is interlocutory. A final judgment should contain the judicial ascertainment of the facts, together with the manner of their ascertainment, and a recorded declaration of the court pronouncing the legal consequences upon the facts thus ascertained. To be a "final judgment," it must contain:

(a) "Declaration in the record of the decision or sentence of the law pronounced by the court upon the matter contained in the record."

Under the law of this state the first order entered in the divorce proceedings in California must be held inoperative to effect a dissolution of the existing bonds of matrimony between H. B. Kinney and Nellie Kinney.

This condition of affairs continued until after the death of H. B. Kinney. At the time of his death and during the preceding time that he lived with Elsie Kinney, he was the lawful husband of Nellie Kinney, unless there had been granted at some other time or place a valid decree of divorce. The uncontradicted evidence is that he made only two efforts to obtain a divorce from Nellie Kinney; one in Colorado, which he voluntarily dismissed, and the other in California, in the cause in which the interlocutory judgment was rendered. After the death of H. B. Kinney, an effort was made to make final the interlocutory decree which had been rendered in the California court, thereby recognizing that it was not final. This is a circumstance corroborative of the testimony of Nellie Kinney that she had never been divorced, and a recognition of the continuance of the marital relationship in the absence of the final decree.

[4] It is true that, without any other proof save that showing the marriage of Nellie Flaherty in 1909 and the marriage to Elsie in 1911, the presumption would be in behalf of a lawful act on the part of the deceased and that he had obtained a divorce before his marriage to Elsie. But when the prior marriage is shown, and the testimony is of-

ferred showing that no divorce has ever been granted—taking the acts of the deceased with reference thereto which were extant as showing that they fell short of a divorce—an issue of fact was thereby presented in rebuttal of this presumption. The trial court found the facts against Elsie Kinney, and in our opinion under the law of Texas no other conclusion could have been drawn than the one which was found by the trial court.

[5] The final judgment rendered on February 10, 1916, was not a judgment *nunc pro tunc*. The judgment roll does not show it to be entered *nunc pro tunc*. It has no validity as a judgment.

To have maintained the plaintiff's cause of action, it was necessary for Elsie Kinney to show that she had been lawfully married to H. B. Kinney, and was his lawful wife at the date of his death. We assume that this may be shown *prima facie* by the facts, which disclose that she was married to him in 1914, and that she continued to live with him to the time of his death. It then became necessary for Nellie Kinney, in order to defeat the contention of Elsie, to show, not only that H. B. Kinney had been married prior to his marriage to Elsie, but that that marriage never had been dissolved. When Nellie showed by her evidence that H. B. Kinney married her prior to the time he married Elsie, and then introduced evidence showing without contradiction and undisputed that H. B. Kinney never had been divorced from her, she rebutted the presumption of law in favor of Elsie and destroyed by facts the effect of that presumption. The court found that she had done this.

[6] The Court of Civil Appeals does not hold that the evidence is insufficient to sustain the finding of the trial court in favor of Nellie Kinney. It holds that, although the proof was in, it constituted no evidence of the facts which it was intended to establish; that as a matter of law it proved nothing; that Nellie Kinney stood in the court having proved only one fact (the previous marriage); and that this fact was not sufficient to destroy the case made by Elsie. We cannot accede to this holding. We think the evidence sufficient in law to present the issue of no divorce. The only evidential effect—if it should be given any—of the final judgment in the California court, is to show a recognition of the inefficacy of the interlocutory judgment to dissolve the bonds of matrimony. It manifests a recognition of

the fact that in the California court was pending the only divorce suit by H. B. Kinney; its effect is to negative any presumption that H. B. Kinney had obtained a divorce in some other jurisdiction.

The good faith of Elsie cannot affect the transaction, because the property involved in this litigation is not property which has been accumulated by the joint efforts of H. B. Kinney and Elsie during the purported marriage estate. It is rather a donation or bounty provided by the telephone company for the protection of specific beneficiaries. The fund clearly goes, not by designation of H. B. Kinney, but by virtue of the provision of the plan, to the lawful wife at the date of his death, whomsoever she may be.

We do not desire to be understood as holding that under the pleading in this case the laws of California could not have been introduced in evidence. That is a question that is immaterial to the disposition of the case, and upon which we express no opinion.

[7, 8] If the opinion of the Court of Civil Appeals can be construed into a holding that the judgment roll was not admissible in evidence because not pleaded, we are of opinion that, even then, the Supreme Court would have the right to review that holding, since it is based upon a legal conclusion in contravention of the established rule in Texas. It was necessary for Nellie Kinney to show that H. B. Kinney had never been divorced from her. She pleaded that fact, and pleaded that she was his lawful wife at the time of his death. This pleading raised the issue as to whether or not any divorce had ever been granted, and as a matter of law it was not necessary for her to plead her evidence.

There is no evidence in the record tending to show that H. B. Kinney ever endeavored to designate in accordance with the "plan" a beneficiary other than as contemplated by the designation specifically set forth in the plan. Clearly, the sole question at issue and decisive of the rights of the parties is as to who occupied the relationship of wife to H. B. Kinney at the date of his death. The trial court found, and we think properly, in favor of Nellie Kinney on that issue.

We think the judgment of the Court of Civil Appeals should be reversed, and that of the trial court affirmed.

PHILLIPS, C. J. We approve the judgment recommended in this case.

DUNCANSON et al. v. HOWELL.

(No. 147-3094.)

(Commission of Appeals of Texas, Section A.
June 9, 1920.)**1. Associations §15(1)—Purchasers of shares in colony held equitable owners of separate tracts and of excess acreage.**

Purchasers of shares in a colony, with understanding it contained not less than 12,800 acres, each share representing 1/1232 part of the whole tract, on paying the price became collectively equitable owners of their interests in the entire tract, and also acquired equitable title to an excess area of 135.92 acres subsequently discovered in the tract, which was not reserved from sale to them or in any way designated or segregated, though deed was not made by the vendors as provided in the contract, but deeds were executed to each undivided purchaser or shareowner for specific property designated by a meeting of shareholders.

2. Tenancy in common §38(1)—One cotenant may maintain action against another who has ousted him.

One tenant in common may maintain action to establish title and to recover possession against his cotenant, when the latter has ousted him of possession of the property owned in common.

3. Tenancy in common §55(1)—Title to undivided interest warranted recovery of whole tract as against trespasser.

Title of a tenant in common to an undivided interest in the land involved in an action to establish title and to recover possession was sufficient to warrant recovery of the entire tract as against a trespasser, though such right does not exist as against a cotenant.

4. Trusts §30½(1)—Commission appointed by colony shareholders not trustees, but agents.

Committee appointed by shareholders in a colony, though denominated trustees, held in fact mere agents, not vested with the title of any of the shareholders.

5. Trespass to try title §26—One without title cannot maintain action for benefit of another with title.

One without title cannot maintain an action to establish title, and to recover possession for the use or benefit of another having title.

6. Trespass to try title §47(1)—Plaintiffs, without title to defendant's interest, could only be admitted into joint possession.

Where plaintiffs in trespass to try title showed no title, legal or equitable, as to the interest of defendant in the land involved, a common tract set apart by shareholders in a colony, among whom plaintiffs and defendant were all numbered, the full extent of plaintiffs' right was to have their interests adjudicated, and to be admitted into joint possession with defendant.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by W. H. Duncanson and others against Lee Howell. From a judgment for plaintiffs, defendant appealed to the Court of Civil Appeals, which reversed, and rendered judgment for defendant (195 S. W. 349), and plaintiffs bring error. Judgment of the Court of Civil Appeals reversed, and cause remanded for new trial, on recommendation of the Commission of Appeals.

C. C. Thomas, of Cotulla, J. O. Rouse, of Vernon, and Hicks, Hicks, Teagarden & Dickson, of San Antonio, for plaintiffs in error.

T. F. Mangum, of San Antonio, for defendant in error.

SONFIELD, P. J. W. H. Duncanson, Ed. C. Taylor, and O. G. Harris, plaintiffs, brought this action against Lee Howell, defendant, to establish title to, and recover possession of, 60 acres of land, known as "Howell Gardens," constituting part of a larger tract of land known as "Bermuda Colony." Plaintiffs sued "for themselves and as trustees for, and as tenants in common with, the shareholders in what is known as 'Bermuda Colony' and 'Brundage Townsite,' in Dimmit county, Texas," alleging that the shareholders numbered probably 600, and that it was practically impossible to give all their names and residences.

Plaintiffs' first amended original petition, in addition to the formal allegations in trespass to try title, alleged, in the alternative, possession of the land in virtue of a gift, and further that they, and those in whose behalf they sued, purchased an undivided interest in the entire Bermuda Colony, and upon division among themselves, by agreement, appropriated to each shareholder specific sections and lots, and kept the remaining undivided 60-acre tract, known as "Howell Gardens," as common or undivided property; that plaintiffs and defendant claimed under common source, defendant deraining title through an execution sale, under a judgment which plaintiffs alleged had been satisfied long prior to the levy upon and sale of the land by the sheriff to defendant.

It appears from the evidence that in the year 1908 the firm of Hust & Brundage owned 20 sections of land in Dimmit county, which they designated as "Bermuda Colony." In that year the firm proceeded to sell out the colony under a colonization scheme, through the sale of 1,232 shares to various purchasers. A uniform contract was adopted, styled "General Purchaser's Application." These applications were signed by those desiring to purchase shares of the colony; they agreeing to pay for each share the sum of \$220, in payments as provided in the contract. The application stipulated that one share should represent an undivided 1/1232 part of the colony, and that the "Guaranties and Privileges" printed on the reverse side of the application

should constitute a part of the contract. The guaranties and privileges, material to this inquiry, were in effect as follows:

When all the shares in Bermuda Colony were sold, a meeting of the shareholders, or their representatives, should be held, Hust & Brundage to notify the shareholders of the time and place of such meeting; that at such meeting a committee of five of the shareholders, or their representatives, should be selected, to whom Hust & Brundage would deliver warranty deeds, with complete abstract, to all the lands and lots in Bermuda Colony, each shareholder being entitled to $\frac{1}{1232}$ part of the entire colony; that at that meeting the shareholders, or their representatives, should determine whether the colony land should be partitioned or held in common, a partition to be had unless by unanimous vote it be determined to hold the land in common; and that the tract of land in Bermuda Colony contained not less than 12,800 acres.

Pending the sale of the shares, Hust & Brundage sold to H. C. King and Eli Howell an undivided one-half interest in the 20 sections constituting Bermuda Colony, and thereafter the joint owners conducted the sale under the firm name of Hust & Brundage Company. This firm continued in existence until on or about the 1st day of February, 1911, when King and Howell sold to Hust & Brundage their interest in the property. All the shares were duly subscribed for, and the first meeting of shareholders and their representatives was called. Practically all the shares were represented, and all the members of the firm of Hust & Brundage Company were present and participated in the proceedings.

Prior to this meeting Hust & Brundage Company caused a survey and a map of the colony to be made, and discovered an excess of 135.92 acres, making a total acreage of 12,935.92 acres. At the meeting of the shareholders, a committee was appointed to look into the matter of the partition of the lands. It reported that, after examining the official map of the colony, and talking with the county surveyor of Dimmit county, they found that the tract contained 12,935.92 acres, that by reason of the uniform character and topography of the land it could be partitioned without prejudice, and that they had so partitioned the same. Through the partition each shareholder was given a 10-acre tract, a residence lot, and an undivided interest in a business lot in the town site of Brundage. The committee recommended the setting aside, without partition, of various tracts, for the mutual interest of the shareholders, in accordance with the suggestion of the Hust & Brundage Company. Included in these tracts was Howell Gardens, the land in controversy. The report of the committee contained this further recommendation:

"In our opinion it will be proper for you to provide—before closing this matter—some form of agency or trusteeship to look after the future interests of the shareholders in the land not partitioned, which is now held in common by you in the ratio of your respective shares in said colony, as well as the lots in the town not partitioned to any club, and for such other purposes or contingencies as might arise concerning the future interest of the several shareholders."

The report of this committee was adopted, the partition accepted, and the commission as recommended provided for. Harry Hust, of the firm of Hust & Brundage Company, was to be chairman, with authority to designate from the pioneer settlers of the colony the two other members. This commission was to act as trustees of the land not partitioned, for a period of three years, and until their successors were elected. The 135.92 acres excess includes the land in controversy, and was not deeded by Hust & Brundage Company to any person. Hust and Brundage each testified that Bermuda Colony in its entirety was sold to the shareholders; that they had been willing at any time to execute a deed to this excess acreage, but did not know to whom the deed should be executed. Hust appointed W. H. Duncanson, one of the plaintiffs herein, as trustee in his stead, and Duncanson named his coplaintiffs as the other two trustees. Duncanson testified that subsequently, at a meeting of the shareholders, he and the other plaintiffs herein were elected trustees.

It is thus seen that plaintiffs assert that title to the land in controversy is in the purchasers of the shares of Bermuda Colony, under the contract; all of the purchase money having been paid. Defendant, Howell, claims under an execution sale. W. W. Gray recovered a judgment against Hust & Brundage, which judgment was assigned to defendant, who caused execution to issue; levy was made on Howell Gardens, and at the sale thereunder defendant became the purchaser. The judgment, execution, and sale were all subsequent to the sale of the shares of the Bermuda Colony and of the first meeting of the shareholders. At the sale, intended purchasers were advised of the claim of title by the shareholders. Defendant credited the amount of his bid on the judgment. Upon the conclusion of the evidence, the trial court instructed the jury as follows:

"You are instructed on the law of this case as follows:

"(1) Under the 'General Purchaser's Application,' with the 'Guaranties and Privileges' printed on the back thereof, shown in evidence as the contract under which the shareholders of Bermuda Colony became purchasers of shares, it is provided that the purchasers of the 1,232 shares (being the whole number of shares) shall be the owners of the entire colony, each share representing $\frac{1}{1232}$ part of the

whole of the land, which was represented to be 12,800 acres, and not less than 12,800 acres. The purchasers, upon complying with the terms of their contracts by paying the agreed price, became collectively the equitable owners of such interests in the entire tract, and upon receiving their deeds to the 10-acre tracts and town lots they became the separate owners in fee simple of the tracts specified in their respective deeds.

"(2) The map of Bermuda Colony shows that the same consist of 20 sections of land, each divided into 64 equal parts in a square form, called 10-acre tracts, being 1,280 such tracts, all of them being numbered, except 36, marked 'Town of Brundage,' 4, marked 'King Park and Lake,' and 6, marked 'Howell Gardens'; the latter being the land in controversy. These 20 sections of land contain 640 acres of land, each more or less, and together they contain 12,935.92 acres, or an excess of 135.92 over 12,800. All the land in the 20 sections was platted on the map as Bermuda Colony; the 135.92 acres excess was not reserved from sale to the shareholders, or in any way designated or segregated, and in law the equitable title thereto passed to them as part of the entire colony, when they complied with the terms of their contracts by paying the agreed price of their shares. Their uninterrupted possession is notice to the world of their claim of right.

"(3) The fact that the land in controversy has at times been called a donation does not affect the character of the title therein of the shareholders of the colony.

"(4) The plaintiffs, as shareholders and trustees of the shareholders, for their common benefit, are entitled to maintain this action, although many shareholders living at a distance may know nothing of their trusteeship or of the pendency of this suit.

"(5) It is in evidence that Hust & Brundage Company at the time of the allotment owned 23 shares, which had not been sold by them, and they were therefore owners of an undivided 23/1232 of the land in controversy. This 23/1232 was subject to levy and sale as the property of Hust & Brundage, assignees and successors of Hust & Brundage Company, at the time of defendant's levy, and under the execution sale to him defendant became the owner thereof.

"(6) You will therefore return your verdict for plaintiffs, as trustees, for all the shareholders, which includes the defendant, to the extent of 23 shares."

Verdict was rendered accordingly, and thereon judgment was entered that plaintiffs, as trustees for all of the shareholders of Bermuda Colony, including defendant, to the extent of 23 shares, recover of and from defendant possession of the land sued for; that, as such trustees, plaintiffs be quieted in their possession of the land; and decreeing the cancellation of the deed by the sheriff of Dimmit county to defendant, and the record thereof, except as a muniment of title to 23/1232 of the land adjudged as belonging to defendant, and ordering a writ of restitution to issue in favor of plaintiffs, as trustees, for possession of the land. On appeal, the Court

of Civil Appeals reversed the judgment of the district court, and rendered judgment that plaintiffs take nothing by their suit. 195 S. W. 349.

The Court of Civil Appeals held that plaintiffs and the other shareholders acquired no title, legal or equitable, to the excess acreage; that this excess was found only after a resurvey, and was not contemplated when many, if not all, of the applications for purchase of shares were executed; that no interest in the land in controversy was ever deeded by Hust & Brundage, who held the legal title, to any one, except by the sheriff to defendant, and that there is no contract or memorandum thereof in writing, signed by or authorized to be signed by Hust & Brundage, for the sale or donation of all or any part of the 60 acres.

[1] We think the Court of Civil Appeals reached an erroneous conclusion in the matter of title, and concur in the conclusions of the trial court in paragraphs 1 and 2 of the charge to the jury. Hust & Brundage owned 20 contiguous sections of land, each section supposed to contain 640 acres. Upon this was predicated their guaranty that Bermuda Colony contained not less than 12,800 acres. The evidence establishes beyond the peradventure of a doubt that the 20 sections, in their entirety, were included in the colony, and that it was the intention of the vendors, through the sale of shares, to dispose of the whole of the colony lands. The contracts clearly, and without ambiguity, define the rights of each shareholder. There were 1,232 shares, each share representing "an undivided twelve hundred and thirty-second part of said colony." All the shares were to be subscribed for during the year 1908; failing in which, the money paid by intending purchasers should be returned. It cannot be questioned that the intention was that the shareholders should be and become the owners of the entire colony. This intention is not left to mere inference, but finds expression in the stipulations under "Guaranties and Privileges" which formed a part of the contract. It is provided therein that, when all the shares shall have been sold, the shareholders, or their representatives, should hold a meeting, whereat a committee of five from among their number should be selected by them, to whom the vendors were "to deliver warranty deeds, with complete abstract to *all* of the lands and lots in said Bermuda Colony, and this contract shall entitle the shareholder to one twelve hundred and thirty-second part of said *entire colony*." The vendors were thus to divest themselves of title to all of the lands and lots in the colony, and the shareholders were to become tenants in common of the colony in its entirety.

It is true, as stated by the Court of Civil Appeals, that the deed was not made by the vendors as provided in the contract, and that, in the language of that court, "on the con-

trary, Hust & Brundage executed deeds to each undivided purchaser for specific property designated by the convention of shareholders. Each deed conveyed a described section of acreage property, certain residence lots in the town of Brundage, and a designated interest in a described business lot in Brundage." It is also true that the contract provides in effect that, when deeds to the various shareholders for the particular part apportioned to each have been delivered, the same should be accepted in full satisfaction of the share applied for in the application. These facts, viewed in the light of the attending circumstances, in no manner militate against our view.

The contract contemplated that the land should be held in common by the shareholders, or partitioned between them by a committee appointed for that purpose. Only through a unanimous vote of the shareholders, or their representatives, could the lands be held in common. The committee was appointed. It had before it the map, recognized as the official map of the colony, based upon the survey made by the vendors, showing the excess. This map showed the colony to consist of 20 sections, subdivided into 10-acre tracts, all being numbered, except the tracts marked and designated thereon "Town of Brundage," "King's Park," and "Howell Gardens." The committee's report to the shareholders was based upon this survey and map, and stated that the colony contained 12,935.92 acres. The partition, recommended by the committee and accepted by the shareholders, was with reference to the survey and map. The committee advised the shareholders to accept the suggestion made by vendors that certain tracts, including Howell Gardens, be left unpartitioned, to be held in common by the various shareholders, and that a commission be appointed to look after the interests of the shareholders in such tracts. From the fact that under such circumstances the shareholders received deeds to specific portions of the property, no inference arises that they deemed the partition as including all of the land to which they were entitled, and that through the acceptance of the deeds they forfeited their rights in the lands not partitioned. They accepted the partition and the deeds in virtue thereof, in view of the recommendation by the committee as to the unpartitioned land. But, whatever their belief, it did not alter or change the legal effect of the contract. No element of estoppel is present. The vendors were in attendance upon the meeting, acquiesced in the proceedings, and recognized the title of the shareholders to all of the colony, including the land in controversy. The evidence establishes that the shareholders went into immediate possession of the land in controversy, through tenants; the leases being executed by some of the shareholders in the belief that they were the

duly appointed agents of all of the shareholders with reference to the unpartitioned land. We conclude that the equitable title to the land in controversy vested in the shareholders in virtue of their contracts of purchase and the payment of the purchase money.

Paragraph 5 of the trial court's charge to the jury, the verdict therein instructed, and the judgment, recognize defendant as the owner of an undivided ²³/₁₂₈₂ part of the land. In view of this, the judgment decreeing exclusive possession of the land in controversy to plaintiff as trustees for all of the shareholders of the colony, including defendant, was clearly erroneous.

[2] Plaintiffs and defendant, in the view of the trial court, were tenants in common. One tenant in common may maintain an action of this character against a cotenant, when the latter has ousted him of possession of the property owned in common. The pleas and answer of defendant clearly show that he recognized no right of common ownership, and this is held equivalent to an ouster. *St. L., A. & T. Ry. Co. v. Prather*, 75 Tex. 53, 12 S. W. 969.

[3, 4] Plaintiffs had title to an undivided interest. This would be sufficient to warrant a recovery of the entire tract as against a trespasser. This right does not, of course, exist as against a cotenant. The judgment was evidently based upon the conception that plaintiffs were trustees for all of the shareholders. Under the evidence no such relation exists. The legal title remained in Hust & Brundage; the equitable title passing to the shareholders. The commission appointed by the shareholders, though called trustees, were in fact mere agents, not vested with the title of any of the shareholders. It is in this right that plaintiffs sought recovery of all of the lands.

[5, 6] One without title cannot maintain an action of this character for the use or benefit of another having title. *Hooper v. Hall*, 30 Tex. 154; *Birmingham v. Griffin*, 42 Tex. 147; *Heard v. Vineyard*, 212 S. W. 489. The court recognized and established defendant's interest in the land. He had the same right of possession and enjoyment of the land as plaintiffs. As to his interest and that of the other shareholders, plaintiffs showed no title, legal or equitable. It follows that the full extent of plaintiffs' right was to have their interests adjudicated, and be admitted into joint possession of the land with defendant. *Boone v. Knox*, 80 Tex. 642, 16 S. W. 448, 26 Am. St. Rep. 767; *Hess v. Webb*, 103 Tex. 46, 123 S. W. 111.

We are of opinion that the judgment of the Court of Civil Appeals should be reversed, and the cause remanded for a new trial.

PHILLIPS, C. J. We approve the judgment recommended in this case, and the holding of the Commission on the question discussed.

DAVIS v. STATE. (No. 5830.)

(Court of Criminal Appeals of Texas. May 26, 1920.)

1. Larceny \S 5—Taking of casing from abandoned oil well valued at more than \$50 would be theft.

Defendant, if going with others to an abandoned oil well and taking therefrom certain casing of the value of over \$50 and selling it, would be guilty of theft.

2. Criminal law \S 507(1)—One participating in theft held an accomplice whose testimony required corroboration.

In a prosecution for the theft of oil well casing, one whom the state's evidence showed to have gone with defendant and to have taken the casing would be an accomplice, if defendant was guilty, and defendant's appropriate request for a special instruction that such person, used by the state as witness, would be an accomplice and would have to be corroborated, should have been given.

3. Criminal law \S 763, 764(17)—Charge as to proof of other offenses held improper as on weight of evidence.

In prosecution for theft wherein the state put in evidence of extraneous offenses to connect defendant with the offense and to show his purpose in being connected with it, a charge that jury might consider evidence of the theft of other property at same time and place, to establish the identity in developing the res gestae of alleged offense or to prove defendant's guilt by circumstances connected with the theft or to show his intent as to property charged to have been stolen, was erroneous, as being on the weight of the evidence.

4. Larceny \S 50—Checks given for payment on sale of stolen property held admissible.

In a trial on a charge of the theft of casing from an abandoned oil well alleged to have been taken and sold by defendant, wherein he denied any guilty connection with the matter and offered evidence of an alibi, checks given for the payment of the casing in the profits of which defendant shared were admissible.

5. Criminal law \S 1099(8)—Agreed statement not filed within time owing to fault of judge will be considered.

Where the statement of facts was not filed within the 90 days requisite in order to entitle it to consideration, and an affidavit of the trial judge assumed all responsibility for the delay on account of the pressure of business and sufficiently exonerated defendant from any want of diligence, and the statement of facts was agreed to and certified by the judge to be correct, it should be considered on appeal.

Appeal from District Court, Eastland County; E. A. Hill, Judge.

G. W. Davis was convicted of the theft of property of a value of more than \$50 and sentenced, and he appeals. Reversed, and cause remanded.

Mays & Mays, of Ft. Worth, for appellant.
Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of the theft of 15 joints of 6½-inch casing of over the value of \$50 and allotted two years in the penitentiary.

[1, 2] The state's evidence is that appellant, his brother, and Dawson went to an abandoned oil well and took the casing mentioned in the indictment and sold it. Under the state's case, if they did it was theft. Appellant's contention was that he did not go to the place where the property was situated, and knew nothing about it being stolen property; that he was a teamster and hauled anything for which he was employed in and about the oil field. The state used Dawson as a witness. Under the law and facts, if appellant was guilty, Dawson was an accomplice. The court did not so charge as to accomplice testimony as shown by his charge copied in the record. There is a bill of exceptions which states that he did submit the issue to the jury as to whether or not Dawson was an accomplice. Outside of this bill of exceptions, we fail to find a charge in the record. It is not embodied in the court's charge. Appellant requested a special instruction to the effect that Dawson would be an accomplice and would have to be corroborated. The requested charge was appropriately in the terms of the law and should have been given. This matter is indefinite, but upon another trial the court should instruct that Dawson is an accomplice.

[3] The state introduced extraneous matters and offenses and circumstances to connect appellant with this offense and to show his purpose in being connected with it. The court charged the jury as follows, as shown by the bill of exceptions:

"In this case if you believe there is evidence tending to prove the theft of other property than that alleged in the indictment to have been stolen, and at the same time, and place, you are instructed that you can consider such testimony for the purpose for which it was admitted, that is, to establish the identity in developing the res gestae of the alleged offense or to prove the guilt of the accused by circumstances connected with the theft, if any, or to show intent with which the accused acted with respect to the property for the theft of which he is now on trial, and you will consider it," etc.

Exception was reserved to this charge, among other reasons, because it was on the weight of the evidence. This charge has been condemned in a number of opinions as being on the weight of the evidence. Appellant's exception to the charge should have been sustained and a proper charge given.

[4] Exception was also reserved to various and sundry matters that were introduced which tended to connect the defendant with

this transaction criminally, and to show his purpose and to obtain the money from the results of the theft and selling the property. We are of opinion this evidence under this record was admissible. It is unnecessary to recapitulate the testimony. The appellant denied any guilty connection with it, and introduced evidence to show that he was not present at the time of the taking. There were checks also introduced given for the payment of this property in the profits of which appellant participated. This was introducible under the facts of this case.

There is a bill of exceptions to the manner in which the jury was obtained. This will not occur upon another trial and is not discussed.

[5] Appellant contends that he was deprived of his statement of facts without fault on his part, and for this reason the judgment should be reversed. The statement of facts was not filed within the 90 days as seems requisite under the decisions in order for its consideration. The trial judge files an affidavit exonerating appellant from any blame in not having his statement of facts filed within time and assumes all responsibility. Without setting out his reasons, we think they are sufficient to exonerate the appellant from any want of diligence. The statement of facts, however, is agreed to and certified by the judge to be correct. He says that he overlooked and failed to sign it in time on account of reasons stated; among others, the pressure of business in the trial of other cases. The correctness of the statement of facts is not assailed, but is agreed to and signed by the attorneys. See Branch's Crim. Law, § 41; Vernon's C. C. P., p. 837, and note 20, for cases; Eitel v. State, 78 Tex. Cr. R. 552, 182 S. W. 318; where quite a number of cases are collated; Gibbs v. State, 70 Tex. Cr. R. 278, 156 S. W. 687; Tankersley v. State, 51 Tex. Cr. R. 171, 101 S. W. 234. We are of opinion the statement of facts, under the statement of the judge, should be considered and is considered in passing upon the case.

On account of the errors above mentioned, this judgment will be reversed, and the cause remanded.

GRISSOM v. STATE. (No. 5776.)

(Court of Criminal Appeals of Texas. April 21, 1920. On Motion for Rehearing, June 9, 1920.)

1. Criminal law §814(2)—Theory submitted must be supported by evidence.

To make pertinent the submission of any legal theory of a case there must be evidence to support such issue.

2. Homicide §309(3) — Manslaughter charge properly refused under evidence.

In a prosecution for homicide, held proper, under the evidence failing to raise such issue, to refuse to charge on manslaughter.

3. Homicide §250—Conviction of murder sustained by evidence.

In a prosecution for homicide, a conviction of murder held sustained by the evidence.

4. Criminal law §982—No suspended sentence following murder conviction.

There can be no suspended sentence following a murder conviction.

5. Criminal law §1056(1)—Errors in charge not excepted to not considered.

Alleged errors in the charge not excepted to will not be considered on appeal.

On Motion for Rehearing.

6. Criminal law §1144(14)—Trial court presumed to have followed the law in refusing charges.

Where special charges on manslaughter and suspended sentence were asked, but it does not appear when they were presented to the court, acting upon the presumption that the trial court followed the law, the appellate court must uphold the action of the trial court in refusing such charges, for the reason that they came too late, if for no other reason.

Appeal from District Court, Wharton County; M. S. Munson, Judge.

Manch Grissom was convicted of murder, and appeals. Affirmed.

A. C. Allen, of Houston, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted in the district court of Wharton county of murder, and his punishment fixed at 15 years' confinement in the penitentiary.

The facts showed that Simon Grissom was an aged negro, living on a farm in Wharton county with his second wife and their three children, the oldest of whom was the deceased, a boy about 18 years of age. The old man seems to have had numerous older children by a former wife. On the day before the homicide, as we understand the record, there was a difficulty between the old man and deceased, in which deceased struck his father with a piece of tire iron, one or more blows, and the old man left the place, apparently going to the home of some of his older children, where he reported the occurrence. On the evening of the homicide he came back to his house, accompanied by three of his older boys and a grandson. The boys seem to have brought with them at least one shotgun, a Winchester rifle, and a pistol. In the mêlée which occurred, George Grissom, Simon, Jr., and the deceased, Boots Grissom, were killed, and appellant was wounded. Appellant and

the grandson, Willie, or Lonnie Greer, were indicted for the murder of Boots Grissom. On this trial appellant alone was tried, his conviction resulting.

Appellant's first and principal complaint is based on the failure of the trial court to submit the issue of manslaughter. An exception was taken to the main charge for such failure, and a special instruction asked presenting the issue. It appears from the charge asked that appellant sought to have manslaughter predicated upon the proposition that if he was approaching the house wherein deceased was, and that some one from the inside of the house shot him, and thereby produced in his mind such a degree of anger, rage, resentment, or terror, as to render him incapable of cool reflection, and that he shot and killed deceased, he would be guilty of no higher grade of homicide than manslaughter.

[1] To make pertinent the submission of any legal theory of a case, it is well settled that there must be evidence to support such issue. There is no dispute as to the fact that appellant, his two brothers, his nephew, and his father, went to the place where deceased was, for the purpose of getting him; nor of the fact that the party had with them the weapons mentioned above. Looking to the testimony of the state, a case of murder seems well established. Examining that of the appellant, we find that he testified that, when his party got near the house where Boots Grissom was, his brothers Si and George got out of the vehicles and went across the field, and, when they got to the house, he heard the shooting; that he then got on a horse and loped up there; that when he went up there he had no gun; that he asked what was the matter, and that somebody shot him in the left side and hand; that he then went back to his buggy, some distance, got a shotgun, and, putting it against his knee, shot back towards the house, he being then some 75 feet distant therefrom. No one was in sight when he fired, and he said that he shot just to let them know that he had a gun.

Appellant's father testified that he and appellant were some 350 yards from the house when the shooting began, and that appellant got on a horse and loped up to the house, and was there when he got there a little later. Lonnie Greer, who was also indicted, testified for the appellant, and stated that, when he got near the Grissom house, appellant, Si, and George got out of their buggies and walked, and got to the house before he and his grandfather did; that, when the shooting took place, all of the Grissoms were there.

[2] The evidence was given in a rambling and disconnected way, but we have tried to give the salient points bearing on the issue of manslaughter. We find ourselves wholly

unable to see any evidence raising such issue. No uncontrollable emotion appears, and no circumstance is in evidence from which such emotion could arise. The parties were admittedly going out after Boots Grissom because of his assault upon his father the day before. They had no warrant, though it was claimed that the sheriff had told one of them to bring Boots in. If the situation testified to by appellant and his father be literally true—that is, that young Si and George had gotten out of their buggies, and left the rest of the party, and gone on to the house, and there engaged in a battle with Boots, and that appellant, hearing the shooting, jumped on a horse and loped up to the house, and was then shot by some one, and returned to his buggy, got his shotgun, and fired it toward the house—this would not require a manslaughter charge. Deceased was not killed with No. 4 shot from a shotgun as appellant said his were, and it was testified to by appellant's witnesses that Si and George had a Winchester rifle and a pistol. Deceased was struck by a bullet that had gone through the wall of the house and went through both legs, apparently breaking the bone of one of them, from the effects of which he died within a short time. Under the charge of the court, and these facts testified to by appellant and his witnesses, unless he was a principal with George and Si, he would not be guilty of murder. That George and Si would have been guilty of murder is apparent from the fact that the entire testimony shows that the attacking party were the aggressors, the shooting began from outside the house, and that one or the other of them stated that their purpose in going there was to kill Boots.

[3] Taking the record as a whole, there seems no doubt of appellant's guilt. His half-sister said that he and George and Si were all shooting. Appellant had the only shotgun used, except a broken one used by Boots on the inside of the house, and after the battle a number of shotgun shells were picked up around the house; and the testimony showed that a number of holes in the walls and doors of the house were such as would be made by a shotgun fired at close range. That appellant, as a member of the attacking party, fully aided and acted with George and Si in their deadly assault on Boots, seems fully proved.

[4] From our view of the matter just disposed of, it would necessarily follow that the trial court committed no error in refusing to charge the law of suspended sentence. There can be no suspended sentence following a murder conviction.

[5] Error is assigned because of the failure of the trial court to charge on self-defense, but this and other errors complained of in the charge may be disposed of by the state-

ment that no exception was taken to the charge of the court below as to any of these matters. We cannot agree with the contention that the evidence does not support the verdict. There seems no question that the parties, one of whom was appellant, were armed and after deceased, who was killed by them. The jury have passed on the evidence, and their finding has ample support.

The judgment will be affirmed.

On Motion for Rehearing.

In his motion for rehearing, appellant contends that the trial court should have charged on manslaughter. As we understand the record, the case was tried entirely upon the theory of principals, and that appellant was acting with his brothers throughout the transaction; he having a shotgun, and they a rifle and pistol, respectively. There is no sort of claim that the brothers of appellant acted in self-defense, or that there is any evidence raising manslaughter as to either of them; nor do we think that there is any evidence seriously questioning the fact that deceased was killed by being shot by one or the other of the brothers of appellant.

[8] Laying aside the overwhelming testimony of the state, that appellant was present during all of the shooting, and acting with his brothers—shooting into the house with his shotgun, as they fired into it with their rifle and pistol, forgetting that appellant had the only shotgun on the outside of the house on that fatal night, and that two 12-gauge shotgun shells were picked up, lying just east of the house, and others just north of it, and that the witnesses who went out and examined the premises immediately afterwards said there were two large holes through a door in said house, that seemed to have been made by a shotgun, and that from their experience such holes could not have been made with a shotgun when fired from a distance of more than fifteen or twenty feet—leaving this mass of testimony out of consideration, and looking at the case alone from the standpoint of the testimony of the appellant, and such testimony as is undisputed, in order to determine the issues raised, we find that he testified that he went with his brothers and father that afternoon, knowing that they were going out to get Boots Grissom, who was the deceased; that, when they got within a short distance of the house, his brothers Si and George, with their arms, got out of the buggy, and walked up a ravine or slough; and that presently and at a time when he was about 300 yards from the house, he heard the shooting, and went loping up there on a horse. He says it was dark at that time, and that when he got up there he could not see any one, and he asked what was the matter, and "somebody" shot him in the hand, arm, and side, and that he whirled; that his father had come

up with the buggy, and he ran out to the buggy and got a shotgun, and put it on his knee, and shot back towards the house. He stated that he was about as far from the house when he fired as "to the back of this place," and it was agreed that this was about 75 feet. Asked why he shot, appellant stated that he shot to let them know he had a gun. He also said that, when he got to the house, the firing was from the opposite side. He did not claim anywhere that deceased shot him, nor that he shot deceased, nor that he shot in self-defense, nor for any other purpose except as stated by him, to let them know he had a gun. He said he did not see any one when he shot, and did not aim at any one. His gun was loaded with No. 4 shot. Old man Simon Grissom, father of appellant, testified as a witness for him, and said that, when he got in the house after the shooting was over, he found deceased lying under a bed behind a barricade of pillows and plank. The testimony shows that deceased had been shot through the right thigh, the ball shattering the bone and going through the left leg also. It seems so incredible that a shotgun, loaded with No. 4 shot, fired at a distance of 75 feet from the wall of a building, could penetrate that wall and inflict such a wound upon the deceased as that which killed him, that no one could believe but that the fatal shot was fired by others than appellant, provided his story upon which manslaughter is sought to be predicated was true. Not one of the witnesses who examined the premises after the shooting said there was a single shot hole of any character from the inside going out through the walls. Under his own testimony, and that of the other witnesses, the most that appellant could claim would be, on his part, that he was not acting as a principal with them, and was not guilty of any offense at all. Of course, under the mass of testimony offered by the state, showing that appellant was present and participating in all of the shooting, it was claimed by the state that he was guilty as a principal; and the case was tried, and the jury instructed, upon that theory. Special charges on manslaughter and suspended sentence were asked; but, looking to the same, we nowhere find any statement as to when they were presented to the court, and in this condition of the record, acting upon the presumption that the trial court followed the law, we will have to uphold his action in refusing said charges, for the reason that the same came too late, if for no other reason.

Believing that the issues raised by the testimony were all comprehended within the charge on principals, and that no charge on manslaughter was demanded, and regretting our inability to agree with able counsel for appellant, the motion for rehearing is overruled.

HOUSER v. STATE. (No. 5807.)

(Court of Criminal Appeals of Texas. May 5, 1920. Rehearing Denied June 9, 1920.)

1. Witnesses \S 249 — Volunteered statement by witness that he thought defendant was automobile thief improper.

In prosecution for theft of automobile, statement, volunteered by a witness, after testifying that when he saw defendant and another driving the car he spoke to defendant, who nodded, that he thought he would stop defendant, as he was certain defendant was an automobile thief, *held* improper.

2. Criminal law \S 1170½(6) — Volunteered statement of witness directed not to be considered was harmless.

In prosecution for theft of automobile, where the trial court instructed not to consider a witness' volunteered statement that when he saw defendant in the car he thought he would stop him, as he was certain he was an automobile thief, such statement did not constitute reversible error.

3. Witnesses \S 248(2) — Answer of witness that he remembered dates because he knew lawyers would frame up alibi improper.

In prosecution for theft of automobile, answer of a witness, to the question of defendant's counsel as to how he came to recollect dates, that it was because he knew "you lawyers would have an alibi framed up for him, and I fixed for it," *held* improper as unresponsive.

4. Criminal law \S 1170½(6)—Unresponsive answer of witness harmless to defendant in view of instructions.

In prosecution for theft of automobile, unresponsive answer of witness to question as to how he came to recollect dates that it was because he knew defendant's lawyers would have an alibi framed up for him, so that he fixed for it, *held* harmless to defendant, and not reversible error, in view of court's instruction not to consider it.

5. Criminal law \S 695(2)—General objection to evidence properly overruled.

Where the trial court could not know what were the grounds of objection by defendant to a statement made by a witness, general objection thereto was properly overruled.

6. Criminal law \S 1091(10)—Grounds of objection to evidence should be stated in bill of exceptions.

The grounds of an objection to evidence should be stated in a bill of exceptions to its admission, in order to present error for review.

7. Witnesses \S 270(2) — Cross-examination of witness improper as irrelevant.

In prosecution for theft of automobile, question to a witness on cross-examination whether he swore defendant stole the car, and answer that the witness believed defendant stole it, but would not swear to it, *held* improper, as not shedding light on the issues.

8. Criminal law \S 1137(5)—Error in answer on cross-examination invited by query.

In prosecution for theft of automobile, where defendant asked a witness on cross-examination whether he swore defendant stole the car, he thereby invited the error in the witness' answer in the negative, but that he believed defendant stole it.

Appeal from Criminal District Court, Tarrant County; Geo. E. Hosey, Judge.

Charley Houser was convicted of theft of an automobile, and he appeals. Affirmed.

Mays & Mays, of Ft. Worth, for appellant.
Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted in the criminal district court of Tarrant county, for theft of an automobile, and his punishment fixed at two years' confinement in the penitentiary.

It appears from the record that a man named Baker parked a new Ford car near a movie playhouse, in the city of Ft. Worth, about 8 o'clock one night, and that shortly thereafter the same was taken. About 9 or 9:30 o'clock on said night Harry Hamilton, a detective in the office of the criminal district attorney, saw appellant and another party in possession of the car, driving out of the city of Ft. Worth, and in the direction of the home of appellant, who lived in Wise county. Mr. Hamilton recognized appellant, and started after him; and when opposite the car Hamilton spoke to appellant, and then drove on ahead, intending to stop and wait at some convenient place until appellant should come up, but appellant ran the car near the curb, and both parties therein hurriedly alighted and went down an alley. Mr. Hamilton carried the car to the police station, where it was turned over to Mr. Baker, the owner, some time about 11 or 12 o'clock that night. A few days later appellant was arrested, and charged with the theft. Upon his trial, his defense was an alibi, and his grandmother and his sister testified to the effect that he was not in Ft. Worth, but was in Wise county, on the night of the theft. The state introduced other witnesses, who testified to seeing appellant in Ft. Worth on the same night the automobile was taken.

[1, 2] Several bills of exceptions were reserved to the testimony of Mr. Hamilton. In the first of these, complaint is made of statements appearing in Mr. Hamilton's narration of the facts leading up to the recovery of the car. This witness stated that when he saw appellant and the other party driving the car, he spoke to appellant, who nodded, and witness then volunteered the statement that he thought he would stop him (meaning appellant), as he was certain he was an automobile thief. Appellant promptly ob-

jected to the last statement; and the court at once sustained the objection, and instructed the jury not to consider what this witness had said about thinking appellant to be an automobile thief. The statement made by the witness was not proper, but as the trial court sustained the objection, and instructed the jury not to consider it, we are unable to see what else could have been done, and do not think the matter presents reversible error.

[3, 4] By another bill, complaint is made of various matters, the only one worthy of consideration being the objection to a statement by Mr. Hamilton, who was asked upon cross-examination by appellant's attorney what day it was that he saw appellant in possession of said car, to which he replied that it was on a Thursday. Thereupon, appellant's counsel asked him how he came to recollect these dates, and the witness replied, "Because I knew you lawyers would have an alibi framed up for him, and I fixed for it." Counsel for appellant objected to this statement, and reserved his bill of exceptions. Looking to the qualification upon said bill, we find that the trial court states that he promptly instructed the jury not to consider the said answer. This answer was manifestly improper, and not in response to the question; but, as it was not the statement of any fact harmful to appellant, and as the court instructed the jury not to consider it, we do not think it such error as to necessitate a reversal of the case.

[5, 6] Appellant's bill of exceptions No. 3 contains his objection to a statement made by the witness Hamilton as to what occurred at the police station, when he went to report the finding of said car. No ground of objection is stated in this bill, and it is clear that the trial court could not know what the grounds of the objection were, and therefore properly overruled the general objection. The grounds of an objection should be stated in a bill of exceptions, in order to present error for review.

Appellant's fourth bill of exceptions is substantially the same as his second bill, which is above disposed of.

[7, 8] Bill of exceptions No. 5 complains that while counsel for appellant was cross-examining witness Hamilton, this question was asked by him, "Do you swear defendant stole that car?" to which the witness answered, "No; I believe he stole it, but would not swear to it." Appellant asked the court to instruct the jury not to consider said statement. In our opinion the character of the cross-examination was manifestly improper. Neither the question nor its answer shed any legitimate light upon the issues before the court and jury, but the knowledge of the theft called for by the question is so closely akin to the belief thereof given in the answer that we think, if any error appeared, it would

be held invited by the character of the query. Finding no reversible error in this record, the judgment of the trial court is affirmed.

HIGGINS v. STATE. (No. 5824.)

(Court of Criminal Appeals of Texas. May 26, 1920.)

1. Criminal law \S 1159(2)—Rape \S 57(1)—Evidence held to justify submission to jury; appellate court will uphold verdict.

In a prosecution for rape of a daughter under 18 years of age, held, that it was the duty of the trial court to submit the case to the jury, and the duty of the appellate court, so far as the question of sufficiency of evidence was concerned, to uphold the verdict.

2. Criminal law \S 369(1)—Proof of separate criminal act admissible to controvert defensive theory.

Proof of a separate and distinct criminal act similar to that involved in the prosecution sometimes becomes admissible in evidence to controvert some defensive theory advanced by the accused, but such evidence is to be received only when brought clearly within some defined exception to the rule excluding it.

3. Criminal law \S 369(8)—Distinct separate offense inadmissible in rape case.

In a prosecution for rape on July 2d, evidence that defendant made an indecent assault upon another female on September 7th was not admissible as rebuttal of defendant's evidence that upon July 2d he was suffering with ailments which rendered it improbable that he would have a desire to commit such an offense; there being no evidence to show that such ailment continued until September 7th.

Appeal from District Court, Hall County; J. A. Nabers, Judge.

J. R. Higgins was convicted for rape, and appeals. Reversed.

A. T. Cole, of Clarendon, and R. H. Templeton, of Wellington, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. The conviction is for rape, with punishment fixed at confinement in the penitentiary for 15 years.

[1] The subject of the rape was the daughter of appellant, under 18 years of age. At the time of the trial, she and her younger sister were married women. The prosecutrix testified to the act of intercourse, claiming that it took place on the 2d day of July, while she and her sister were in bed together. She claimed to have been unwilling, and to have made some resistance. The conviction, however, is upon the theory of her consent. The sufficiency of the evidence is assailed, the circumstances, including a

motive for fabrication on the part of the prosecutrix and her sister and the denial of the act by the appellant, are pointed out. We deem it unnecessary to discuss the facts further than to say that the definite testimony of the prosecutrix to the offense is not overcome, as a matter of law. It was the duty of the trial court to submit the issue to the jury, and the duty of this court under the facts, so far as the question of the sufficiency of the evidence is concerned, to uphold it.

[2, 3] The state introduced, over the objection of the appellant, the evidence of the sister of the prosecutrix that on the 7th day of September, following the alleged offense, the appellant made an indecent assault upon her. The state attempts to justify the admission of this evidence upon the theory that it was the proper rebuttal of evidence introduced by the appellant showing his physical condition. The evidence of his physical condition was that of the doctor, who testified that he had examined the appellant shortly before the 2d of July, and that at that time he was suffering from certain ailments which rendered it not impossible, but improbable, that he would have a desire for sexual intercourse. As we understand the record, the ailments of which he was complaining were not of a permanent nature. The doctor had made no further examination of them prior to the date upon which the assault upon the sister of the prosecutrix was made. There is evidence that in the meantime his physical condition had improved; in fact, the record, as we view it, rather negatives the idea that his condition upon the 7th day of September was similar to that described by the evidence as existing on the 2d day of July, at the time the offense charged was committed. It sometimes happens that proof of a separate and distinct criminal act similar to that involved in the prosecution becomes admissible in evidence to controvert some defensive theory advanced by the accused. Wharton's Crim. Evidence, vol. 1, § 41. In the instant case this principle might be invoked in support of the ruling of the court if at the time of the subsequent act the conditions existing at the time of the commission of the offense prevailed. Since, however, according to the evidence such maladies as were claimed to have reduced the appellant's vitality to a degree which rendered it improbable that he was in a physical condition on the 2d of July to have committed the offense were not shown to have continued during the two months intervening before the time of the subsequent alleged assault upon another party, we think the evidence was not relevant, and that its admission was error. The harmful nature of the proof of other offenses is recognized

(see Underhill on Crim. Evidence, § 87), and such evidence is to be received only when brought clearly within some defined exception to the rule excluding it.

This condition is not met in the instant case, and we regard the error committed and pointed out as harmful to a degree that requires a reversal of the judgment, which is ordered.

Ex parte YOUNG. (No. 5818.)

(Court of Criminal Appeals of Texas. May 5, 1920. On Motion for Rehearing, May 26, 1920.)

1. Criminal law \S 1158(2)—On appeal from denial of bail, evidence will not be stated in detail.

On appeal from an order denying bail to one charged with murder, the court will not make a detailed statement and analysis of the evidence.

2. Criminal law \S 1158(2)—On appeal from denial of bail the question is whether verdict of guilty would probably be rendered.

On appeal from an order denying bail to one charged with murder, the question is not whether the Court of Criminal Appeals would sustain a verdict inflicting capital punishment, but whether, in the opinion of such court a jury, in due administration of the law, would probably convict and inflict capital punishment.

3. Bail \S 49—Evidence held not to sustain refusal of bail.

Refusal of bail to one charged with murder of his sister-in-law held not warranted by evidence.

4. Bail \S 49—Conflict in evidence not conclusive of right to bail.

In deciding whether one charged with murder is entitled to bail, that the evidence is conflicting is not conclusive of the right to bail.

Appeal from District Court, Montgomery County; D. F. Singleton, Judge.

Floyd Young was charged with murder and applied for bail. From an order denying bail, he appeals. Reversed and bail allowed.

See, also, 219 S. W. 1102.

C. W. Nugent, of Galveston, for appellant. Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. [1, 2] This is an appeal from the order of the district judge denying bail. Appellant was charged with the murder of Bertha Snooks, a girl about 18 years of age. The evidence discloses that while sitting in the kitchen at her father's home she was shot and killed, her assailant using a shotgun loaded with buckshot. The state relies upon circumstances to identify the appellant as the assassin. We refrain from mak-

ing a detailed statement and analysis of the evidence, such being the practice in cases of this character. *Sharp v. State*, 1 Tex. App. 290; *Ex parte Day*, 8 Tex. App. 328; *Ex parte Sperger*, 62 Tex. Cr. R. 133, 137 S. W. 351. The question is not whether this court would sustain a verdict of a jury inflicting capital punishment, but whether in the opinion of this court a jury, in due administration of the law, would probably convict and inflict capital punishment. *Ex parte Smith*, 23 Tex. App. 100, 5 S. W. 101; *Ex parte Russell*, 71 Tex. Cr. R. 377, 160 S. W. 76.

[3] The deceased was the daughter of George Snooks. She had several sisters, one of whom was the wife of appellant. The members of the family were farmers, and lived in the same neighborhood, the home of appellant being about a quarter of a mile from that of the father of the deceased. The mother of appellant resided some five miles distant from him, and in traveling from her home to his own he would pass along the road near the home of deceased. At the time the homicide occurred, there was on the premises of the father of deceased a large shallow pond, caused apparently by heavy rains and insufficient drainage. This pond was between the home of appellant and the road mentioned. It was the state's theory that the appellant, after spending a part of the day at the home of his mother, left late in the evening, traveling on horseback on the road mentioned, reached the premises of the father of deceased after dark, hitched his horse to a fence some short distance from the road, waded across the pond and across a potato patch to the house, and, standing near the door, fired the fatal shot, using a 12-gauge shotgun loaded with buckshot; that he returned by the same road, mounted his horse, and rode to his home, depositing the shoes which he was wearing at the time in the pond as he returned to his horse. It was shown that appellant a short time before the homicide had purchased two buckshot shells, 12-gauge, and it was also shown that after the homicide the sheriff found at the house of appellant two such shells undischarged. He owned, and had in his house when it was searched by the sheriff shortly after the homicide, a 12-gauge shotgun, but this, according to the testimony of the sheriff, which was not disputed, had not been recently fired. Some three weeks prior to the homicide he had bought a single-barrel 12-gauge shotgun, and the next day after he bought it told the dealer he had sold it to a negro. The whereabouts of this gun at the time of the homicide was not otherwise shown. From the pond to the house, and from the house to the pond, tracks were plainly visible, they having been made by a woman's shoe with certain peculiarities, and after the homicide a pair of such shoes were found in the pond, with circumstances indicating that they had been recently deposited there. There was

evidence that the shoes mentioned belonged to the wife of appellant, and had been seen at his house before the homicide. This fact was strongly controverted by the appellant, his wife, and several other witnesses. There was also a controversy and conflict of evidence as to whether the foot of appellant was of a size that would permit him to wear the shoes. There were tracks indicating that a horse had been hitched near the pond, and there were tracks near this horse, made by a person wearing heavy boots. The tracks were imperfect, and not otherwise identified. The appellant's boots and perhaps his pants were wet. This was accounted for from the appellant's standpoint by proof that the weather was rainy, that he had been working in his mother's potato patch in the rain, and had driven his wagon into a pond at her house in order to clean it out for use in hauling cotton, and in so doing had gone to a depth that wet his clothes. There was testimony that tracks made by one of the horses driven by appellant to his buggy at the funeral of the deceased were similar to the tracks of the horse which were traced to the home of appellant on the morning after the homicide. There was much room for controversy from the circumstances touching the identity of the horse making the tracks. The peculiarity was not shown to have been marked or uncommon, nor was the foot of appellant's horse examined to determine its presence thereon.

The shot was fired near 8 o'clock in the evening, there being some conflict as to the exact time. The appellant sought to show by witnesses who were with him on his way home from his mother's house that he must have reached home before the shot was fired. His wife testified at the time it was fired he was milking the cows at his home.

The deceased, some two years before her death and while living at appellant's house, had given birth to an illegitimate child. It was the state's theory that appellant was its father, and the motive for the crime was resentment because of the unwillingness of the deceased to continue illicit relations with him. The appellant and his wife took the child to Houston to an infirmary, from which it was placed with persons to raise. The mother of deceased, and some of deceased's sisters, testified that she had told them that the child was that of appellant. Against this it was proved that she had sworn in the grand jury that another person was the parent of the child, and had also made a similar statement to others. Anonymous letters found among the effects of the deceased, seeking to arrange a clandestine meeting, and threatening violence upon refusal, were introduced, and the opinion of witnesses pro and con taken as to the identity of the handwriting with that of appellant; an irrecon-

cilable conflict being developed. Two of the sisters of the deceased had given birth to illegitimate children, with which it was made plain that appellant was not connected. He had taken some interest in aiding these women, and one of them had received some money from him. There was evidence negating any secret association with the deceased by the appellant during the 2 years intervening between the birth of her child and her death, and during this time the relations between the appellant and the members of the family of deceased were friendly, and visits were exchanged.

[4] This is a summary of the evidence upon which we reach the conclusion that we cannot approve the judgment of the trial judge refusing appellant bail. While the fact that the evidence is conflicting is not conclusive of the right to bail (*Smith v. State*, 23 Tex. App. 357, 5 S. W. 219, 59 Am. Rep. 773; *Ex parte Jones*, 31 Tex. Cr. R. 422, 20 S. W. 983) in deciding the question involved in this character of proceeding, a consideration of the nature of the evidence for both the state and the accused cannot be overlooked. Assuming that the facts proved on behalf of the state would be sufficient to support the verdict of the jury assessing capital punishment, such verdict would be supported by the judgment of the jury touching the credibility of the witnesses, and the weight to be given their testimony. So supported on appeal, the truth of the criminating facts relied on by the state would stand established, and the issues dependent upon conflicting evidence resolved against the accused. The office of this court on appeal would be to determine whether the established facts justify the conclusion of guilt, and authorize the punishment assessed when measured by the rules applicable to circumstantial evidence. As the matter is now presented, the truth of practically all of the criminating facts is controverted, and to hold the proof evident it would be necessary for this court to determine these conflicts against the appellant, and to draw the conclusion that a jury, in the due administration of justice, would probably convict the appellant of a capital crime and assess the punishment accordingly. In our opinion, under the facts of this case, it is the right of the appellant to have bail pending the decision by a jury which of the conflicting facts are established, and whether inference of guilt would be drawn from them. Analogous cases, we think, are numerous, among them *Ex parte Boyett*, 19 Tex. App. 17; *Ex parte Catney*, 17 Tex. App. 332; *Ex parte Coldiron*, 15 Tex. App. 464; *Ex parte Duncan*, 27 Tex. App. 485, 11 S. W. 442; *In re Foulk*, 13 S. W. 746; *Ex parte Gallaher*, 25 Tex. App. 455, 8 S. W. 481; *Ex parte Gilstrap*, 14 Tex. App. 240; *Ex parte Jones*, 26 Tex.

App. 597, 10 S. W. 114; *Ex parte Locklin*, 72 S. W. 585; *Ex parte Pace*, 16 Tex. App. 541; *Ex parte Smith*, 26 Tex. App. 136, 9 S. W. 359.

The judgment is reversed, and bail allowed in the sum of \$10,000.

On Motion for Rehearing.

PER CURIAM. On a former day of this term the judgment of the district court of Montgomery county denying appellant bail was reversed, and bail granted in the sum of \$10,000. Appellant has filed a motion for rehearing herein, requesting that same be granted to the extent of reducing said bail to the sum of \$5,000, for the reason that it is impossible for the appellant to make bail in so large a sum, and that same is excessive.

Upon a careful review of the evidence, in connection with appellant's motion for rehearing, we have reached the conclusion that the amount of appellant's bail should be reduced, and his bond fixed in the sum of \$5,000. To this extent the rehearing is granted with instructions that upon his execution of the proper bond in said sum he shall be discharged as provided by law.

HOOVER v. STATE. (No. 5743.)

(Court of Criminal Appeals of Texas. May 19, 1920.)

1. Homicide §268—Wooden club held not per se "deadly weapon."

In a prosecution for murder, where the weapon used was a wooden stick about three feet long, three inches in diameter at one end, and tapering to two inches at the other end, such club was not per se a "deadly weapon."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Deadly Weapon.]

2. Homicide §290—Instruction as to use of wooden stick as deadly weapon held erroneously refused.

In prosecution for murder, where deceased was killed with one blow of a wooden club, which was not per se a deadly weapon, it was error to refuse to instruct affirmatively that unless the jury found that in the manner used the stick was a deadly weapon, conviction should not be returned unless the jury believed beyond a reasonable doubt that at the time the blow was struck defendant had the specific intent to kill deceased, in view of evidence that only one blow was struck, and that defendant did not intend to kill.

Appeal from District Court, Comanche County; J. H. Arnold, Judge.

John Hoover was convicted of murder, and he appeals. Reversed.

Hampton, Harris & Hampton, of De Leon, and George L. Sullivan and Goodson & Nabors, all of Comanche, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. The appeal is from a sentence of confinement in the penitentiary for six years for the offense of murder. The deceased was a supervisor of the construction of a "tank farm" in one of the oil districts, the construction work being done by employes of independent contractors. Appellant and his father had been such employes, and on Saturday preceding the homicide on Tuesday an altercation took place on the premises. In this altercation insulting epithets were exchanged between the deceased and the appellant; some blows were struck, the deceased obtaining and exhibiting a pistol, and ordering the appellant to leave and to refrain from coming back on the premises, also ordering appellant's father to cause this to be done. There were mutual threats made at the time, and evidence of their repetition later, those of the deceased being communicated to the appellant. Evidence pro and con touching the disposition and reputation of the deceased as a man of violence was introduced. There was also evidence that appellant had been informed after the difficulty on Saturday that the deceased was armed. The immediate scene of the homicide was at the depot of the village, near which was situated a restaurant belonging to the father of appellant, and a store kept by a witness named Barnes. Appellant testified that he had business at the depot, and while standing there the deceased passed, brushing the arm of the appellant, and then called for the railroad agent. The appellant then walked to the restaurant, and picked up a stick, which was used for packing ice in an ice cream freezer. Taking the stick to the depot for the purpose of protection, he laid it down on the ground. On his return the deceased was not observed by him, and he entered into conversation with others, and while so engaged this occurred:

"I looked up at the door, and Mr. Breen was standing in the door like, looking right down at me with his hand in his side pocket, and I looked back down again, and about that time he came out the door, and as he came out I grabbed the stick, and as he stepped on the engine, I hit him. The reason I hit him was because I thought he was going to shoot me. Just as Mr. Breen stepped on the engine he caught it with both hands, and then he dropped his right hand; and was sorter turning toward me, and just as he turned I hit him up above the ear somewhere. I did not intend to kill him, but hit him to keep him from getting his gun and shooting me. When I hit him he fell off the engine to the ground, and I threw the stick away and caught hold of his hands. I didn't know how badly he was hurt,

and thought he might shoot me. When I found he was badly hurt I laid his hands down."

There were several eyewitnesses introduced by the state, one of them measurably corroborating the appellant's theory of a demonstration by the deceased. Most of them, however, exclude by their testimony this theory. The court in its charge took cognizance of the evidence raising the issues of murder, manslaughter, and self-defense based upon a demonstration following communicated threats.

In his instruction to the jury, the court embodied a part of article 1147, P. C., as follows:

"If the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless, from the manner in which it was used, such intention evidently appears."

[1] The homicide resulted from one blow upon the head of deceased, struck by the appellant, using a wooden stick about three feet long, three inches in diameter at one end, and tapering to two inches at the other end, somewhat in the shape of a baseball bat. The weight of the stick is not given. Under numerous expressions of the opinions of this court, the stick in question was not per se a deadly weapon. Among these are *Crow v. State*, 55 Tex. Cr. R. 202, 116 S. W. 52, 21 L. R. A. (N. S.) 497, in which the instrument was a baseball bat. Others in which sticks of wood of varying sizes were used will be found in *Wilson v. State*, 15 Tex. App. 155; *Washington v. State*, 53 Tex. Cr. R. 483, 110 S. W. 751, 126 Am. St. Rep. 800; *Boyd v. State*, 28 Tex. App. 137, 12 S. W. 737; *Fitch v. State*, 37 Tex. Cr. R. 502, 36 S. W. 584; *Shaw v. State*, 34 Tex. Cr. R. 442, 31 S. W. 361; *Hamilton v. State*, 60 Tex. Cr. R. 258, 131 S. W. 1127. Similar rulings with reference to other instruments used as a bludgeon will be found in *Honeywell v. State*, 40 Tex. Cr. R. 189, 49 S. W. 586; *Danforth v. State*, 44 Tex. Cr. R. 111, 69 S. W. 159; *Skidmore v. State*, 43 Tex. 93; *Peacock v. State*, 52 Tex. Cr. R. 435, 107 S. W. 346. The fact that death results from the use of the weapon does not change the rule stated as to its character. The trial court, in recognition of the application of this rule to the instant case, gave the charge mentioned. Appellant insists, however, that there was a fatal omission in the charge in its failure to instruct the jury affirmatively that, unless they found that in the manner used the stick was a deadly weapon, a conviction of murder could not result unless the jury believed beyond a reasonable doubt that at the time the blow was struck he had the specific intent to kill the deceased. This view was presented in several special charges, which were refused, and represents the converse of the proposition that was submitted. Article 1149, P. C., provides that where a homicide occurs under

the influence of sudden passion, but by the use of means not in their nature calculated to produce death, the person killing is not guilty of a homicide unless it appears that there was an intention to kill, but the party from whose act the death resulted can be convicted for any grade of assault and battery. Speaking on this subject, Presiding Judge White, in the case of *Hill v. State*, 11 Tex. App. 456, in which the same point was involved, said in substance:

"The otherwise admirable charge * * * did not submit the alternative proposition presented in article 614 [now 1149] as to the law where there was no intention to kill. * * * From a careful investigation of all the facts as they are stated in the record, we are of opinion that defendant was entitled to have this view of the law submitted to the jury in a plain, pointed and affirmative manner. If she was not actuated by an intention to kill, * * * then the killing could not be murder."

In instances in which under the evidence the instrument used in producing the homicide was not a deadly weapon, or in which there was an issue upon that point, this court, with marked uniformity, has held that upon appellant's request his theory of an absence of intent to kill should be put before the jury in a manner clearly informing them as to the law. *Washington v. State*, 53 Tex. Cr. R. 483, 110 S. W. 751, 126 Am. St. Rep. 800; *Crow v. State*, 55 Tex. Cr. R. 203, 116 S. W. 52, 21 L. R. A. (N. S.) 497; *Merka v. State*, 82 Tex. Cr. R. 569, 199 S. W. 1123; *Branch's Crim. Law of Texas*, § 434, cases listed therein.

[2] In the instant case the proof was undisputed that the instrument used was a stick, and that but one blow was struck. The appellant testified that he did not intend to kill, and we think the evidence was such that the court was not warranted in refusing to instruct the jury in an affirmative way upon this theory of the appellant's.

The omission in the charge, which we have pointed out, requires a reversal of the judgment, which is ordered.

SCHELLENGER v. STATE. (No. 5650.)

(Court of Criminal Appeals of Texas. May 26, 1920.)

War §4—Disloyalty Act unconstitutional.

The disloyalty Act passed by the fourth called session of the Thirty-Fifth Legislature (Acts 1918, c. 8) is invalid.

Appeal from District Court, Cherokee County; L. D. Guinn, Judge.

C. L. Schellenger was convicted under the Disloyalty Act, and appeals. Reversed, and prosecution dismissed.

Israel Dreeben, of Dallas, for appellant.
Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. In this case appellant was convicted under what is known as the Disloyalty Act, passed by the fourth called session of the Thirty-Fifth Legislature (chapter 8), and his punishment fixed at confinement in the penitentiary for a term of two years. It is not necessary to go into an extended statement of the facts in this case, or a discussion of the law relative thereto. In the case of *Ex parte Ben. F. Meckel*, reported in 220 S. W. 81, this court held the law under which this conviction was had invalid, and we have not had any occasion since to change our views regarding same.

The judgment of the lower court will be reversed, and the prosecution will be dismissed.

BRIGGS et al. v. STATE. (No. 5803.)

(Court of Criminal Appeals of Texas. April 21, 1920. On Motion for Rehearing, June 9, 1920.)

1. Judgment §143(2), 145(2)—Excuse for surety's failure to answer proceeding on forfeited bail bond must be shown on motion for rehearing or new trial.

On a surety's motion for rehearing or new trial after default judgment in the state's proceeding on a forfeited bail bond, a sufficient excuse must be shown by the surety for his failure to answer, as well as a further showing that he has a meritorious defense.

2. Judgment §143(2)—Default judgment will not be set aside in absence of fraud, accident, or other cause.

In the absence of some showing of fraud, accident, or unavoidable cause, a default judgment of a court of competent jurisdiction will not be set aside.

3. Appeal and error §957(1)—No relief from default on bail bond unless discretion in denying rehearing abused.

To obtain relief at the hands of the Court of Criminal Appeals from the trial court's refusal to grant motion of surety on a bail bond for rehearing or new trial after default judgment against him, it must be affirmatively shown that the discretion of the trial court has been abused.

On Motion for Rehearing.

4. Bail §58 — Bond stating defendant was charged with unlawfully keeping intoxicating liquor, a felony, sufficient.

Under Vernon's Ann. Code Cr. Proc. 1916, art. 321, bail bond describing the offense with which the principal was charged as "unlawfully keeping intoxicating liquor in violation of law, a felony," held sufficient in the description,

all that is necessary being to state that defendant is charged with a felony or misdemeanor; the remainder of the descriptive language used in the bond might be treated as surplusage.

Appeal from Criminal District Court, Tarrant County; George E. Hosey, Judge.

Action on a forfeited bail bond by the state of Texas against M. D. Briggs and others. From judgment for the state, defendants appeal. Affirmed.

Sam S. Beene, of Ft. Worth, for appellants.
Jesse M. Brown, Cr. Dist. Atty., of Ft. Worth, and Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. This is an appeal from a final judgment upon a forfeited bail bond, had in the criminal district court of Tarrant county.

M. D. Briggs was charged by indictment in said court with a felony, and upon his arrest he executed a bail bond, in the usual form, giving one Arnold Guertler and one Frank Thomas as sureties. Thereafter, upon the call of the case, Briggs made default, and judgment nisi was entered against him and his sureties in May, 1919, and citations duly issued for the parties defendant in said proceeding. Thereafter, no answer having been filed, in October, 1919, a final judgment was entered against said parties. On December 23d a motion for rehearing, or new trial, was filed by the appellant Guertler, in which he sets up the fact that immediately after service of said citation he employed an attorney to represent him in said matter, and that he was not aware until December 12, 1919, nearly 30 days after the rendition thereof, that a final judgment had been entered against him, and that said attorney had failed to file an answer, or in any way to present his defenses. It is also alleged in said motion that Mr. Guertler has a meritorious defense, which he would have made had his said attorney not failed, etc., as aforesaid.

[1] It is the rule in such cases that a sufficient excuse must be shown for failure to answer, as well as the further showing that the party sought to be charged has a meritorious defense. We find nothing in the record which suggests any sort of an excuse or reason why the attorney employed by Mr. Guertler did not file an answer. Said attorney did not testify with regard to the matter, nor did Mr. Guertler assign any reason in his testimony for the failure on the part of such attorney.

[2] However much we may regret it, we have no right to override the authorities in such case, which seem to agree that, in the absence of some showing of fraud, accident, or unavoidable cause, a default judgment of a court of competent jurisdiction will not be set aside. *Martin v. Clements* (Civ. App.) 193 S. W. 437; *Miller v. First State Bank et al.*

(Civ. App.) 184 S. W. 614; *Hester v. Baskin* (Civ. App.) 184 S. W. 726.

[3] In order to obtain relief at our hands, it must be affirmatively shown that the discretion of the trial court in these matters has been abused. *Boyd v. Urrutia* (Civ. App.) 195 S. W. 341; *Giles v. State*, 68 Tex. Cr. R. 612, 151 S. W. 1043.

We have examined the various defenses which appellant alleges he would have made if permitted. We think none of them very meritorious, and that the trial court did not abuse his discretion in this proceeding.

Finding no error in the record, the judgment is affirmed.

On Motion for Rehearing.

Appellant Guertler has filed a motion for rehearing, urging that we erred in holding that no sufficient excuse was shown for his failure to file his answer in the trial court prior to the taking of a final judgment upon the forfeited bond. The only excuse or reason suggested by the record for such failure was that an attorney whom appellant had employed failed to file any answer. It is not even attempted to be shown that said attorney was in any wise prevented or was unable to file such answer, or that he was misled; in fact, there is no effort on the part of appellant to account for the action of said attorney in any way. Under all the authorities cited in our original opinion, this is no showing why the trial court should have granted a new trial, and certainly is no showing why we should hold that in refusing a new trial the lower court was guilty of abusing the discretion confided by law in him. No authority is cited by appellant holding to the contrary, and none are known to the court.

[4] Complaint is also made that we should have held that the defenses which appellant would have made, if an answer had been filed, were meritorious. The only proposition advanced in support of this contention in his motion is that, inasmuch as the bail bond in question described the offense with which appellant's principal was charged, as "unlawfully keeping intoxicating liquor in violation of law, a felony" same was not a sufficient description, and the said bond was invalid. Appellant cites as his only authority the recent case of *Saunders v. State*, 216 S. W. 870. This case does not support appellant's position. The bond under discussion in that case did not state whether the principal therein was charged with a felony or misdemeanor, did not set out any offense known *eo nomine* to the law, nor did it set out the constituent elements of any offense known to our statutes, and hence it was correctly held to be insufficient. In the instant case it appears that the principal was charged, in terms as set out in the bail bond, with a felony; and under article 321, Vernon's C. C. P., it is a suffi-

cient description, and all that is necessary is to state that the accused is charged with a felony or a misdemeanor, as the case might be. The remainder of the descriptive language used in the bail bond in the instant case might be treated as surplusage.

Being unable to agree with any of the contentions made in this motion, the same will be overruled.

Ex parte ROSELLE. (No. 5827.)

(Court of Criminal Appeals of Texas. May 5, 1920. On Motion for Rehearing, June 9, 1920.)

1. Evidence \S 83(1)—Courts will take judicial notice that Lieutenant Governor was duly elected and had qualified.

The courts will take judicial notice that one who signed an extradition warrant as acting Governor was the duly elected and qualified Lieutenant Governor, and had the authority, and was required, in the absence of the Governor, to act as such.

2. Evidence \S 83(1)—Presumption of regularity of acts of acting Governor.

Where an extradition warrant was signed by the acting Governor and duly certified by the secretary of state, the presumption is in favor of the regularity of the acts of the acting Governor, and in the absence of showing to the contrary his acts will be upheld.

On Motion for Rehearing.

3. Habeas corpus \S 85(2)—One attacking validity of a warrant, regular on its face and signed by acting Governor, has burden of proof.

One attacking on habeas corpus a warrant for extradition, which is regular on its face, etc., has the burden of showing that the prima facie case of regularity was not in accordance with the facts.

4. Habeas corpus \S 30(2)—Jurat of justice of foreign state, affixed to affidavit, held not open to attack on account of technical defects.

Objection to the jurat of a justice of the peace affixed to the affidavit, a copy of which accompanied the Governor's extradition warrant, and which affidavit was certified as authentic by the Governor of the demanding state, on the ground that it did not state the number of the justice's precinct, will not be considered in habeas corpus proceedings, where there was nothing to show that in the demanding state a complaint sworn to before a justice of the peace was void, unless he stated in his jurat the number of his precinct, for, even though there was a technical defect in the jurat, it might be amended.

5. Habeas corpus \S 30(2)—Fugitive not discharged because of substantial defects in state's pleadings under law of demanding state.

In habeas corpus proceedings a fugitive from justice arrested under an extradition warrant

will not be discharged because of substantial defects in the pleadings of the state, under the laws of the demanding state.

6. Extradition \S 36—Not necessary that there be a certified copy of complaint and indictment accompanying warrant.

In an extradition case, it is not necessary that there be a certified copy of the indictment or of the complaint accompanying the Governor's warrant.

7. Extradition \S 34—Where requisition shows affidavit in demanding state, and demand is made, requirements of law are met.

Where a requisition shows that an affidavit has been made against the accused in the demanding state, and that a demand has been made upon the Governor of the state of the forum, which certifies that the affidavit is authentic, the requirements of the law are met, and it is immaterial, on habeas corpus to secure the release of one held under an extradition warrant, that the prosecuting attorney of a county of the demanding state was allowed to testify that certain acts constitute an offense under the law of that state.

Appeal from Criminal District Court, Harris County; C. W. Robinson, Judge.

Application of P. L. Roselle for writ of habeas corpus. From a judgment remanding him to custody, he appeals. Affirmed.

Heldingsfelders, of Houston, for appellant. Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. This is an appeal from a judgment of the criminal district court of Harris county, remanding appellant to the custody of certain officers of that county, and directing that he be forthwith delivered to the extradition agent of the state of Wyoming.

[1, 2] On April 12, 1920, a warrant issued from the office of the Governor of Texas, duly reciting that appellant stood properly charged by affidavit with the offense of forgery in the state of Wyoming, and that demand had been made, in accordance with the laws of the United States and of this state, for the delivery of appellant to a named officer of said state of Wyoming, to be by him extradited. The application for the writ of habeas corpus seems to set up that appellant was detained without any warrant or due process of law, it being stated therein that he was held under a telegram from a Wyoming officer. The application was dated April 7, 1920. A hearing was had in the court below, and judgment rendered, remanding appellant on April 13, 1920, and the warrant above referred to seems to have been offered in evidence. We think the judgment of the trial court correct. Said warrant was signed by W. A. Johnson, acting Governor, and duly certified to by the secretary of

state. This court judicially knows that W. A. Johnson is the duly elected and qualified Lieutenant Governor of Texas, and that he has authority, and is required, in the absence or inability of the Governor, to act as Governor of the state. The presumption is in favor of the regularity of the acts of the said Johnson as acting Governor, and, in the absence of some showing to the contrary, such acts will be upheld.

The objections to the jurat to the complaint against appellant are not matters which we can consider.

The judgment of the trial court is affirmed.

On Motion for Rehearing.

[3] In a motion for rehearing it is insisted that we were in error in upholding the action of the lower court in remanding appellant to the custody of the officers, who held him under a warrant issued by W. A. Johnson, acting Governor of Texas, upon a requisition from the Governor of Wyoming. No authorities are cited intimating the incorrectness of our holding originally in this regard. The warrant is regular on its face, is signed by W. A. Johnson, acting Governor, is attested by the great seal of Texas, and the signature and seal of the secretary of state of Texas. The burden is on appellant to show that this prima facie case of regularity was not in accord with the facts, and such burden is not met by any showing in this case. We think the regularity of the acts of the acting Governor is to be presumed, in the absence of any affirmative attack and showing relative thereto. Ex parte Stanley, 25 Tex. App. 378, 8 S. W. 645, 8 Am. St. Rep. 440; Ex parte White, 39 Tex. Cr. R. 499, 48 S. W. 639; Ex parte Hancock, 75 Tex. Cr. R. 71, 170 S. W. 145.

[4, 5] The objection to the jurat of the justice of the peace, affixed to the affidavit, a copy of which accompanied the warrant of the Governor, and which affidavit is certified by the Governor of Wyoming as authentic, will not be considered by us. Said affidavit shows upon its face that it was made before one of the justices of the peace of Platte county, Wyo., and nothing appears on the part of appellant, or anywhere in the record, showing that in the state of Wyoming a complaint sworn to before a justice of the peace is void, unless the justice states in his jurat the number of his precinct, etc. If there be a technical defect in the jurat, the same might be amended. Cubine v. State, 68 Tex. Cr. R. 99, 151 S. W. 301; Sanders v. State, 52 Tex. Cr. R. 153, 105 S. W. 803; Flournoy v. State, 51 Tex. Cr. R. 29, 100 S. W. 151. This court will not discharge a fugitive from justice upon the ground even of substantial defects in the pleadings of the state under the law of the demanding state. Pearce v. Texas, 155 U. S. 311, 15 Sup. Ct. 116, 39 L.

had told her that morning about Mr. Burke as to the chain, and this conversation was by the defendant. The ex parte court is to tell somewhat further in view of an goes further in than was Briscoe should tion as to of getting impeach- l testi- Penal

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We are of opinion that the requirements of our statute are fully met in the instant case, and the motion for rehearing will be overruled.

BRISCOE v. STATE. (No. 5804.)

(Court of Criminal Appeals of Texas. May 19, 1920.)

1. Homicide §144, 158(3)—General threat by accused is inadmissible, and state has burden of showing that deceased was meant.

In a prosecution for murder, evidence that five hours before the killing accused made a threat to kill a man which was not shown to have referred to deceased was inadmissible, the nearness of time not being sufficient to render such threat admissible without other evidence that deceased was the man threatened, and the burden was on the state to show that deceased was meant or included.

2. Witnesses §269(7), 330(1)—Wife of accused cannot be cross-examined as to new matter.

The wife of accused cannot be cross-examined on new matter not relevant to matters brought out on direct examination, such as threats by accused, either for the purpose of impeachment or as original testimony.

3. Witnesses §389—Cannot be impeached by immaterial statements which he denies.

A witness cannot be impeached by proof of immaterial statements which he denied making.

4. Criminal law §404(4)—Clothing worn by deceased held admissible.

In a prosecution for homicide where the testimony by witnesses for the state and those for the defense were conflicting as to the attitude of the parties toward each other when shots were fired, it was not error to admit in

evidence clothing worn by deceased at the time of the shooting.

5. Criminal law §404(3)—Prosecutor can introduce knife accused claimed deceased attempted to use.

In a prosecution for homicide where accused claimed that he shot in self-defense when deceased was advancing on him with a knife, it was not error to admit the knife in evidence to show that it was in a badly crippled condition.

6. Homicide §187 — Prosecutor can show physical condition of deceased known to accused.

Where accused claimed self-defense against an attack by deceased, it was not error to show that deceased was 70 years of age, clumsy, and having defective eyesight, where accused had known deceased for 40 years and knew of his condition.

Appeal from District Court, Comanche County; J. H. Arnold, Judge.

Nathan Briscoe was convicted of murder, and he appeals. Reversed and remanded.

Callaway & Callaway, of Comanche, and Eldson & Eldson, of Hamilton, for appellant. Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. In this case appellant was charged with the murder of one Jesse Burke, and upon conviction his penalty was fixed at 50 years' confinement in the penitentiary.

Appellant and deceased were neighboring farmers. Deceased owned a binder, and, shortly before the homicide, claimed to have lost therefrom a chain. Some time prior to the killing, appellant was engaged in cutting his grain with a binder which belonged to a Mr. Lindsey and the brother of deceased. While so engaged, the parties broke a link in a similar chain. Not being able to further operate said machine, Mr. Lindsey asked appellant to go to the house of deceased and get from him a link with which to mend the broken chain. Appellant did so, and, according to the witness, returned with one link; but, in the meantime, the parties had broken another link, and could not further operate the machine. Witness Nelse Briscoe, who was assisting in said cutting, testified that he went that night on horseback down to the place of a Mr. Tunnell, and got some links, with which the chain was again repaired, and the cutting continued. When appellant returned from going after the link at the house of deceased, he reported that deceased was not there, but that he had gotten the link out of his tool box. Very soon thereafter deceased began claiming that some one had stolen a chain from his binder, and seems not only to have made that statement to several parties, but after hearing that appellant had been to his house and gotten a

link out of his tool box, deceased came and examined the chain on the Lindsey binder, and claimed that it was his, and stated that the person who got the link stole the chain. To some of the witnesses, deceased made a direct charge that appellant had stolen his chain. Appellant testified that, on the day before the homicide, he had a conversation with deceased, in which he was accused of stealing the chain. He said that he told deceased he was mistaken, and that he could prove it. He further said that he told deceased that he did get the one link, and that deceased then said, "Yes, and you got the chain too." Appellant further says that he explained to deceased how they fixed the chain, and told him that Nelse Briscoe got on his work horse and rode down to Doc Tunnell's in the night and got the links with which to fix it. He says that deceased asked him if he could prove that, and he told him that he could prove it by Nelse Briscoe; that deceased then said, if he would bring Nelse and have him state as appellant claimed, he would accept that statement. Appellant said that he then promised to get Nelse and bring him to prove that the chain on Lindsey's binder was not the chain of deceased, but was a chain that they had repaired themselves. Soon after parting with deceased on this occasion, appellant said he met the witness Talley, who told him that deceased had made very heavy threats against him. It appears from the evidence that the next day appellant went to the town of Gustine, some seven or eight miles distant, where Nelse Briscoe was staying, got Nelse, and went with him and a young man named Sewell, who had also been present when the chain was broken and mended, to the farm of deceased, and then out into the field where deceased was at work. Before going, appellant placed a pistol in his pocket, giving as his reason for so doing that he did not know what deceased might attempt to do to him; that he was a much smaller man than deceased, not physically strong, and no match for deceased in a personal encounter, if deceased should attack him. When appellant and the two men who were with him approached deceased, the fatal difficulty immediately ensued, and deceased was shot, once in the hand or arm, once in the side, and once in the back from the effects of which he died at once. The account given of the occurrence by the state's witnesses, and those for appellant, were widely different, and, as the case must be reversed, we express no opinion as to the evidence, pro or con. Appellant and his witnesses claimed that deceased immediately became angry, and attacked appellant, forcing him backward quite a distance, cutting at him with a knife, and that appellant shot him in self-defense.

[1] It appears from bill of exceptions No. 3, that on the day of the homicide, and about 11 o'clock—the homicide being about 4 o'clock—and while in the town of Gustine, some seven or eight miles from the scene of the killing, appellant was heard to say, "I would kill a man before I would be done that way." The witness who gave this testimony said that appellant was across the street from him, and talking to the justice of the peace, a man named Gray, and that he had no reason to believe or suspect that appellant was referring to deceased, and that he had since been informed that appellant was referring to another man. In all the cases known to us where a general threat of the accused is introduced by the state, it is held error unless the state also show that the threat is directed toward the injured party, or embraced such person. In his qualification to this bill of exceptions, the trial court lays stress on the fact that it was only a few hours before the killing, and appellant made no explanation of this statement. This does not help the matter. The burden is on the state to show that deceased was meant or included, and not on the appellant to show that he was not meant or included. On another trial, unless there be evidence showing substantially that the threat was directed at deceased, it should not be admitted. *Fuller v. State*, 54 Tex. Cr. R. 454, 113 S. W. 540; *Garrett v. State*, 52 Tex. Cr. R. 258, 106 S. W. 889; *Hall v. State*, 43 Tex. Cr. R. 259, 64 S. W. 248; *Fossett v. State*, 41 Tex. Cr. R. 400, 55 S. W. 497; *Holley v. State*, 39 Tex. Cr. R. 307, 46 S. W. 39. In the *Fossett* Case, just cited, the threat was made only a few moments before the homicide. In many of the cases, the threats were made nearer to the time of the killing than the one in the instant case. The nearness of time does not seem to be sufficient to justify the admission of such threats, unless there be something else either connected therewith, or appearing in the evidence elsewhere, which would make it reasonably certain that the injured party was meant or included in the threat.

[2] The cross-examination of appellant's wife, we think, went too far. By none of the authorities does it seem to be held that in cross-examination new matter may be gone into by the state. The bill of exceptions sets out, in question and answer, the examination and cross-examination of Mrs. Briscoe, and much of the cross-examination appears to be on new matter not relevant to the matters brought out on direct examination. In his qualification of this bill, the court below says that no objection was made to any of the cross-examination, except that portion of her testimony which related to the question addressed to her as to what Mrs. Lindsey

had told her that morning about Mr. Burke's inquiry as to the chain, and this conversation was drawn out by the defendant. The explanation of the trial court is somewhat lengthy, and we are unable to tell therefrom just what was objected to. In view of another trial, unless appellant goes further in his examination of this witness than was done in the instant trial, Mrs. Briscoe should not be asked on cross-examination as to threats made by appellant to her that deceased would never accuse another man of getting his chain, either for the purpose of impeachment, or to elicit such fact as original testimony. Sections 152, 153. Branch's Penal Code.

[3] We are unable to see how the testimony, as to what was said by Nelse Briscoe over the telephone, in a conversation supposed to have been had with Mrs. Leona Parker, was material to any issue in this case. The court undertook to limit the same as affecting only the credibility of said Briscoe as a witness, but a witness cannot be impeached upon denial thereof by proof of immaterial statements. In the absence of further light on the subject-matter involved in said conversation, the disconnected part of which at one end of the telephone used was testified to, said testimony should not be admitted.

[4, 5] The attitude of the parties toward each other during the difficulty being an issue, we are unable to say that it was error to admit in testimony the clothing worn by deceased at the time of the shooting. Nor do we think any error appears in the introduction of the knife of deceased. It was shown to be in a badly crippled condition, and in view of the fact that appellant claims that deceased attacked him with his knife, and cut his clothes in several places, the condition of the knife, as seen by the jury, might have a material bearing on this issue.

[6] The objections urged to proof of the physical condition of deceased, including his sight, do not seem to us tenable. Deceased was a man about 70 years of age—large, clumsy, and shown to have eyesight more or less defective. Appellant had known him for 40 years. Appellant claimed that he shot in his necessary self-defense, against an attack then being made on him by deceased. The physical condition of deceased, as known to appellant, was material for what it is worth as shedding light on what appellant believed about his danger at the time of the shooting.

This disposes of the material matters raised on appeal.

For the errors mentioned, the judgment of the trial court is reversed, and the cause remanded.

BROWN v. STATE. (No. 5695.)

(Court of Criminal Appeals of Texas. April 28, 1920. Rehearing Denied June 9, 1920.)

1. Homicide §297—Refusal to instruct on justifiable homicide proper.

In a prosecution for murder committed upon a negro in course of an unjustifiable assault made by defendant as a member of a posse and other members upon the wife of deceased, refusal of the trial court to instruct on the law of justifiable homicide *held* not erroneous, the homicide not having been justifiable under any phase of the evidence.

2. Homicide §112(4)—Killing of negro by assailant of latter's wife not in self-defense.

If a negro assaulted a posse member who, with others, was committing an unlawful assault upon the negro's wife to compel her to reveal the whereabouts of a criminal, the attack was provoked by the posse member's unlawful acts, and killing of the negro by him to avert injury to himself was unlawful, as the negro had a right to protect his home and family, and to resist unlawful detention of his own person also attempted.

3. Homicide §112(4)—That person assaulted by posse member stopped when ordered did not deprive him of right to resist.

Fact that negro stopped when posse member first ordered him to do so, and afterwards advanced threatening injury to posse member if he obstructed his progress to his home, where other members of posse were illegally assaulting his wife to compel her to reveal whereabouts of a criminal, did not confer upon posse member the right to kill the negro, and, in restraining the negro by an assault with a shotgun, he was guilty of a continuous assault, which negro had right to resist.

4. Homicide §101—Posse member's ignorance of character of assault on wife did not justify his killing of husband.

Where a posse member knew that his companions were making an illegal assault upon a negro's wife to compel her to reveal the whereabouts of a criminal, though he was ignorant of the particular character of the force used by his companions, his ignorance did not render lawful his acts in attempting to restrain the negro with a shotgun when he was endeavoring to go to the assistance of his wife, nor render justifiable the killing of the negro.

5. Homicide §122, 123—Negro had right to procure arms for defense of home and family.

A negro had a right to procure arms if necessary to protect his home and family against an illegal assault by posse members endeavoring to discover the whereabouts of a criminal.

6. Criminal law §423(3)—Proof of acts of companions of defendant admissible on ground of common purpose or ratification.

In prosecution of posse member for murder of a negro whose wife other members of the posse were assaulting in an endeavor to

extort from her the whereabouts of a criminal, proof of acts of other members of the posse while assaulting the wife of deceased *held* admissible, defendant having shared in their purpose to assault the woman, or else, by having heard her screams and not interfered, having ratified the assault.

7. Criminal law §1169(6)—Testimony of acts of companions of defendant charged with murder harmless in view of verdict.

In prosecution of posse member for murder of a negro whose wife other members of posse were assaulting in an endeavor to extort from her the whereabouts of a criminal, proof of the acts of defendant's companions while assaulting the wife of deceased *held* harmless to defendant, where the verdict of guilty of manslaughter was the most favorable authorized by charge or facts.

8. Criminal law §1171(1)—Failure of court trying murder case to require opening statement by prosecution harmless.

In a prosecution for murder, failure of the trial court to require the district attorney to make an opening statement as directed by Code Cr. Proc. 1911, art. 717, *held* harmless, no injury being disclosed by the record.

9. Jury §82(3)—Motion to quash venire for lack of personal summons properly denied where all present or excused.

In a prosecution for murder, defendant's motion to quash the venire because Code Cr. Proc. 1911, art. 668, requiring the sheriff executing the writ of special venire verbally to summon the veniremen in person, was not observed, was properly denied, where all the special venire summoned by mail were either in attendance on the court or had been excused for sickness or other legal cause.

Appeal from District Court, Nacogdoches County; L. D. Guinn, Judge.

D. Brown was convicted of manslaughter, and appeals. Affirmed.

S. M. Adams, C. C. Watson, and V. E. Middlebrook, all of Nacogdoches, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. The appellant shot and killed Alex Escow, was indicted for murder, and convicted of manslaughter, and punishment fixed at confinement in the penitentiary for two years.

On the 16th of May, 1918, Orange Escow, a brother of deceased, killed Jackson Carnelly, who was a cousin of appellant and a deputy sheriff, in a field near the home of deceased. Excitement followed the homicide. A posse, of which appellant was a member, was formed, and, on suggestion of search of Alex Escow's home, a remark in the hearing of appellant was made that the Escow negroes were dangerous. On the following afternoon, believing that the wife of deceased had knowledge of the whereabouts of Orange Es-

cow, and was suppressing the information, the appellant, in company with Smith and Davis, went to the home of deceased, and while there the homicide took place. There is but slight conflict in the testimony relating the incidents of the transaction. Stating them as gathered from appellant's testimony, he and his companions had been deputized to aid in the apprehension of Orange Escow. They went by automobile, a distance of about 11 miles, to the home of the deceased. Davis and Smith went into the house; appellant, observing a negro attempt to run out, followed him, and on reaching the back gallery Davis and Smith were engaged in conversation with the wife of deceased, trying to get her to tell what she knew about the murder. Pausing but a short time, he followed the negro who had run out of the house, and ordered him to go in the lot, and shortly after reaching the lot he heard screaming at the house. There were several other young negroes about, and they were ordered by appellant to go in the lot. A negro boy, the son of deceased, came from the field on a mule about this time, and the deceased, with a stick in one hand and a bucket in the other, was walking behind him. Quoting from appellant:

"When deceased was up about fifteen or twenty steps of me I told him to stop, and he stopped, and I told him that no one was going to the house; that the old negro woman was at the house, and they were trying to make her tell where the murderer had gone; and he said he was going to the house. I told him to stop, that he was not going to the house, and for him to stop there, he would be all right there; and he said he was going to the house; if I didn't get out of the trail and let him go to the house he would kill me with the stick. He then started towards me, and I backed up two or three steps, maybe four or five, and I had my gun up to my shoulder. I motioned to him to stop. He kept on coming. From his appearance and looks I saw he was coming, and if I had not run or shot him or done something he would have knocked me in the head with that stick. I had been there the day before, and found a gun out there. I didn't know but what they had a gun there. They were all over the country. He was coming straight towards me when I shot him. My gun was up, and I walked backward, and I told him to stop."

From his cross-examination it appeared that he directed the younger members of the family to stay in the lot. They claimed that he told them to get in the wagon. He said he did not know what Davis and Smith did to the woman, but he heard her screaming, hollering for help, and praying, but did not think they were going to hurt her. He said that he thought the old negro woman hushed hollering about the time that the old man reached the appellant; that he supposed deceased heard her hollering, and was coming to ascertain what was the matter; that he

was told by appellant that no one was going to hurt her.

Before the killing took place the companions of appellant, Davis and Smith, put a rope around the neck of the wife of the deceased, put the rope over a rafter, and pulled her up off of the floor. During their assault upon her she was screaming and calling for help in a loud voice. The younger members of the family, who were congregated in a wagon at the lot, were also screaming. There was evidence that the deceased was in the habit of walking with a stick, and that at the time he was killed he had his walking stick. Several state witnesses declared that he made no demonstration with it, and that appellant did not retreat, but shot the deceased as he approached.

[1, 2] The appellant assails as error the action of the court in refusing to instruct the jury upon the law of justifiable homicide. Under no phase of the evidence was the homicide justifiable; appellant's conduct deprived him of the right of perfect self-defense. If the deceased assaulted appellant in the manner described by him, the attack was provoked by appellant's unlawful acts, and the homicide to avert injury to himself was unlawful. The deceased had the right to protect his home and his family (*Richardson v. State*, 7 Tex. App. 486; *Wells v. State*, 68 Tex. Cr. R. 618, 141 S. W. 96; *Ross v. State*, 10 Tex. App. 455, 38 Am. Rep. 643), and to resist unlawful detention of his person, and in the interference with the exercise by the deceased of these rights the appellant was the aggressor. He was a trespasser upon deceased's premises, and without warrant in law put deceased under such restraint as was tantamount to an illegal arrest. His acts were unlawful, and sufficient and reasonably calculated to provoke the difficulty. *Ross v. State*, 10 Tex. App. 453, 38 Am. Rep. 643; *Peter v. State*, 23 Tex. App. 684, 5 S. W. 228; *Goodman v. State*, 4 Tex. App. 349; *Williams v. State*, 41 Tex. Cr. R. 365, 54 S. W. 759; *Miers v. State*, 34 Tex. Cr. R. 161, 29 S. W. 1074, 53 Am. St. Rep. 705; *Miller v. State*, 31 Tex. Cr. R. 609, 21 S. W. 925, 37 Am. St. Rep. 836.

[3] The fact that deceased stopped when appellant first ordered him to do so, and presented his gun, and that he afterwards advanced, threatening injury to appellant if he obstructed his progress to his home, did not confer upon appellant the right to kill deceased. In restraining deceased by force of an assault with a shotgun he was guilty of a continuous assault. *Alford v. State*, 8 Tex. App. 545; *Johnson v. State*, 5 Tex. App. 47. The deceased had a right to resist it to regain his liberty and to go to his home. These rights continued, notwithstanding he stopped when the appellant first commanded him to do so. There was no abandonment of the aggression on the part of the appellant, so

long as he opposed by force the freedom of action of deceased. *Woods v. State*, 3 Tex. App. 204; *Maner v. State*, 8 Tex. App. 361; *Staples v. State*, 14 Tex. App. 136.

[4] If, as claimed by appellant, he was ignorant of the character of force in use by his companions in making the wife of the deceased divulge facts within her knowledge, such ignorance would not render his acts lawful nor the homicide justifiable. He was aware that in making the woman disclose the facts within her knowledge the treatment of her by his companions was such as to cause her to utter screams, calls for help, and prayers for mercy.

[5] Whether her outcries continued up to the moment the shot was fired or not, they were heard by the deceased and by the appellant before the deceased was commanded to refrain from going to the aid of his wife, and were known to appellant when he killed the deceased while he was resisting the force used by appellant to compel obedience to his commands. The fear which appellant says possessed him that deceased might obtain arms if not restrained does not justify the appellant. The deceased had the right to procure arms, if necessary to protect his home and his family. *Ross v. State*, 10 Tex. App. 455, 38 Am. Rep. 643.

[6] The complaint of the proof of acts of Davis and Smith, while they were assaulting the wife of deceased, in our judgment is not well founded. The appellant and his companions in entering the premises had the common purpose to make the negro woman divulge facts supposed to be within her knowledge. If, as he claims, the means of accomplishing this purpose were not agreed upon, his conduct in preventing interruption of their effort by keeping her son and daughters and her husband away, when by her protestations he was advised that the means used by Davis and Smith were putting her in terror and in pain, was such as to raise the issue that he and they were acting together. We find no evidence that in the design to compel the woman to divulge the facts the intent of appellant was different from that of Davis and Smith. But, if the contrary were true, the conduct of appellant in continuing to act with them, with knowledge that personal violence was being used against her, would justify the conclusion that he ratified and adopted their acts, and make him a principal with them in the unlawful act.

[7] Moreover, the admission of the evidence showing the conduct of his associates towards the woman was not injurious to appellant, because, despite such proof, the verdict rendered by the jury was the most favorable to him that was authorized by the charge as justified by the facts.

absence of injury disclosed by the failure of the court to restrict attorney to make an open-

ing statement, as directed by article 717, C. C. P., harmless. *Holsey v. State*, 24 Tex. App. 35, 5 S. W. 523.

The motion to quash the venire was overruled. The facts attending it are set out in the agreement contained in the bill of exceptions certified and qualified by the trial judge. From the bill we copy it as follows:

"That the said veniremen were served by the officer mailing out a post card and mailing the same to their addresses as known by them; that said original venire facias consisted of 100 men, as drawn by the district clerk, but that only 42 appeared in obedience to said summons; and that defendant was compelled to select the jury, or attempt to select the jury, from less than 50% of the venire facias, and forced to go to trial; and, notwithstanding which said motion and agreement so made by the state, the court declined and refused to sustain motion and quash venire facias, but overruled the same, and renders said venire so drawn, and required defendant to proceed with the selection of the jury therefrom, and from which the defendant was compelled by the court to select the jury which tried said cause;" to which action of the court the defendant then and there excepted and tendered his bill of exceptions No. 2 (latter half Tr. p. 23), which bill of exceptions was tendered to the court and allowed by the court (Tr. p. 24), with this proviso: "Further, all of the special venire were either in attendance upon court or had been excused by the court on account of sickness or some legal exemption."

The statute (article 668) requires the sheriff executing the writ of special venire to verbally summons the veniremen in person. The failure of the sheriff to comply with this statute does not in every case work a reversal. In the early case of *Charles v. State*, 13 Tex. App. 664, the venire called for 60 men. But 36 were summoned. The motion to quash was overruled. The court said:

"In this case it does not appear that the trial judge committed any error in overruling the motion to quash the venire, nor that any right of the defendant was prejudiced thereby. For aught that appears from the record, the jury that tried the case was composed of men selected from the thirty-six summoned jurors. If so, the defendant certainly cannot complain that he was injured by the ruling of the court upon his motion. It is not shown that the defendant, by reason of the ruling of the court, was compelled to pass upon talesman jurors, or to accept any objectionable juror, or in any other manner suffer injury by reason of the overruling of his motion."

Rulings following the *Charles Case* will be found in *Parker v. State*, 33 Tex. Cr. R. 111, 21 S. W. 604, 25 S. W. 967; *Jones v. State*, 214 S. W. 325; *Whittington v. State*, 215 S. W. 457.

[9] The application of this rule to the instant case is emphasized by the qualification of bill by the trial judge to the effect that all of the special venire were either in at-

tendance upon the court, or had been excused by the court on account of sickness or some legal exemption. The purpose of the personal summons is to procure the attendance of the jurors. When that is accomplished by an irregular summons, the form of summons is not available as a ground for quashing the writ, unless some injury is shown. *Whittington v. State*, 215 S. W. 457. From the 12 *American & English Encyc. of Pleading and Practice*, p. 324, we make the quotation:

"Where a venireman appears, though irregularly summoned, or in fact not summoned at all, the irregularity or omission will be deemed immaterial, since his attendance, which is all that the service of process would effect and which is its object, has been attained."

The case of *Johnson v. State*, 218 S. W. 496, to which we are referred, is not analogous. In that case the statute designated the list of names drawn by the jury commissioners from which to draw a special venire. In drawing the special venire a different list was used. The record failed to disclose that any of the men composing the jury was legally drawn. The accused was denied a jury selected by law. This is not such a case. Here all of the jurors were legally drawn. The summons was irregular, but their appearance cured this fault. The jury illegally drawn in *Johnson's Case* assessed against him the death punishment. The jury in this case lawfully drawn, and attending in response to an irregular summons, convicted appellant of the lowest grade of offense which, under the law and the charge of the court, was authorized, and assessed against him the lowest punishment.

The judgment is affirmed.

CHARLES v. STATE. (No. 5746.)

(Court of Criminal Appeals of Texas. April 21, 1920. Rehearing Denied June 9, 1920.)

1. Criminal law §366(4)—Recognition of slayer by deceased *res gestæ*.

A statement made by decedent immediately after defendant shot him, showing his recognition of the defendant as the party who fired the shot, was admissible as *res gestæ*.

2. Witnesses §268(5)—Proper to cross-examine witness as to age.

On cross-examination of a witness for the state, who testified that he was 16 years of age, defendant had the right to show that the witness was not 16.

3. Witnesses §271(1)—Census report not made by witness not relevant on cross-examination.

On cross-examination of a witness for the state, who testified that he was 16 years of age according to information from his mother,

court did not err in refusing to permit defendant to examine the witness in connection with a report of the school census made by the father of witness, showing his age as 14.

4. Witnesses §240(4)—Question not leading.

In a prosecution for homicide, decedent having been shot while plowing, a question by the district attorney, "Well, was that plowed to the end of the row, or partly plowed?" was not objectionable as a leading question.

5. Homicide §170—Measurements of footprints and foot of defendant admissible.

A witness, who had measured accurately the footprints of person slaying another and the shoe of accused, could testify to such measurements.

6. Criminal law §419, 420(10)—Objection of hearsay held properly sustained.

Where on cross-examination of an accomplice in a prosecution for homicide witness was asked whether he had not been told that deceased was a "hoodoo negro," the court properly sustained state's objection that it was hearsay.

7. Criminal law §1091(3) — Bill of exceptions held not to show prejudice in cross-examination.

A bill of exceptions, reciting that a witness was testifying that he lived about one-half mile from the place where deceased was killed, and that he had not heard a gun "over there" before he left for C. and that on cross-examination district attorney asked witness if he could hear a gun from where deceased was killed to C., did not show any injury to defendant; the answer of the witness not being stated.

8. Witnesses §388(2)—Statement no ground for impeachment where no foundation is laid.

The mere fact that a witness, testifying for the state in telling about the killing soon after it occurred had not claimed that he had seen two persons at the time of the shooting did not render competent evidence of his statement of the occurrence, the defendant claiming that witness had only seen one person, and had not seen defendant, the mere fact that witness had not included defendant in statement being no ground for impeachment; no predicate having been laid or any question asked the witness as to the statement.

9. Criminal law §1091(3)—Bill held insufficient to show error in examination of witness.

A bill in a homicide case, reciting that a state's witness was asked "concerning a matter of the deceased losing some seed cotton some 10 months before the killing, the deceased having charged defendant with the theft of the seed," was insufficient to present the matter for consideration, the bill not stating defendant's objection, the answer to the question, nor any of the facts and circumstances that would show whether the matter was material or not.

10. Criminal law §1091(4)—Bill held insufficient to show error in admission of evidence.

A bill, reciting that the state "sought to bring out by B. matters concerning some cotton that deceased claimed to have lost some 10

months before the killing, and deceased claimed that defendant was implicated in getting the cotton," and that the witness was permitted to testify to a conversation he had with defendant with reference to the matter, did not show that the admission of such testimony was error; it not appearing what the conversation was.

11. Witnesses \S 345(2)—Impeached by showing charge of murder.

A witness may be impeached by showing that he is under a charge of murder.

12. Witnesses \S 359—Details of accusation of murder not admissible.

Although a witness may be impeached by showing that he is under a charge of murder details of the murder are not admissible.

13. Criminal law \S 1186(9)—No error in overruling application on ground of absence of witness who later testified.

A bill of exceptions to the overruling of an application for a continuance on the ground of the absence of a witness will not be considered, where the witness was brought into court and testified.

14. Criminal law \S 600(3)—Admission after conclusion of testimony of truth of matter to be testified to by absent witness did not relieve of error in denying continuance.

Admission by district attorney after the conclusion of the testimony that absent witness would have testified as indicated in an application for a continuance, and that his testimony was true, cannot relieve any error of the court in overruling the application for continuance, as such admission by the state's attorney must be made at the time of overruling a continuance as a means of avoiding such continuance.

15. Criminal law \S 1166(9)—Overruling continuance harmless, where other witnesses testified to some facts.

Error of the court in overruling an application for continuance was harmless, where matters which would be testified to by absent witness were placed before the jury by other witnesses.

16. Criminal law \S 511(5)—Evidence held sufficient to corroborate testimony of accomplice.

In a prosecution for homicide, evidence that a son of decedent saw defendant and the accomplice at the place of the shooting, and as to measurement of tracks, held sufficient to corroborate testimony of an accomplice and to sustain a finding that defendant fired the shot which killed deceased.

Appeal from District Court, San Jacinto County; J. A. Platt, Judge.

Jim Charles was convicted of murder, and appeals. Affirmed.

Wm. McMurrey, of Cold Springs, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The trial of appellant resulted in a conviction of murder with the death penalty assessed.

[1] There are two theories involved under the testimony; one that appellant in connection with the accomplice White went into the woods near the field where deceased was plowing, and that appellant shot the deceased, from which shooting he died a few days later. The accomplice testified to these facts. A son of deceased was with his father at the time, and in front of him. The deceased was plowing and walking from the direction from which the shot came, he receiving a shot in the back. The boy was ahead of his father a few feet, and when he heard the shot looked around, and saw defendant and White in the edge of the woods. Appellant had the gun. He holloed at him, expressing his recognition. It is also shown that deceased at the time recognized defendant as the party who shot him. This was a *res gestae* statement. The sheriff also testified to measurements of tracks of two men in the woods at or near the place where White and appellant were supposed to have been stationed at the time of the shooting. These tracks corresponded with the shoes worn by the two men. There were no exceptions to the charge.

[2, 3] The first bill was reserved to the refusal of the court to permit the cross-examination of the son of deceased as to his age. The bill shows that he testified he was 16 years of age, and had received such information from his mother. Counsel stated to witness he had a report of the school census, and in connection with this desired to examine the witness. This was objected to by the state because irrelevant and immaterial. Appellant contended that it was relevant, and would be direct testimony as to the age of the boy testifying. The court permitted the boy to testify as to his age, and his information from his mother that such was his age, being 16. The bill does not show the stated age of the boy in this census report. In the testimony, if we should revert to that, it is shown by the census that his father stated the age of the boy to be 14. This report was made in March, 1918, and the killing occurred in August of the same year. The answer of the witness would seem to preclude further examination, as he had no connection with the report, and it involved no act of his. That the defendant had the right to show the boy was not 16, as the boy testified, is not to be questioned, but from census report we think the examination of the boy would not be material, as it was not his act. Had he made the report, it would have been proper to examine him. The bill is indefinite from any viewpoint of it, and, as it is presented, there could have been no possible error.

[4] Another bill shows that, while the sheriff, Patrick, was testifying he was asked this question by the district attorney:

"Well, was that plowed to the end of the row, or partly plowed? A. It was plowed to the end of the row, four or five feet from the end of the row."

The appellant objected to the district attorney leading the witness, and asked that the question be stricken out. The objection was overruled. This would not be termed a leading question. The bill does not show any attendant fact or circumstance that led to this inquiry.

[5] Another bill recites the same witness was asked with reference to the measurements of the tracks found in the woods to which he had testified. The main objection was that there was no proper predicate laid, and proper measurements were not made. These objections were not well taken. These tracks were measured as stated by the sheriff rather accurately, and this measurement was applied to the shoes of the two men, appellant and White, and found to correspond. This was legitimate. The next bill was in regard to the same matter, and rather an amplification of the former bill in regard to the attendant circumstances and the condition of the ground where the tracks were made, showing that the tracks were easily identified upon the ground; it being soft and damp and the impressions distinct.

[6] Another bill recites that while the accomplice, White, was testifying, on cross-examination he was asked if certain people, "named in the question," but not specified in the bill, had not told witness White that Lester Green "was a hoodoo negro." The state's objection was sustained. What was the object and purpose of introducing this testimony is not stated, nor are there any connecting facts to show that this testimony was admissible. The state's objection was that it was hearsay. As presented in this bill, such objection was well taken. If the question of the deceased being a "hoodoo negro" got into the case in such way as to make it a question for examination, it might have been proper to have asked and elicited the answer, but the expected answer is not stated.

Another bill recites that, while White was being cross-examined by defendant, he was asked if he told defendant a day before deceased was shot that he (witness) had killed a tall negro with boots on. The state's objection was sustained. This bill is too indefinite for consideration.

[7] Another bill recites, while Mr. Kennedy was testifying and had stated he lived in about one-half mile of the place where deceased was killed, and that he had not heard a gun "over there" before he left for Cleveland, on cross-examination the district attorney asked witness if he could hear a gun from where deceased was killed to Cleveland. The answer is not stated. How this

could have injured the appellant is not shown by the bill.

[8] Another bill recites that appellant offered the testimony of Elmore Charles. The bill further recites that it developed that Elmore Charles had not been subpoenaed as a witness, and "had been in the courtroom during the examination of other witnesses, and heard a great many of them testify"; that the state had invoked the rule, and objected to the witness testifying on that ground. Appellant insisted that, inasmuch as he had not had time to get his testimony together, and his counsel had not had time to learn who were witnesses for the defendant, and did not know that Elmore Charles had information that would make him a witness, the court should permit him to testify. The defendant offered to show by this witness that he had heard Lester Green tell about the occurrence soon after it occurred, and that he had not claimed that he had seen two persons at the time of the shooting. The appellant also claimed that Lester Green had only seen one person, and that that person was White, and not defendant. The state objected to this witness being permitted to testify. This is the entire bill. This bill does not manifest error. That Lester Green may have made a statement at some time with reference to the killing, and had not included appellant, would not subject him to be impeached upon this ground. Had he been called upon to testify in regard to all the facts in the case, or during his testimony his attention had been directed to whether there were more than one person present, and he had stated that there was not, and thereafter testified that two persons were present, it would have subjected him to impeachment. The bill does not even show that Lester Green was asked, while testifying, with reference to any statement he may have made that Elmore Charles may have heard. As the bill presents the matter the ruling of the court is not brought within any of the decisions or any rule of evidence that has been called to our attention that shows error in regard to the ruling. The bill fails to show that a predicate had been laid or any question asked of the witness Green as to these statements.

[9] Another bill recites that the state's witness Hightower was asked "concerning a matter of the deceased's losing some seed cotton some 10 months before the killing, the deceased having charged the defendant with the theft of the same, or rather it appeared that defendant had been implicated in some way." Appellant objected, the objection not being stated. It is stated the district attorney asked the question, but it does not give the answer, and none of the facts and circumstances are set forth in the bill that would show whether this was material or

not. The bill is not sufficient to present the matter for consideration.

[10] Another bill recites that the state "sought to bring out by her witness Billie Norsworthy matters concerning some cotton that deceased claimed to have lost some 10 months before the killing, and deceased claimed that defendant was implicated in getting the cotton." Objection was urged to this, and the witness was permitted to testify to a conversation he had with defendant with reference to deceased having accused him of stealing the cotton. What that conversation was, otherwise than it was a conversation, is not stated, nor is the ground of objection stated. The bill recites that appellant objected to the introduction of the testimony, and the court overruled it. This may have entered into the motive for the killing. In order to have brought this question before the court for consideration, enough of the facts should have been stated to manifest what the defendant supposed to be error.

[11,12] While the witness Jenkins was testifying for the state, it developed that he had been brought from the county jail to testify. Upon cross-examination this occurred.

"What have they got you in jail for? A. For murder—supposed to be murder. Q. Murdering who? A. Jim Wynne. Q. What was his age?"

The state objected to any further examination. The court sustained the objection, and would not permit the appellant to go farther into details. There seems to be no error in this matter, nor is it shown what was the purpose of seeking the age of Jim Wynne. That a witness may be impeached by showing that he was under a charge of murder is sustained by the authorities, but the authorities announce the rule that in such impeachment usually the details of the accusation will not be permitted. The same may be said of the following bill of exceptions, as it is upon the same subject, and from the same witness.

[13-15] There is a bill of exceptions reserved to the action of the court overruling the application for a continuance. There were two witnesses sought, the wife of appellant, and a witness named Charles who seems to have been in some way related to appellant. The wife of appellant was brought into court and testified. It is unnecessary to consider the application further as to her. By the other witness, Charles, appellant expected to show a son of appellant on the evening of the killing had been sent by appellant to a certain house for shucks. This house seems to have been not far from where the killing occurred. What effect this testimony would have had upon the case is not made to appear. The testimony shows

that the boy was sent for the shucks. The court signs the bill with the qualification that the district attorney, after the conclusion of the testimony, offered to admit before the jury that witness would have testified as indicated, and that his testimony was true. We are of opinion that this does not relieve the error of the court in overruling the continuance, if there was error. Such admission must be made at the time of overruling the continuance as a means of avoiding such continuance. The reasons for this seem to be obvious. Had the admission of the truthfulness of the statement been made at the time and before the introduction of testimony, the state would have been precluded from contradicting it. The state will not be heard to admit the truthfulness of a statement and then introduce contradictory testimony of that admission. But the matter was testified by witnesses before the jury. Taking the evidence from the statements in the motion for new trial, we are of opinion that whether this testimony was or was not before the jury would not be very material, but the jury had the matter before them anyway for their consideration for whatever it was worth. Viewing the record in the light of the motion for new trial, we are of opinion the court did not commit error in this matter.

[16] It is contended as a final proposition that the evidence is not sufficient to support the conviction. The testimony of White, the accomplice, is corroborated by the son of deceased, who saw both White and appellant at the place of the shooting, and appellant was armed with the gun that fired the shot, and is further corroborated by the sheriff with reference to measurements of tracks. This would justify the jury in arriving at the conclusion that appellant did fire the shot from the woods which killed deceased. The testimony for the defendant shows, both by positive evidence and circumstances, that he was not present. In other words, he himself swore to an alibi, and other witnesses swore to facts which tend strongly to corroborate him. These matters were all before the jury. They heard the witnesses, noticed their manner of testifying, and had the whole matter in front of them, as did the trial court. Under such circumstances this court would scarcely feel justified in setting aside the conviction. This was either an assassination, or it was nothing so far as the appellant is concerned. We would not feel justified in reversing the case for want of sufficient evidence under the stated circumstances.

Finding no reversible error in the judgment, or one that would justify this court in reversing the judgment, it is ordered to be affirmed.

BOCKNIGHT v. STATE. (No. 5826.)

(Court of Criminal Appeals of Texas. May 26, 1920.)

1. Criminal law §614(3)—Diligence to procure attendance of witness not shown.

Diligence to procure the attendance of a witness, for whose absence a second application for continuance of a trial for homicide was made, was not shown, where it appeared that after the first continuance defendant saw the witness, but did not get out process for his appearance, relying on his promise to appear.

2. Criminal law §917(2)—Testimony of absent witness for which continuance was refused must be such as would probably change result.

A new trial need not be granted because of the absence of a witness for which continuance was refused, unless it was reasonably probable that with his presence a verdict more favorable to accused would have resulted, and the probable truth of the testimony of the absent witness must therefore be made to appear.

3. Criminal law §956(5)—Showing as to testimony of absent witness held not to make denial of new trial an abuse of discretion.

An affidavit by accused alone that an absent witness would testify to threats by deceased, which accused testified were confirmed by a witness who was present, but which were denied by the dying declaration and by the witness who was present, do not establish the truth of the alleged testimony or the probability that it would affect the result sufficiently to show an abuse of discretion in denying the new trial.

4. Criminal law §1141(2) — Appellant must overcome presumption of correctness of denial of new trial.

The overruling of a motion for new trial by the trial judge will not be arbitrarily overturned, but the burden rests upon accused to overcome the presumption favoring the correctness of the decision.

5. Homicide §250—Evidence held to sustain conviction for manslaughter.

Evidence that accused sought the meeting with deceased and was the aggressor in the encounter held to sustain a conviction for manslaughter though accused claimed threats and an attack with a knife by deceased.

Appeal from District Court, Brown County; J. O. Woodward, Judge.

Earl Bocknight was convicted of manslaughter and he appeals. Affirmed.

Wilkinson & McGaugh, of Brownwood, for appellant.

Alvir M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. Under an indictment for murder, appellant was convicted of manslaughter, and punishment assessed at confinement in the penitentiary for a period of

5 years. A reversal is sought upon the ground that, in view of the weakness of the state's case, and the importance of the alleged testimony of an absent witness, the court, having overruled an application for continuance, abused his discretion in refusing to grant a new trial.

The appellant, a negro youth 19 years of age, shot and killed the deceased, a negro boy about 17 years of age. The homicide occurred at night, both appellant and deceased and several of the witnesses having previously been at a dance. Appellant's theory, arising from his testimony, was that there had been no previous trouble, but that while at the dance Lilton Davis said to him:

"Jimmie Barnes (deceased) says he is going to make you break out of here to-night. If you don't believe what I said, go and ask Mary Bean; she heard it, and can tell you all about it"

—and further said: "He has got a knife up his sleeve sure enough." Appellant testified that he asked Mary Bean about the matter, and she said: "Yes; he said it, but I think it was just nigger talk." He then borrowed a pistol from the witness Lane, who was at the dance, and started to go home; that before going home he started to go by his brother's house on an errand for his mother, and that he met the deceased, and said: "Jimmie, what caused you to make the talk you did about me? They say that you are going to make me tear out of the hall." Deceased replied: "You are a God damn liar, you, Mary Bean and Lilton Davis both"—at the same time starting toward the appellant with a knife. Appellant, while running backward, fired one shot, striking the deceased in front, and inflicting a wound from which he later died. He claimed that the knife in the hands of the deceased was open, and that he had been informed on the previous day that the deceased had said he intended to kill him.

The state's theory, as developed by the statement of the deceased at the examining trial, was, in substance, that the deceased had walked from the dance with a girl named Nina to her home, and, returning, met the appellant near the home of the girl; that the appellant stopped deceased, and appeared to be mad; that he had his hand in his pocket. Deceased said:

"He asked me what made me tell Mary Bean that I was going to put him out of the house. I told him I didn't tell Mary that, and he said: 'Oh yes, you did,' and began to draw his pistol. I got my knife out, but never did get it open. I never had trouble of any kind before with him. Last night as I left the hall with a girl, he told me he wanted to see me. I told him I would be back in a few minutes."

Mary Bean testified that she had no such conversation as that described with deceased,

and that in answer to appellant's inquiry while at the dance whether the deceased had made remarks to her about the appellant, her reply was that he had not done so. She also denied that she had made such statement to Lilton Davis. A pocketknife was picked up near the deceased, after he fell, and there was a conflict as to its condition, whether the blade was open or not. The homicide took place within a short distance of the dance hall, and after the appellant left the dance hall he met a witness, and inquired for the deceased, and was told that he had gone home with the girl Nina. Appellant proceeded in the direction in which the deceased had gone, and a few minutes later the shot was fired.

[1] The indictment was filed in May, 1919. The trial took place in the latter part of December of the same year. The application for continuance was to secure the testimony of Lilton Davis, whose residence was alleged to be unknown. It was alleged that on a date not stated a subpoena had been issued for the witness to Brown county, and had been returned with the indorsement, "Not found in Brown county"; that a subpoena was issued on the request of the state to Cameron county, and which was on December 4th, returned, marked, "Not found after diligent search." The application was described as a "subsequent application," and it appears from the court's qualification of the bill of exceptions that at the preceding term of the court the case had been continued upon the application of the appellant for the same witness; that after that time the appellant saw the witness in Texas City, Tex., and at that time the witness promised that he would be present at the trial, but no process was issued for him. Under the facts, the action of the trial court in overruling the application cannot be made the subject of just criticism. There was an absence of the diligence which the law requires. The witness had been served with no process. The appellant, after continuing the case for the absence of the witness, failed to embrace the opportunity to serve him with process in Texas City, and relied upon the promise of the witness to make a voluntary appearance. His residence at the time of the trial was unknown, and we fail to discern upon what facts a reasonable expectation of procuring his testimony at a subsequent term could be based. *Sinclair v. State*, 34 Tex. Cr. R. 453, 30 S. W. 1070; *Roquemore v. State*, 59 Tex. Cr. R. 568, 129 S. W. 1120; *Vernon's Texas Crim. Statutes*, vol. 2, p. 319, note 30. The circumstances were such that diligence would have demanded the prompt issuance of process for the witness when his whereabouts, after the continuance for his absence, became known to the appellant. *Todd v. State*, 57 Tex. Cr. R. 26, 121 S. W. 506; *Hamilton v. State*, 74 Tex. Cr. R. 219, 168 S. W. 537; *Brittain v. State*, 40 S. W. 297.

[2] The testimony expected from the wit-

ness was that the appellant had been told by him that the deceased had threatened to run the appellant away from the dance. To justify annulment of the verdict, there must be a reasonable probability that with the presence of the absent witness a verdict more favorable to the appellant would have resulted. *Covey v. State*, 23 Tex. App. 388, 5 S. W. 283; *Pruitt v. State*, 30 Tex. App. 156, 16 S. W. 773; other cases, *Branch's Annotated Texas Penal Code*, § 319. Viewed in the light of the evidence on the trial, the probable truth of the testimony of the absent witness must appear. *Casinova v. State*, 12 Tex. App. 554, and other cases, *Branch's Annotated Texas Penal Code*, § 319. Primarily these matters were for the trial court. *Vernon's Texas Crim. Statutes*, vol. 2, p. 320, note 34, and cases referred to.

[3] It was by the affidavit of the appellant alone that proof was made that the witness would, if present, give the testimony alleged. If given, the evidence of the absent witness would have been in conflict with the testimony of the deceased and the witness Bean, and corroborated by that of appellant alone. The court remained in session for 30 days after the verdict was rendered, and almost that long before the motion for new trial was overruled. No affidavit of the absent witness or other fact developed after the trial to strengthen the contention of appellant that the witness would give the testimony, or would be present at another trial, or to enhance the probability of the truth of the alleged evidence, or its affecting the verdict on another trial.

[4] It is not within the province of this court to arbitrarily overturn the judgment of the trial judge in overruling a motion for new trial (*Bronson v. State*, 59 Tex. Cr. R. 20, 127 S. W. 175), and in the instant case no measure or standard or changed condition is pointed out from which we can determine that the trial judge abused his discretion in deciding matters involved in the motion for new trial against the appellant. The burden rests upon the appellant to overcome the presumption favoring the correctness of the decision of the trial court, and this burden in the instant case has not been discharged.

[5] From the state's standpoint, the evidence shows an unlawful homicide. It suggests that the appellant had been attentive to the girl whom the deceased accompanied to her home; that the appellant followed the deceased, and sought the meeting with him, and in the encounter was the aggressor. The deceased, by his testimony, negated any previous threats and any assault by him, except in response to the demonstration by the appellant. The appellant's version puts threats into the mouth of the deceased, and makes him the aggressor. An issue of fact for solution by the jury arose, and we cannot

concur in the view that, accepting the testimony of the state's witnesses as true, the verdict of the jury is not authorized by the evidence.

We find no error in the record, and order the judgment affirmed.

OTT v. STATE. (No. 5833.)

(Court of Criminal Appeals of Texas. May 19, 1920.)

1. Homicide \S 300(3) — Instruction on self-defense submitting converse of defendant's theory not erroneous.

In a prosecution of a wife for killing her husband, charge on self-defense, which in applying the law to the facts directed the jury specifically to the theory of the case on which defendant predicated her right of self-defense, *held* not erroneous, though submitting the converse of defendant's theory that the mere belief she was in danger in the absence of reasonable grounds did not excuse her.

2. Criminal law \S 829(5)—Refusal to instruct on defendant's right to arm self not erroneous in view of charge given.

In a prosecution for homicide, where no limitation was placed on the right of perfect self-defense in the charge, there was no error in refusing to instruct on the right of defendant to arm herself.

3. Criminal law \S 806(2)—Element of main charge need not be repeated.

In a prosecution for homicide, the trial court in the main charge having instructed that defendant was in no event bound to retreat in order to avoid the necessity of killing deceased, it was not incumbent upon him to repeat it in a special charge.

4. Criminal law \S 419, 420(6)—Testimony of attorney for husband killed by wife inadmissible as hearsay.

In prosecution of a wife for killing her husband, evidence for defendant of an attorney for the deceased husband as to what decedent told him preparatory to bringing suit for divorce against defendant, being explanatory of the details under which defendant had received a pistol shot wound, as she claimed, from decedent, while living with him some time before the homicide, *held* inadmissible as hearsay.

5. Witnesses \S 201(2) — Testimony of husband's attorney in prosecution of wife for killing husband not privileged.

In prosecution of a wife for killing her husband, testimony of the attorney for the husband in his divorce suit that the husband asked him for advice as to what punishment would likely be meted out to him if he killed his wife, etc., who was defending on the ground of self-defense, *held* not excluded as a privileged communication between attorney and client.

6. Homicide \S 189 — Course of conduct between deceased husband and defendant wife admissible.

In prosecution of wife for killing her husband, defended on ground of self-defense, trial court properly allowed to come before the jury the various difficulties, quarrels, threats, and encounters constituting the course of conduct between husband and wife; such matters including a conversation wherein the husband asked his attorney for advice on killing his wife, being competent on the controverted question of self-defense.

Appeal from Criminal District Court, Dallas County; Robt. B. Seay, Judge.

Ida Ott was convicted of manslaughter, and she appeals. Reversed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. Under an indictment for murder appellant was convicted of manslaughter, and punishment assessed at confinement in the penitentiary for a period of three years.

The deceased, Andrew Ott, was the husband of the appellant. The tragedy occurred on one of the streets of the city of Dallas. Six shots were fired by the appellant from a pistol. The first shot, fired while the deceased was walking in front of the appellant, took effect on the side of his head, back behind his ear, and was a fatal one. He fell at once, and other shots were fired into his body. Deceased, a short time before the homicide, had filed a suit for divorce against the appellant, and secured an injunction against her interference with him. He was living in adultery with another woman at the time he was killed. A long course of ill treatment was described by appellant in her testimony, in which she claimed that the deceased first seduced her, and after marrying her required her to prostitute her person for his profit; that he had at one time wounded her severely by shooting her with a pistol, and had frequently threatened to take her life. Some of these matters were controverted, the state introducing evidence to show that the appellant was shot accidentally with her own pistol while she was undertaking to shoot deceased, and also that she had threatened and attempted to kill him on other occasions. She was a young woman. She claimed that, frightened by his repeated and specific threats to kill her, she obtained an automatic pistol and learned to use it. On the morning of the killing she phoned to the place of business of the employers of deceased, desiring, as she said, to get one of them to intercede with her husband, whom she still loved, and, ascertaining that her husband was not at the place of business, she went there for the purpose of an interview with his employers, and that while on

her way she saw deceased walking on the street with a lady. As they were about to meet, the lady walked across the street and entered deceased's automobile. When they met, appellant said: "Who is your sweetheart?" Deceased replied: "None of your damn business who she is. I told you not to come down here, and God damn you I am going to get my gun out of my car and blow your God damn brains out"—and, uttering these words he started to run toward his car. Appellant said: "Andrew don't do that," she following him and asking him to wait. He continued his course until he had nearly reached the car, when, as she says, "I pulled my gun and fired." The state's eyewitnesses heard none of the conversation, but said that while the appellant was about an arm's length behind the deceased she fired the first shot, and when he fell she fired the remaining shots, and then knelt down by his body, and uttered some endearing terms with reference to him, apparently being very nervous and excited.

[1] The criticisms of the court's charge on the law of self-defense, we believe, are without merit. This issue arose alone from appellant's testimony, and, in applying the law to the facts, the mind of the jury was directed specifically to the theory of the case upon which the appellant predicated the right of self-defense. The court said:

"Now if you believe from the evidence, or have a reasonable doubt, that at the time the defendant killed the deceased that the deceased had started across the street in the direction of an automobile, and that he had said he was going to get his pistol and kill the defendant, and if it reasonably appeared to the defendant that the deceased was about to attack her in such manner that it reasonably appeared to her, as viewed from her standpoint, under all facts and circumstances within her knowledge, that she was in danger of losing her life or suffering serious bodily injury at the hands of the deceased," etc.

[2] In submitting the converse of appellant's theory, to the effect, in substance, that the mere belief that she was in danger in the absence of reasonable grounds upon which to base such belief, testing the reasonableness of the grounds as viewed from her standpoint at the time, would not excuse her, we think there was no error. Appellant has referred us to no precedent supporting her contention that in this respect the court's charge placed upon the appellant's right of self-defense an unwarranted limitation. See *Tillery v. State*, 24 Tex. App. 251, 5 S. W. 542, 5 Am. St. Rep. 882; *Ruling Case Law*, vol. 13, p. 816. There being no limitation placed in the charge of the court upon the right of perfect self-defense, there was no error in refusing to instruct the jury upon the right of appellant to arm herself. *Williford v. State*, 38 Tex. Cr. R. 383, 42 S. W.

972; *Smith v. State*, 81 Tex. Cr. R. 368, 195 S. W. 595.

[3] The court in the main charge having told the jury that the appellant was in no event bound to retreat in order to avoid the necessity of killing the deceased, it was not incumbent upon him to repeat it in a special charge.

[4, 5] The deceased, in his conference with his attorney preparing to bring suit for divorce against the appellant, made certain declarations which the appellant sought to reproduce on the trial through the attorney, and their exclusion as privileged matter is made the basis of complaint. Part of these declarations were explanatory of the details under which appellant had received a pistol shot wound while living at San Antonio some time before the homicide. Aside from the question of privilege, we think the effort to prove the circumstances of the transaction mentioned by the declaration of deceased in the presence of the witness was not admissible, because obnoxious to the rule against hearsay testimony. The other declaration offered was to the effect that deceased sought to obtain the legal advice of the witness as to what punishment would likely be meted out to him in the event he killed his wife, and that in this connection deceased had expressed his belief to the witness that in the event he should elect to kill his wife, a jury would not affix his punishment any greater than confinement for five years; that the witness advised against such a course. We think this statement was not protected by the rule which excludes privileged communications between attorney and client. *Ormon v. State*, 22 Tex. App. 604, 3 S. W. 468, 58 Am. Rep. 662; *Id.*, 24 Tex. App. 495, 6 S. W. 544; *Everett v. State*, 30 Tex. App. 682, 18 S. W. 674; *Underhill on Crim. Evidence*, § 175.

In the case of *Ormon v. State*, the accused complained to the attorney that one had been guilty of insulting language toward a female relative, and made inquiry as to the extent of the culpability in the event he slew the utterer of the language. The attorney read to him the statute on the subject. Subsequently, upon his trial for murder, the state was permitted to prove this transaction, the court in substance recognizing as the rule existing in criminal cases that the communications must be in the course of legitimate professional employment, and not communications made for the purpose of being guided in the commission of an offense, and that these rules obtain notwithstanding the innocent purpose of the attorney giving the advice; in other words, declaring that the public policy which prevented the disclosure of confidential communications between attorney and client would not seal the lips of the attorney who was consulted by one who, contemplating the commission

of a crime, sought the advice of the attorney as a means of evading or modifying punishment.

In Everett's Case, the deceased went to the offices of his attorneys, threatened the life of the accused, and asked the advice of his attorneys as to how to avoid the legal consequences of the killing of accused. This testimony was excluded upon the grounds that it embraced a confidential communication between attorney and client. The court on appeal overturned this ruling, and made it one of the grounds for reversal.

In the instant case there was evidence of previous attempts on the part of deceased to take the life of the appellant, and on numerous occasions, according to the evidence, he had, with her knowledge, threatened to do so. She claimed that it was his practice to carry a pistol, and to leave it in his automobile when he was walking on the streets. The evidence that immediately before he was killed he declared that he would get his pistol and kill the appellant depended upon her evidence alone. From his acts, as described by her, in endeavoring to reach the automobile, and from the other facts in the case, the jury were to determine whether from her standpoint at the time there was reasonable apprehension of danger. To solve the doubt as to whether the actions of the deceased amounted to an attack, or a threatened attack, his declaration made to his attorney, expressing an intention, desire, or motive to kill the appellant, and seeking an expression of opinion as to the probable consequences, might have been of value to the jury. Upon this subject Mr. Wharton in his work on Evidence says:

"For the purpose, therefore, in cases of doubt in showing that the deceased made the attack, and, if so, what motive, his prior declarations, uncommunicated to the defendant, that he intended to attack the defendant, are proper evidence." Wharton's Crim. Evidence, vol. 2, § 757, p. 1507.

[6] The case of Wallace v. State, 44 Tex. Cr. R. 301, 70 S. W. 756, 100 Am. St. Rep. 855, was one in which the accused killed her husband. There was no proof of an actual demonstration on his part at the time, yet it was held that the exclusion of his uncommunicated threats was not warranted; and, generally speaking, we understand the rule to be that, in cases of self-defense upon apparent danger, the prior hostile declarations of the deceased are to be received. The court properly allowed to come before the jury in the instant case the various difficulties, quarrels, threats, and encounters; in other words, allowed to be detailed the course of conduct between the husband and wife who were the parties to this tragedy. It was in the light of this evidence that the jury was called upon to solve the contro-

verted questions (Hall v. State, 31 Tex. Cr. R. 565, 21 S. W. 368; Medina v. State, 49 S. W. 380; Wallace v. State, 44 Tex. Cr. R. 304, 70 S. W. 756, 100 Am. St. Rep. 855), and the evidence excluded might have been of material aid. At all events, it was relevant, tending to show the state of mind of deceased toward appellant, and, as we understand the record, was excluded upon what we regard as a mistaken theory that the witness in whose knowledge it existed was not privileged to disclose it because he had received it in conference between attorney and client.

We are constrained to the opinion that in rejecting the evidence an error was committed requiring reversal of the judgment.

MASTERSON v. GINNERS' MUT. UNDERWRITERS' ASS'N OF TEXAS. (No. 2215.)

(Court of Civil Appeals of Texas. Texarkana.
May 14, 1920. Rehearing Denied
May 20, 1920.)

1. Mortgages \S 497(2)—Foreclosure of senior mortgage with no notice of junior mortgage bars rights of junior mortgage.

The foreclosure of a lien on land at the suit of the senior mortgagee who did not have notice of the right in the owner of the junior mortgage in the property bars such right, notwithstanding the junior mortgagee was not a party to the foreclosure suit.

2. Bills and notes \S 350—Transferee after maturity held to have no greater rights than transferor.

If pledgee of pledgor's notes payable to bearer, and deed of trust to secure notes, was bound by foreclosure of a senior mortgage, subsequent holder who took notes after maturity with notice of nature of transaction between pledgor and pledgee and of senior mortgagee's claim to land as foreclosure sale purchaser was also bound thereby, since such holder could not assert a right which pledgee could not assert.

3. Mortgages \S 427(2)—Mortgagee held not chargeable with facts not shown by record of junior deed of trust and holder thereof not necessary party to foreclosure proceedings.

Where notes payable to bearer secured by deed of trust were deposited with maker's creditor as security for debt, senior mortgagee with no actual notice thereof was not chargeable with constructive notice requiring it to make such creditor a party to foreclosure proceedings, though deed of trust was of record, and though by inquiry it could have ascertained such facts.

4. Mortgages \S 1—Existence of debt necessary.

The existence of a debt is indispensable to existence of a mortgage.

5. Mortgages 6-224—Purchaser of mortgage apart from debt takes nothing.

Where debtor deposited his notes payable to bearer and secured by deed of trust with creditor as collateral for payment of his debt, purchaser of the notes and trust deed, after maturity with knowledge of such facts took nothing by his purchase, since an assignment of the mortgage alone without the debt is nugatory and confers no right whatever upon assignee.

Appeal from District Court, Smith County; J. R. Warren, Judge.

Suit by the Ginnners' Mutual Underwriters' Association of Texas against N. T. Masterson and others. From judgment rendered, the named defendant appeals. Affirmed as reformed.

This was a suit by appellee against T. N. Jones, N. T. Masterson, and J. E. Winfrey on facts substantially as follows:

January 25, 1912, said Jones made and delivered to appellee 11 promissory notes, each of them being for \$1,000, interest and attorney's fees, payable to appellee or order, the first of them on or before January 15, 1914, and one of the others on or before January 15 of each of the ten years next following said year 1914. Each of the notes contained a stipulation that a failure to pay it when it matured should, at the option of the holder, operate to mature the other not then due. At the time Jones made the notes he executed and delivered a deed whereby he conveyed certain land to Dabney White as trustee to secure the payment of the notes.

February 10, 1913, Jones executed 10 notes, bearing that date, each for \$1,000, interest and attorney's fees, payable to "bearer" on or before February 10, 1918, and to secure the payment of the notes (it was recited in the instrument) executed a deed, also dated said February 10, 1913, whereby he conveyed to W. H. Marsh, as trustee, the land he had before conveyed to White as trustee. The deed to Marsh was duly recorded March 4, 1913. The 10 notes just mentioned did not at the time they were made, or ever afterward, represent an indebtedness of Jones to any one.

February 27, 1913, Jones made and delivered to the Harris Lumber Company a promissory note, bearing that date, for \$1,000, interest and attorney's fees, payable to the order of said lumber company October 1, 1913. Attached to this note was an instrument executed by Jones, referred to in the record as a "collateral agreement," in which it was recited that the 10 notes to "bearer," secured by the trust deed to Marsh, had been deposited with the lumber company as collateral security for said \$1,000 note made to it by Jones. By said instrument Jones authorized the lumber company "to collect said collateral when due, crediting the proceeds thereof on the foregoing note," and in case of default "in the payment of the foregoing note

at maturity" "to sell said security with or without notice, at public or private sale."

Jones having defaulted in the payment of the 2 notes which first matured of the 11 he made to appellee, the latter declared all of them due, and on October 15, 1915, in a suit against Jones alone, recovered judgment for the amount of the notes, to wit, \$12,298.40, and foreclosing the lien of the deed to White on the land conveyed to him as trustee. January 4, 1916, the land was sold by virtue of process issued on the judgment. Appellee was the purchaser at the sale, and the sheriff by deed dated said January 4, 1916, conveyed the land to him. At the time it commenced said suit and at the time it purchased the land at its foreclosure sale appellee had no actual notice or knowledge of the existence of the 10 notes made by Jones to bearer or of the trust deed made by Jones to Marsh to secure same.

The note for \$1,000 dated February 27, 1913, to the Harris Lumber Company, was renewed by Jones September 21, 1917. No part of it had been paid December 31, 1918, when the lumber company at Dallas agreed with H. Masterson at Houston to sell the note to him and to deliver to him with it the 10 notes made by Jones to bearer, together with the collateral agreement, deposited with it (the lumber company) as collateral security. The papers were accordingly sent through a Dallas bank to a Houston bank, where they were delivered to said H. Masterson January 2, 1919, he then paying to the Houston bank for the lumber company the sum he had agreed to pay therefor. On the next day thereafter, to wit, January 3, 1919, H. Masterson, by authority of the collateral agreement before referred to, sold the collateral notes (that is, the 10 notes made by Jones to "bearer") to appellant for \$1,000, and indorsed the amount as a credit on the principal note (that is, the note for \$1,000 made by Jones to the lumber company). At the time H. Masterson paid for the principal note and received it and the collateral notes he knew that appellee had foreclosed its lien on and was in possession of the land, claiming to own it, and also knew that Jones was never indebted to the lumber company except for the amount of the principal note, to wit, \$1,000, and 10 per cent. interest thereon from February 27, 1913.

W. H. Marsh, the trustee named in the deed of trust made by Jones February 10, 1913, died September 29, 1916. January 4, 1919, appellant, as the owner and holder of the 10 notes made by Jones to bearer, in writing appointed J. E. Winfrey to act as trustee under the deed, and thereupon Winfrey, as such trustee, at appellant's request advertised the land for sale on the first Tuesday in February, 1919. This suit was commenced January 30, 1919. By it appellee sought: (1) To enjoin a sale of the land by

virtue of the trust deed to Marsh; (2) to cancel said trust deed and the notes it was made to secure, on the ground that same were a cloud on its title to the land; (3) if the court thought that should not be done, and that appellant had a lien on the land to secure the payment of the principal note made by Jones to the lumber company, to be permitted to pay the amount thereof to appellant, and so bar the lien; (4) or, if the court thought that appellant had a lien on the land to secure the payment of the 10 notes made by Jones to bearer, to have its (appellee's) lien thereon to secure the payment of Jones' notes to it foreclosed and declared to be a prior lien on the land; that the land be sold, and that the proceeds be applied to the payment of Jones' indebtedness to it and the amount it had expended for taxes and improvements on the land, before any part of same was paid to appellant. Appellant in his pleadings tendered to appellee the amount of the 11 notes Jones made to it, and sought, if the tender was declined, a recovery against Jones of the amount of the 10 \$1,000 notes he made to "bearer" and a foreclosure of the trust deed to Marsh made to secure them.

The appeal is by appellant, N. T. Masterson, alone from a judgment in his favor against Jones for \$1,792.84, the amount of the note for \$1,000 made by Jones to the lumber company February 27, 1913, and foreclosing the lien of the trust deed to Marsh on the land in question, directing a sale thereof by the sheriff, and directing that the proceeds of such sale be applied: First, to the payment of the judgment recovered by appellee against Jones October 15, 1915; second, to the payment of said \$1,792.84 adjudged in favor of appellant against Jones; third, to the payment of the costs of this suit; and, fourth, the balance remaining, if any, to be paid to appellee. But it was provided in the judgment that the sale of the land ordered should not be made if appellee should pay to appellant the \$1,792.84 and interest adjudged in his favor. The judgment canceled the 10 notes made by Jones to bearer and the trust deed he made to Marsh, "except," it was recited, "as herein provided," and perpetuated a temporary injunction granted to restrain the sale of the land by virtue of said trust deed to Marsh.

Simpson, Lasseter & Gentry, of Tyler, for appellant.

Marsh & McIlwane, of Tyler, for appellee.

WILLSON, C. J. (after stating the facts as above). Appellant attacks the judgment as erroneous because it is not in his favor for the amount of the 10 notes for \$1,000 each deposited with the Harris Lumber Company as collateral security, and for a foreclosure of the trust deed to Marsh, instead of for the amount of the principal note for \$1,000 made by Jones to said lumber company. Appellee,

in cross-assignments, attacks as erroneous, because without the support of testimony, it says, the finding that it was chargeable with notice of the rights of the owner of indebtedness secured by the trust deed to Marsh at the time it commenced its foreclosure suit against Jones and at the time it purchased the land under the judgment in its favor in said suit, and on the ground that it did not have and was not chargeable with such notice, and on the ground that "there were no pleadings nor facts" authorizing it, attacks the judgment as erroneous in so far as it awarded appellant a foreclosure of the trust deed on said land for any amount.

In the view we take of the case, a determination of the contentions presented by the cross-assignments referred to will dispose of the appeal.

[1] It seems to be the law that the foreclosure of a lien on land at the suit of the senior mortgagee who did not have notice of the right in the owner of the junior mortgage in the property bars such right, notwithstanding the junior mortgagee was not a party to the foreclosure suit. 2 Jones on Mortgages, § 1425; Rogers v. Houston, 94 Tex. 403, 60 S. W. 869; Reel v. Wilson, 64 Iowa, 13, 19 N. W. 814; Henderson v. Grammar, 66 Cal. 332, 5 Pac. 488.

[2] It appears from the record that appellee, as a matter of fact, did not know of the existence of the deed of trust to Marsh at the time it commenced its foreclosure suit against Jones, not, indeed, until June 7, 1917, which was long after the time when the land was conveyed to it as the purchaser at the sale thereof made by the sheriff as directed by the judgment in said foreclosure suit. Therefore, unless the record of said trust deed of March 3, 1913, operated to charge appellee with notice that the lumber company had acquired a right in the land, appellee was not bound to make that company a party to its foreclosure suit in order to bar such right. If the lumber company was bound by that judgment, of course appellant was; for he, as well as his assignor, H. Masterson, acquired the collateral notes and trust deed long after said notes matured and with full notice of the nature of the transaction between Jones and the lumber company and of appellee's claim to the land as the purchaser thereof at the sale under the judgment in its foreclosure suit. Therefore appellant was not in a more favorable position than the lumber company was in, and as the holder of the collateral notes could not assert a right it could not have asserted.

Finding, in accordance with the statement hereinbefore made, that appellee had no actual notice of the existence of the collateral notes and trust deed to Marsh until June 7, 1917, the trial court further found that the record of the deed operated to charge appellee with constructive notice—

"that Jones had executed his 10 promissory notes of \$1,000 each payable to bearer, and to secure said notes he had executed a deed of trust upon the land, naming W. B. Marsh, of Tyler, Tex., trustee in the mortgage."

Unquestionably, we think, the record was notice of that much, and we do not understand appellee to be in the attitude of contending to the contrary; but the court further found, and appellee attacks the finding as without support in law, that the effect of the record and recitals referred to was to put appellee on inquiry and to charge it with notice of the existence of such other relevant facts as inquiry pursued with proper diligence would have disclosed.

"From these facts," said the court, "that is, the execution of the notes and deed of trust, and causing same to be recorded in the record provided by law for record of such instruments, it would be presumed that the notes had in some way gone into the channels of trade, and a lien had become fixed. To hold otherwise would be to assume that the entire proceedings were for no purpose and not intended for what they speak. With this information given by the record, a reasonable inquiry of either Jones, the maker of the notes, or of Marsh, the trustee, would have disclosed the fact that the notes were held by the Harris Lumber Company."

[3] As supporting his view of the law, the court cited *Wilkerson v. Ward*, 137 S. W. 159. In that case Ward claimed under a deed from Miles made in 1888, and duly recorded, in which the land was described as block 49, containing lots numbered 1 to 20, inclusive, in the Jonathan Miles First addition to San Angelo, and Wilkerson claimed under a deed from Miles made in 1908, in which the land was described with reference to streets in said addition. The court of civil appeals held Wilkerson to be chargeable with notice that the land Miles sold him was the same land he had conveyed to Ward. If the case is not within a qualification of the general rule announced in *Carter v. Hawkins*, 62 Tex. 393, it is opposed to the doctrine recognized in this state by the Supreme Court. The general rule and the qualification was stated by Chief Justice Phillips in *Wiseman v. Waters* (Sup.) 174 S. W. 516, as follows:

"The general rule that under the doctrine of constructive notice there is imputed to the subsequent purchaser or incumbrancer notice only of that which appears on the face of the recorded instrument, and that where there is substantial discrepancy between the property intended to be conveyed or mortgaged and that described in the instrument, the record will not operate as notice, is subject to the qualification that where the description in the instrument is ambiguous, inconsistent in its parts, or correct in one particular and false in another, the record is such as to naturally excite inquiry, and under such circumstances it therefore becomes the duty of the subsequent purchaser or incumbrancer to make inquiry for

the purpose of ascertaining what property was actually the subject of the instrument."

And in discussing the question further the Chief Justice added:

"With the qualification announced in *Carter v. Hawkins*, the rule is established, at least in this state and in others, that the record of instruments provided or permitted by law to be recorded operates as notice only of the facts actually exhibited by the record, and not those which might have been ascertained by such inquiries as an examination of the record might have induced a prudent man to make" citing numerous authorities, to which may be added *Adams v. Lumber Co.*, 162 S. W. 974.

The reason for the distinction between the effect of constructive and actual notice appears in the statement of the Supreme Court of Minnesota in *Bailey v. Galpin*, 40 Minn. 319, 41 N. W. 1054, as follows:

"Constructive notice of the contents of a deed arises as an inference or presumption of law from the mere fact of record, and is in law equivalent to actual notice of what appears upon the face of the record to the party bound to search for it, whether he has seen or known of it or not; that is, constructive notice under the recording acts may bind the title, but does not bind the conscience; while actual notice binds the conscience of the party."

If, as seems to be true by force of the rule in question, appellee was chargeable with notice only of facts recited in the trust deed to Marsh, and not with notice of the existence of facts which inquiry suggested by recitals in the deed if diligently pursued would have disclosed, we see no way of escape from the conclusion that it was not bound to make the Harris Lumber Company a party to its foreclosure suit in order to bar its right to enforce the lien it claimed on the land; for appellee did not otherwise know and it was not informed by anything in the trust deed who was the owner of the debt it was made to secure. Appellee could not have made the owner of the debt a party to its suit without first identifying him, and he could have done that only by making inquiry he was not bound to make.

The operation of the rule cannot be regarded as unfair or inequitable in this case, in view of the fact that the notice appellee had of the lumber company's claim on the land was presumptive only, and not actual so as to be "binding on its conscience," and in view of the fact that the lumber company, by taking from Jones and placing of record proper evidence of its claim, could have charged appellee with notice thereof and compelled it, in order to bar its rights, to make it a party to any foreclosure suit it brought. *Rogers v. Houston*, 94 Tex. 403, 60 S. W. 869; *Gamble v. Martin*, 151 S. W. 327.

[4] If, however, the conclusion reached by us that the right of the holder of the note for \$1,000 made by Jones to the lumber company

to look to the land as security for the payment thereof was cut off by the judgment in appellee's foreclosure suit was shown to be erroneous, the conviction we have as to the disposition which should be made of the appeal would remain unchanged; for we think the contention of appellee that the judgment was not warranted by the pleadings and the evidence in other particulars so far as it was in appellant's favor for a foreclosure of the lien he claimed on the land also should be sustained. It is clear that the only effect as between Jones and the lumber company of the delivery by the former to the latter of the 10 \$1,000 notes and the deed of trust to Marsh was to create a lien on the land to secure the note for \$1,000 made by Jones to the lumber company. As between those parties the transaction could not have had any other effect; for the 10 notes did not represent indebtedness of Jones to the lumber company or to any one else. Jones owed the lumber company only the amount of the note for \$1,000 he made to it February 27, 1913, and, so far as the record shows to the contrary, owed no other debts except the one to appellee. Therefore, unless the transaction by which Jones passed the 10 notes and the trust deed to Marsh to the lumber company operated as stated, it did not operate at all as between said parties, but was a nullity; for there was no other debt to be secured by it, and the existence of a debt (or other obligation, and there was no pretense in this case that there was any other obligation) is indispensable to the existence of a mortgage. *Carroll v. Tomlinson*, 192 Ill. 398, 61 N. E. 484, 85 Am. St. Rep. 344; *Richards Trust Co. v. Rhomberg*, 19 S. D. 595, 104 N. W. 268; 19 R. C. L. 294, and authorities there cited. In the work last referred to it is said:

"Since a conveyance cannot be a mortgage unless given to secure the performance of an obligation, the existence of an obligation to be secured is an essential element without which the mortgage instrument is but a shadow without substance."

[5] If such was the effect of the notes and trust deed as between Jones and the lumber company, such was the effect thereof as between Jones and H. Masterson; for, taking the papers as he did after the maturity thereof with full knowledge of all the facts relating thereto, said H. Masterson, as the holder thereof, had the rights, and only the rights, the lumber company had while it held same; in other words, H. Masterson could look to the land described in the trust deed as security (not for the amount of the 10 \$1,000 notes to bearer, but) only for the amount of the \$1,000 note to the lumber company. It was on that theory, it seems, and the theory that N. T. Masterson by his purchase of the 10 \$1,000 notes made by Jones to bearer became the owner of Jones' debt

to the lumber company, that the court below rendered the judgment he did in appellant's favor. But appellant in his pleadings did not seek a recovery as the owner of the note, or of an interest therein, made by Jones to the lumber company. The recovery he sought was on account of and as the owner of the 10 \$1,000 notes made by Jones to bearer. And the testimony was that H. Masterson intended to sell and appellant intended to buy those notes, and not the note nor an interest in it made to the lumber company; in other words, it appeared from both the pleadings and the testimony that the thing H. Masterson intended to sell and appellant intended to buy was what we have held operated as between Jones and the lumber company and Jones and H. Masterson as a mortgage only. And we do not think the 10 notes to bearer and the trust deed to Marsh operated differently in favor of appellant, for he purchased same after the notes matured and with knowledge of the facts shown by the collateral agreement under which the lumber company, and after it H. Masterson, held same. He purchased paper he was bound to know was only a mortgage, and, for anything appearing to the contrary in the record before us, took nothing by his purchase; for the rule is that—

"An assignment of the mortgage alone, without the debt, is nugatory and confers no right whatever upon the assignee." 27 Cyc. 1286, and authorities there cited.

The judgment, so far as it awards appellant a foreclosure of the trust deed to Marsh and directs a sale of the land therein described, will be so reformed as to deny him such relief, and, as so reformed, will be affirmed.

STRINGER et al. v. JOHNSON. (No. 568.)

(Court of Civil Appeals of Texas. Beaumont.
May 12, 1920. Rehearing Denied
May 19, 1920.)

1. Adverse possession §101—Actual possession insufficient to give title to contiguous tract subsequently purchased.

Where a person who has acquired title by adverse possession to a certain portion of a league purchases a tract contiguous thereto, the continued actual possession of the land to which he had acquired adverse possession without enlargement or extension so as to reach the land purchased would not give him title by adverse possession to land purchased; his possession of other tract not being extended thereto by construction.

2. Adverse possession §115(4) — Inclosure by fence and use for pasture for required period held for jury.

In trespass to try title, whether plaintiff's predecessor, who plaintiff claimed to have ac-

quired title by limitation under 5 and 10 year statutes, had kept the land continuously inclosed by a fence for any period of 5 or 10 years, and during such period continued its use and enjoyment as a pasture for stock, *held* for the jury.

3. Adverse possession §112 — Limitation claimant must prove every fact necessary to give title.

One asserting title to land by limitation has the burden of proving every fact necessary to give such title; inferences never being indulged in favor of a limitation claimant.

4. Adverse possession §14—Mere fencing of land without actual occupancy not sufficient.

The mere fencing of land, though land is claimed under a deed duly of record, and taxes are duly paid thereon, will not, of itself, without the statutory contemplated use, cultivation, or enjoyment, give such purchaser title by limitation under either the 5 or 10 year statutes.

5. Adverse possession §115(2) — Possession at times by tenants for cutting timber held not to give landlord title by adverse possession as matter of law.

That a grantee had several Mexican tenants who at times camped upon the 30-acre tract in tents for purpose of cutting timber for wood and charcoal, etc., and at times cultivated a small garden on the land, *held* not as a matter of law to give grantee title by adverse possession as against true owner.

Error from District Court, Jefferson County; E. A. McDowell, Judge.

Action by Mrs. Annie H. Johnson against T. A. Stringer and another. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

E. M. Chester and E. E. Easterling, both of Beaumont, for plaintiffs in error.

John Hancock, of Thurber, and Smith & Crawford, of Beaumont, for defendant in error.

HIGHTOWER, C. J. This was an action of trespass to try title, brought by Mrs. Annie H. Johnson, as plaintiff, against T. A. Stringer and B. M. Chester, as defendants, to recover about 60 acres of land, a part of the Absolam Williams league in Jefferson county, the land being sued for as one tract, and so described in the plaintiff's petition by specific metes and bounds. Plaintiff also specially pleaded title to the land under the statutes of limitation of 3, 5, and 10 years. Defendants disclaimed as to all the land sued for by plaintiff, save and except a tract consisting of about 30 acres, which was described by metes and bounds in their answer, and as to this 30-acre tract they pleaded the general denial, not guilty, and also interposed the 3, 5, and 10 year statutes of limitation.

The case proceeded to trial with a jury, but at the conclusion of the evidence the

trial court, at plaintiff's request, peremptorily instructed a verdict in her favor for all the land sued for by her, and upon the verdict thus obtained, judgment in her favor was rendered. Defendants, at the proper time, objected and excepted to the trial judge's action in instructing the verdict against them for so much of the land as was described in their answer and claimed by them, and after their motion for new trial was overruled defendants prosecuted a writ of error to this court.

For convenience, plaintiffs in error will be referred to as "appellants," and defendant in error as "appellee."

At the trial below, appellee never attempted to show title in herself from the sovereignty or from any other source, but relied solely upon her claim of adverse possession as to all the land sued for, while appellants established title in themselves from the sovereignty; and, therefore, appellee was not entitled to an instructed verdict in her favor as to the 30-acre tract described in appellants' answer, unless it can be said that the evidence as a whole showed, without contradiction or dispute and was therefore conclusive, that appellee had acquired title thereto by limitation, as claimed by her. This alone was the issue between the parties below, and we shall try to state, as succinctly as possible, the substance of the material evidence relative to such issue, as the same is reflected by the record.

In August, 1878, Joseph Nassis and wife, who were not shown to have any title, executed and delivered to one Ezekial Janes a deed purporting to convey to Janes a tract of approximately 33 acres of land, a part of the Absolam Williams league. The deed specifically described the 33 acres by metes and bounds, and was duly recorded soon after its execution. Janes at once took actual possession of this 33-acre tract, claiming it under his deed duly of record, made permanent and substantial improvements thereon and lived thereon, claiming the land as his own, and paid all taxes as they accrued, and continued in peaceable and adverse possession of this 33-acre tract until 1910. By such continuous adverse possession, Janes acquired title to said 33-acre tract, and this is admitted by appellants. In 1892, one C. U. Connelley, who was not shown to have any character of title, but who, it seems, was asserting some character of claim antagonistic to Janes, made a deed to Janes, purporting to convey to Janes said 33-acre tract, title to which at that time Janes had already acquired by limitation under both the 5 and 10 year statutes, and such deed also purported to convey to Janes the 30-acre tract which is claimed by appellants in this suit, and of which they were the true record owners, the two tracts,

however, being conveyed as one described by specific notes and bounds. This deed from Connellee to Janes was duly recorded within a few weeks after its execution, and the proof showed, without dispute, that Janes thereafter regularly paid all taxes due on the 30 acres in controversy until 1910. The undisputed proof shows that up to the time Janes got said deed from Connellee, his improvements of every kind and character had been confined to the 33-acre tract, which lies immediately south of the 30-acre tract in controversy, and Janes, up to that time, never had any character of possession of any portion of the 30-acre tract owned by appellants, or rather their predecessors in title. As to whether Janes ever had such actual possession of the 30-acre tract here in controversy, or any portion thereof, subsequent to the deed from Connellee and for such length of time as would confer title by the 5 or 10 year statute of limitation (there could be none under the 3-year statute, because there was no connection with the sovereignty) was, we think, an issue of fact for the determination of the jury.

Counsel for appellee, in their argument in this court, conceded that her right to recover the 30-acre tract in controversy must depend upon proof that title to that tract was acquired by Janes by limitation subsequent to the execution of the deed to him from Connellee in 1892. If the evidence upon that point showed, conclusively, that is to say, without dispute or contradiction, that Janes had so acquired title to the 30-acre tract, then the instructed verdict was proper; but, if not, the issue should have gone to the jury.

Appellants have attacked the action of the trial court, in peremptorily instructing the verdict against them, by several assignments of error, but the gist of their contentions may be stated as follows:

(1) That Janes' possession of the 33-acre tract under the deed from Nassis and wife having continued for such period of time as to give him perfect title by limitation, the 33-acre tract was thereby effectively segregated from all remaining portions of the league, and just as much so as if the true owner had conveyed the 33-acre tract to Janes; and that when Janes took the deed from Connellee in 1892, which, according to the boundaries specified, conveyed both the 33-acre tract and the 30-acre tract here in controversy, Janes' actual possession of the 33-acre tract was not thereby extended by construction to the 30-acre tract, and that Janes' actual possession of the 33-acre tract remaining the same after the deed from Connellee as before, and being in no manner enlarged or extended to the larger tract described in the Connellee deed, such continued actual possession of the 33-acre tract, however long continued, without en-

largement or extension so as to reach the 30 acres here in controversy, was insufficient to require the true owner of the 30-acre tract to go to the records to ascertain the extent of Janes' claim.

(2) That as to whether Janes ever had and held such continuous, actual possession of the 30-acre tract in controversy, and so used, cultivated, or enjoyed the same for a period of time sufficient to give him title by limitation under either the 5 or 10 year statute, after taking the deed from Connellee, was under the evidence adduced, an issue of fact for the jury.

We do not find in appellee's brief any counter proposition which absolutely and unequivocally denies the soundness of the first contention made by appellants, as shown above, but by the second counter proposition, which comes nearer to doing so than any of them, appellee replies that the undisputed evidence showed that Janes, subsequent to taking the deed from Connellee, and while still in actual possession of the 33-acre tract, as before, also took actual possession of the 30-acre tract, and used, cultivated, and enjoyed it for some period of time, and that, even if less than the statutory term, still such possession, however brief, was sufficient to require the true owner of the 30-acre tract to go to the record to ascertain the extent of Janes' claim to that tract, and that such possession, regardless of its duration, put the statutes of limitation in motion as to the 30-acre tract, which continued so long as Janes occupied and used either of said tracts.

As to the second contention made by appellants, as we have shown it above, appellee replies that the evidence adduced upon the trial showed, conclusively and without conflict or contradiction, that Janes had and held adverse and peaceable possession of the 30-acre tract for a period of time sufficient to perfect title in him under both the 5 and 10 year statutes.

[1] After careful consideration of the proposition involved, we have reached the conclusion that appellants' first contention, as above shown, is sound, and must be sustained. We do not think, however, that either of the cases cited by appellants in support of their contention can be said to be exactly decisive of the point in their favor, for we think that none of such cases is precisely relevant in its facts to the instant case. The cases cited by appellants in support of their contention are *Broom v. Pearson*, 98 Tex. 469, 85 S. W. 790, 86 S. W. 733; *Hill v. Harris*, 26 Tex. Civ. App. 408, 64 S. W. 820; *Holland v. Nance*, 102 Tex. 177, 114 S. W. 346; *Bird v. McHargue*, 182 Ky. 27, 205 S. W. 957, the last mentioned being a Kentucky case. But though the cited cases are not squarely relevant in their facts, yet the reasoning by which the conclusion

was reached in them all, and especially that of *Hill v. Harris*, supra, applies, strongly we think, in favor of appellants' contention here. *Hill v. Harris* was a decision by the Galveston Court of Civil Appeals, speaking through Justice Gill, and the Supreme Court of this state denied a writ of error. There was but one point in the case for the consideration of the Supreme Court, and that court's action denying the writ of error meant, of course, that in the opinion of the Supreme Court the judgment of the Court of Civil Appeals was correct, but it would not necessarily follow, of course, that the Supreme Court approved in toto the reasoning of the Court of Civil Appeals in reaching its conclusion. But, however that may be, it occurs to us that the reasons given for the conclusion by the Court of Civil Appeals in that case are sound and logical, and that the reasoning there applies to the point here under consideration. It was substantially held in *Hill v. Harris* that, where a person held a part of a league of land under a deed duly recorded until title thereto was perfected in him by limitation, his possession could not be extended, by construction, so that limitation would run in his favor as to any other portion of the same league by his taking a deed to the remainder of the same league, of which he did not take actual possession also, notwithstanding it was shown that taxes upon the whole league were regularly and duly paid after the second deed was taken. In reaching the conclusion there, the court, among other things, said:

"It seems to us, therefore, that it is not so much a question of extent of claim on the part of those asserting limitation as it is a question of the sufficiency of the possession to send the true owner to the record to ascertain the extent of the claim. The taking and recording of a deed to land will not of itself put the statute in motion in favor of a claimant thereunder. Neither will adverse possession put the 5-year statute in motion, in the absence of a duly recorded deed and the payment of taxes. The true owner may ignore such a deed until his domain is actually invaded. The record of it is not notice of the adverse claim as to the true owner until some act is done upon the land itself amounting to adverse possession. When this occurs, the owner must take notice of it, and the record of the deed immediately becomes constructive notice of the extent of the adverse holder's claim. That the record of a junior deed is not constructive notice to prior purchasers is now well settled. * * *

We mention this only to emphasize the fact that the record of the deed under which defendants claim the 1,000 acres was utterly without significance as to plaintiffs, if unaccompanied by adverse possession. It has been shown that the adverse possession of the 3,234-acre tract had ripened into perfect title in those holding it prior to the purchase by the senior Kennedy, so that, conceding that the legal title to the entire league had been in the plaintiffs, the senior Kennedy, by his purchase of the last-

named tract, acquired a title thereto as unavailable as if plaintiffs themselves had conveyed it. It was thereby as effectually segregated from the remainder of the league as if it had been conveyed to him by the true owner. At the time of Kennedy's purchase of the 1,000-acre tract, his possession of the larger tract had served its purpose and had ceased to be unlawful. * * *

So in this case title to the 33-acre tract was complete in James by limitation long before he took the deed from Connellee in 1892 and therefore the 33-acre tract was, at the date of the last-mentioned deed, effectively segregated, in legal contemplation, from all other portions of the Absalom Williams league; and since the undisputed evidence showed that James, after taking the deed from Connellee, did not enlarge his improvements upon the 33-acre tract so as to extend them in any way to the 30 acres here in controversy, and the character of his possession of the 33-acre tract being in no manner changed, his continued actual and unchanged possession of that tract did not have the effect to extend, by construction, his possession to the 30-acre tract now in controversy, the true ownership of which is admitted to be in appellants. And we cannot agree with counsel for appellee in their broad contention that any act or conduct on the part of James that constituted actual possession for any period of time, however brief, after recording the deed from Connellee, was sufficient to put the statutes of limitation in motion in his favor, and that limitation then continued as long as James held actual possession of the 33-acre tract. On the contrary, we cannot escape the conclusion that in order for James to have acquired title by limitation to the 30-acre tract in controversy, notwithstanding the fact that he placed the Connellee deed promptly of record and paid all taxes accruing thereon, it was incumbent upon appellee to show, by conclusive evidence, in order to entitle her to an instructed verdict in this case, that James took and held actual possession of the 30-acre tract, claiming the same adversely, and held such possession continuously for a term sufficient to give him title under either the statute of 5 or 10 years; and we shall not proceed to discuss that point.

Appellee, in this connection, first contends that the undisputed proof conclusively showed that James, shortly after taking the deed from Connellee in 1892, inclosed the 30-acre tract in controversy with a wire fence, and that he kept it continuously inclosed until 1910, when he sold the land to appellee's predecessor in title, and that during all that period of time, James was using this inclosure for a pasture for stock, both cattle and horses, and that such inclosure, use, and enjoyment of the land constituted, in contemplation of law, adverse possession in him

as against the true owner, and that, it being undisputed that the Connellee deed describing the 30-acre tract was duly of record during such period of possession, and that all taxes were regularly paid, title by limitation was shown to have been complete in Janes, under both the 5 and 10 year statutes, long before appellee acquired the title through him. Of course, if appellee is correct in this contention as to what the undisputed evidence was, we would not be required to go any further, but would sustain the contention and affirm the judgment. After a careful consideration of all the testimony found in the record, we think that it cannot be held that it was shown by the undisputed evidence, in its entirety, that Janes kept this 30 acres continuously inclosed by a fence for any full period of either 10 or 5 years between the time he took the Connellee deed and 1910, when his possession ended; neither can it be said that the evidence, as a whole, showed conclusively and without dispute that the land was used continuously as a pasture during any such period of time while Janes had it. It may be conceded, and we might add it is the opinion of this court, that the evidence on the part of appellee, if there were no other, was sufficient to warrant the court in instructing the verdict in this case, and therefore it will be unnecessary to discuss the evidence of any witness for the appellee, nor will it be necessary to discuss the evidence in detail of the several witnesses who testified for appellants; but, in disposing of the point now under consideration, it will be sufficient to note or mention such portions of the evidence introduced by appellants, as defendants below, as was of such character, we think, to require the submission to the jury of the issue whether Janes' possession and use of the 30-acre tract as a pasture was such as to give him title by limitation. As stated above, it was conclusively shown upon the trial that appellants have the record title to the 30 acres in controversy, lying just north of and contiguous to the original 33-acre tract purchased by Janes from Nasis and wife, and that appellants hold such title under a regular and consecutive chain of transfers from the sovereignty, and that they also claim title under a deed from the heirs of one Emma Fennels, whatever that claim of title may amount to. Among other witnesses introduced by appellants, as defendants below, on the issue of limitation, was the witness George Simmons, whose testimony in full was as follows:

"I am 58 years old and have been living in Beaumont all my life. I live in the north end of town about a quarter of a mile north of the place where Zeke Janes use to live. I have known Zeke all my life. I have lived up there north of Zeke's old place 30 years. He had about 30 or 40 acres of land fenced in out there, and he had it fenced when I moved out

there. It was north from him and south from me. He had it fenced with a pew fence, made out of pews. That is the kind of fence he had around his field. He had a wire fence north of his field right close to where we live, and about 30 acres of land was fenced inside that fence. That fence was put up about 6 years after I went out there. It was black land, and nothing inside that fence but woods, pine, oak, and gum, some large and some small. There were no houses inside of that pasture. That fence stayed there 3 or 4 years; it had some gaps in it, so that we could go through this land. There were no gaps left here, and the fence was down so you could pass through it, and I have seen it down in different places, during the 3 years it was up there. There was no horses or nothing of that kind in there; nothing but woods. After that 3 years Zeke quit keeping the fence up, and it was torn down by people going through there. The first time I ever saw any horses in Zeke's pasture was about a year after that wire fence was put up; Dan Gill put them in there. That pasture was not on the 30-acre tract; it was between the 30-acre tract and Zeke's homestead. It was a little round place, about two or three lots, something like that, that he would bring horses up and put them in there. It was south of where Emma Fennels lived. It was not inside of Zeke's field. Dan kept his horses in there about six or eight months. He didn't keep them in there all the time either. He would keep them in there three or four days at a time. That little pasture fence where Dan kept his horses was built after the wire fence was built, and before the wire fence was torn down. There wasn't any horses or cows in the 30-acre tract, except some time when people would go through and leave the gate open stock would get in there. I never saw Dan Gill's horses in the 30-acre tract. I saw his horses, about seven or eight head in that little pasture. The fence around that 30-acre piece was a three-wire fence. It was fastened to trees and posts. The fence was sufficient to keep stock in and out, except when the gaps were down. When the gaps were down stock would get in there. I have seen that fence down at other places than the gaps, but cannot say how often. I never saw any stock in there except when the fence was down. I went through there very often. In going to my work, sometimes I would go through there and sometimes I would go to Magnolia. I cannot say whether I went through there as often as once a week or as often as once a month but I would go just which way I wanted to. I lived about two blocks from the north fence of that 30-acre tract. The Connellee tract had about 30 acres in it, and was right next to us, and was between us and Zeke Janes' field. The fence I spoke of is on the Connellee tract. There was no cross fence that I know of between the Connellee tract and the Zeke Janes 30-acre tract. The fence stayed around the Connellee tract about 3 years. It went down when Zeke quit fooling with it. All the fence I have been telling about was on the Connellee tract, except the little fence where Dan Gill put his horses. That was not on the Connellee tract. No, sir; Zeke Janes never had any pasture out there. None at all. There was no fence south of the Connellee fence, ex-

cept the fence around Zeke's field. That is the only fence that I saw. I don't know exactly how far Zeke's field was from the Connellee fence, but it was about three-quarters of a mile. I know where Zeke's house was; it was on the Nancy White tract. I lived north of the Connellee 30-acre tract. I never saw any fence around the land between the Connellee 30-acre tract and the tract where Zeke had his field."

Cross-examination:

"The pasture that I am testifying about came up in about two blocks of where I live, and is on the Connellee land. Yes; I know where the Connellee land is. There is 30 acres of it. That was the pasture that I had been going through and about which I testified about being down in about 2 or 3 years after it was built. Zeke Janes built that fence. No; we had nothing against Zeke Janes. I did not cut his fence down. He put gaps in there so that we could open and close them. Zeke had no pasture between the Connellee tract and Zeke's field. There was no pasture in there. I never did see any horses in there. Emma Fennels lived kinder to the side of her father's field, but it wasn't between Zeke's field and the Connellee tract. She lived about two blocks from his field fence. When we came through the Connellee pasture we would come right up on the south and come out there (pointing to north line of Connellee's fence). The Connellee pasture, the pasture that I have been testifying about, is about three-quarters of a mile from Zeke's house, I guess. The closest person living around the place where we would go out of the Connellee pasture was Emma Fennels. The pasture fence that I have been testifying about did not take in Zeke's field. If there was any other pasture there I know nothing about it. Yes; I know Dan Gill. I know Mr. Johnson, the merchant that lives on Concord road. I don't know exactly how far I live from him. He has delivered groceries to my place. He has bought produce from me. He has been living there a good while. He lives about a mile from that pasture.

"Q. And you say that Zeke didn't have any fence around the north part of his field? A. No, sir."

Redirect examination:

"Amos Prater did not live in that pasture. He lived west of Zeke's field, and kinder west of Emma Fennels. Amos Prater had a house and a patch fence around it. Amos' girl tore the house down and moved it before Emma Fennels died. I saw Zeke Janes cutting wood on the tract of land where Emma Fennels lived, but he is about the only one I ever saw cutting wood in there. Some Mexicans lived there on the Amos Prater place, but I don't remember ever seeing them cutting any wood. I don't know exactly how long they lived there. I never saw anybody living in a tent on that tract of land or camping on it. That tract of land had been pretty well cut over before Zeke sold it. Emma Fennels lived there 7 years. I remember when the house was built there. Her papa helped to build it; I don't remember who else. From the place where I would come out of the Connellee pasture it was about three or

four blocks before I would come to Emma Fennels' house. I think all that land between the south fence on the Connellee tract and Emma Fennels was open land. I never saw any fence around it."

Appellants also, as defendants below, introduced the witness Frank Thomas, whose testimony in full was as follows:

"I am 49 years old, and live on the Concord road about a quarter of a mile from where Zeke Janes used to live. I have known Zeke Janes all my life, and know where his house was out there. I don't know how many acres he had in the field around his house. He had a pasture around his house, but I don't know how many acres, neither do I know how long he kept the pasture up. I don't exactly remember when he had the pasture there. I know he had a pasture, and him and Dan Gill and Sid Milligan use to pasture some horses up there, and it was up as often as it was down. I remember when Zeke sold out and moved. I don't know how long it was before that, that I saw this fence around that pasture; I didn't pay any attention to it. That Milligan boy was running around with Dan, and they pastured some horses in that pasture, but I couldn't tell you exactly how often. I don't know how many years they did that; I didn't keep any account of that. They didn't keep the stock in that pasture all the time. Whenever they wanted to go in the cove and catch wild horses they would put them in that pasture. Sometimes the pasture was down, sometimes it was up. I couldn't tell you how long it would stay down; they were always fixing up fence around there. Sometimes I went through there hunting and saw it down. I was up in that neighborhood all the time. Sometimes in the evening I went out there hunting. I used to hunt in that pasture. Sometimes there would be one or two cows in there. They were supposed to be Zeke Janes' cows. He didn't keep his cows in there all the time. Everybody would turn their stock out, and when they wanted to go in that pasture they would go on through. There wasn't any stock law out there at that time. I knew Emma Fennels, but don't remember what year she died. At the time she died Archie (her husband) had quit her. The fence was down then. I don't know how long it was down. All the posts were down where stock ran over it and knocked it down, and they would go there and repair it. It was torn down that way around about in different places. It was a two or three wire fence; I don't remember. When that fence was down other peoples horses and cattle went in there, because I had a little mare named Nellie, and she got away one day, and I found her in that pasture; the fence was down. That was a good many years ago. It was after Emma Fennels and Archie broke up, but before Emma died. I don't know exactly how long before she died. I suppose Emma and Archie lived together about 6 or 7 years. I remember Dan Gill used to have horses out there in that pasture, but whether or not they were his I don't know. That was after Emma Fennels' death, I believe. At that time they would go and repair that fence whenever they wanted to put anything in there; they would build it up again. They would put stock in there a month or two,

and then the fence would get down, and if they wanted to put some more stock in there they would have to repair it. I don't know how long that would be between times. I didn't keep no account, and I didn't keep the days, years, months, or weeks of that at all. Sometimes it was down weeks and months as far as I know exactly. Whenever I would go through there sometimes it would be down and sometimes it would be up."

Cross-examination:

"I have been living in and around Beaumont all my life. I have been married 23 years, and have one child, and have been living on Concord road about two miles north of Beaumont all those 23 years. Zeke Janes was living on the Gold Hill addition, north of town, when I married. I remember when he sold his place. He had a daughter named Emma Fennels. She died right there in Zeke's house before he moved away. She lived in the house that Archie built on Zeke's property in the pasture. Zeke was supposed to give her some land. She lived up in the pasture. I don't exactly remember how long she lived in there. She and Archie broke up while they were living in there. There was a pasture up north of Zeke's pasture. It was supposed to belong to Zeke. The pasture that I was testifying about being down was the one that Dan and Milligan used to put horses in. I have no interest in this case. I am just letting my testimony come out just like I haven't got any interest whatever in this case. I haven't talked about this case at all. Yes, sir; I talked to Mr. Chester about what my testimony would be in this case. There was one big pasture, and there was a fence that cut across there. I don't know the difference in the size of those pastures; I only saw them sometimes when I went through there hunting. I don't know which pasture was the largest, because I never paid much attention to them, but I did pay attention to the fence, because I was through there hunting. That has been a long while ago. I couldn't tell you how long it has been since that fence was built. I cannot tell you which fence fell down first. Sometimes the fence was down in panels. In other words there was no fence there at all. I don't know whether it would turn stock or not, but I do know that they had to repair it occasionally. I am a carpenter. I have handled horses and cattle. I have seen stock in that pasture. The fence was sufficient to hold cattle for a while, but if they wanted to get out they could get out. There never was a bunch in there. They could break out. I didn't pay any attention to which fence was down, whether it was the north or south pasture. I know that the fence was down sometimes, and that is all I know about it. I couldn't tell you whether or not all that fence was down when Zeke left, because some fellows went there and put a new wire fence around there. I think George Simmons put a new wire fence around there. A new wire fence was put there a year ago. I drove a wagon through there, and saw where the new fence was put up. It was around the land where Zeke had the pasture, and around the Amos Prater place. There was a pasture there when Zeke used to live there, but I cannot say that it was a pasture that would hold stock

if they wanted to get out. I don't remember now whether or not Archie Fennels was around his wife when I found my little mare Nellie in that pasture. I think they had broken up. Nellie was a gray mare, and I bought her from Gilbert Scott and paid \$75 for her."

Redirect examination:

"I used to play around Amos Prater's place before Amos and Adeline died. I used to be over there all the time. They lived on that side (indicating west) of the pasture. His house was right off here, and the pasture was in here, running up toward the Simmons settlement. There was a fence running along by Prater's house up to Ike Black's house. I couldn't tell you how that fence was; it ran in such a zig-zag way; that fence ran all kinds of ways. Just to come to the facts about it, there wasn't much of a fence at all."

Cross-examination:

"I have built some fences; a good many. That fence that we have been talking about is just like some children had been playing. If a horse wanted to get out he could do so; that is the way that fence was. I think a fellow would be foolish to try to keep a horse in there. I know I wouldn't put a horse in there if I expected him to stay in there. He could go right on about his business."

[2] We think that it must be conceded, after the testimony of these two witnesses is considered as a whole, that the issue of whether Janes kept the 30 acres in controversy continuously inclosed by a fence for any period of 5 or 10 years, and during such period continued its use and enjoyment as a pasture for stock, was a question of fact for the determination of the jury. It must be borne in mind that the question is not whether the evidence was sufficient to have warranted a finding in favor of appellee on the issue of limitation, but the question is, Was the state of the evidence such that the trial court could take the issue away from the jury, and determine the credibility of all the witnesses and the weight to be given to all the testimony? According to the evidence of the witnesses Simmons and Thomas, the jury could have found that the fence which Janes had around the 30-acre tract in controversy was down for "weeks and months at a time," and that stock passed in and out at will, not only stock belonging to Janes, but other stock in the community belonging to other owners, and while the evidence of these witnesses also shows that the fence was frequently repaired, and especially at times when it would be needed to hold stock that was being gathered, it nevertheless leaves the matter in such shape that a jury would be warranted in concluding that the fence was not kept up around the land for any continuous period of 5 or 10 years, and we think that the burden was upon appellee, in order to warrant an instructed verdict in the case, to show that the fence was kept up for

at least some continuous period of five years during the time Janes was claiming the land under the deed from Connellee, and that if there were breaks in the fence they were repaired within a reasonable time, and also that the land so inclosed for such period of time was used continuously as a pasture, or used or enjoyed in some other way contemplated by the statute.

[3, 4] One asserting title to land by limitation has the burden of proving every fact necessary to give such title, and inferences are never indulged in favor of a limitation claimant. *Dunn v. Taylor*, 102 Tex. 80, 113 S. W. 265. But even if it had been shown conclusively by all the witnesses that Janes kept the land inclosed by a fence for a continuous period of 5 or 10 years, without any breaks whatever, still such mere inclosure, unaccompanied by such use, cultivation, or enjoyment as the statute contemplates, would not have been sufficient to give Janes title by limitation. In other words, the mere fencing of land, although claimed under a deed duly of record and taxes duly paid thereon, will not, of itself, without the statutory contemplated use, cultivation, or enjoyment, give such possessor title by limitation under either the 5 or 10 years' statute. *Niday v. Cochran*, 42 Tex. Civ. App. 292, 93 S. W. 1027; *Buster v. Warren*, 35 Tex. Civ. App. 644, 80 S. W. 1063. As we construe the evidence as a whole, it not only fails to show, conclusively and without dispute or contradiction, that Janes kept the 30-acre tract inclosed by Janes during any consecutive 5 or 10 years while he claimed the land, but it also fails to show, conclusively, that he used the land as a pasture for stock for any period of 5 or 10 years consecutively. It is true the evidence shows that he very frequently gathered and pastured stock upon this land, but it also shows, or at least a jury would be warranted in concluding, that there were periods of time of perhaps months that no stock was kept on the land as a pasture, but, on the contrary, stock belonging to people in general in the community would come in at will and go out at will, and it cannot be said, therefore, that the proof was conclusive, as a whole, that Janes kept this tract of land inclosed and used it as a pasture for any consecutive period of 5 or 10 years.

[5] But appellee further contends that the trial court correctly instructed the verdict in her favor, for the reason that the evidence was such as to show, without reasonable dispute, that Janes after taking the deed from Connellee, at times had Mexican tenants upon the 30-acre tract, who were engaged in cutting timber from the tract for wood and charcoal, etc., and that these Mexican tenants were upon the land some 6 or 7 years; that

these Mexican tenants lived in tents while they were engaged in cutting the timber, and that they also cultivated portions of the land. It is true, as shown by the undisputed evidence, that Janes had several Mexican tenants who camped upon the 30-acre tract in tents at times, and that they were engaged in cutting the timber into wood and burning coal, etc., and that the cutting of this timber was quite extensive, but we do not think that it could be said, as a matter of law, that the cutting of the timber through these Mexicans was such use or enjoyment of the land, of itself, as would constitute adverse possession and divest title out of the record owner, but that such use of the land, together with all other uses made by Janes, would be matters for the determination of the jury; that is to say, the jury should be permitted to determine whether such acts upon and use of the land constituted adverse possession, under proper instructions from the court. As to the cultivation which appellee claims these Mexicans did upon the land, it was quite meager indeed—nothing more than a garden, a small potato patch at times—and we are of opinion that it cannot be held, as a matter of law, that such character of alleged cultivation was sufficient to divest title out of the true owner under either of the statutes of limitation.

We cannot tell, of course, since the record does not disclose, upon what theory the trial judge peremptorily instructed the verdict in this case, but it is stated in appellants' brief that the trial judge did so upon the theory that when Janes took the deed from Connellee in 1892, which embraced or included the 30-acre tract in controversy, and continued to remain in undisputed actual possession of the 33-acre tract already owned by him, such possession extended immediately, by construction, to the 30-acre tract in controversy, and, having continued until 1910, title to Janes under both statutes of limitation was complete in him, without regard to the character of possession had by Janes of the 30-acre tract, or the use made by him of that tract. If such was the trial court's theory, we think, as we have said above, that he was in error, and also think that the question as to whether Janes ever had such actual possession of the 30-acre tract, and so used, cultivated, or enjoyed it for any consecutive period of 5 or 10 years as would give him title by limitation was an issue of fact for the jury, and that the trial court, therefore, erred in peremptorily taking that issue from them. Appellants' assignments of error based upon that action of the court are sustained, and the judgment will be reversed, and the cause remanded; and it is so ordered.

**HARTFORD ACCIDENT & INDEMNITY
CO. v. DURHAM. (No. 1643.)**

(Court of Civil Appeals of Texas. Amarillo.
April 21, 1920. On Motion for
Rehearing, May 19, 1920.)

**1. Master and servant ⇨375(1) — Automobile
truck helper held killed in course of employ-
ment.**

Where furniture driver, after having de-
livered furniture to nearby town, instead of
immediately returning, proceeded to another
city, where he became intoxicated, a helper
on the truck who was under the control of the
driver, and who was killed on return trip, was
killed in the course of his employment, since,
upon driver's failure to immediately return, he
was not required to abandon the truck and seek
other conveyance back to home town.

**2. Master and servant ⇨403—Employer has
burden of proving intoxication as defense.**

In an action under Employers' Liability
Act, where intoxication of employé is pleaded
as a defense under Vernon's Ann. Civ. St. Supp.
1918, art. 5246—1, defendant has burden of af-
firmatively establishing such intoxication.

**3. Master and servant ⇨381—Intoxication,
to constitute defense under Employers' Li-
ability Act, must have contributed to acci-
dent or disability.**

Intoxication, to be available as a defense
under Vernon's Ann. Civ. St. Supp. 1918, art.
5246—1, in action under Employers' Liability
Act, must have contributed to the happening
of the accident or the disability resulting there-
from.

**4. Master and servant ⇨381—Intoxication of
employé held not proximate cause of acci-
dent.**

That employé killed when truck in which he
was riding overturned as result of driver's
negligence was intoxicated would be no defense
in action for his death under Employers' Li-
ability Act, where no act of employé contributed
to injury, causing death; such intoxication not
being the proximate cause.

**5. Master and servant ⇨418(5)—Method of
calculating compensation for death held not
ground for complaint.**

In action for death of employé under Em-
ployers' Liability Act, defendant could not
complain, on appeal, of court's failure to cal-
culate the compensation due exactly as re-
quired by the statute, under Vernon's Ann.
Civ. St. Supp. 1918, arts. 5246—14, 5246—82,
where amount allowed was less than it would
have been if statute had been strictly followed.

**6. Master and servant ⇨405(6)—Lump sum
held properly awarded for employé's death.**

In action for death of employé under Em-
ployers' Liability Act, held, under the facts,
that court properly awarded a lump sum rather
than a weekly allowance.

Appeal from District Court, Dallas County;
Kenneth Foree, Judge.

Suit by Sophronia Durham against the
Hartford Accident & Indemnity Company.
Judgment for plaintiff, and defendant appeals.
Affirmed.

J. J. Eckford, of Dallas, for appellant.
W. R. Simmons, of Weston, W. Va., and
Parks & Hall, of Dallas, for appellee.

HALL, J. This suit arose under the Em-
ployers' Liability Act (Acts 1913, c. 179 [Ver-
non's Sayles' Ann. Civ. St. 1914, arts. 5246h-
5246zzzz]), and was instituted by appellee, the
widow of George Durham, deceased, against
the Hartford Accident & Indemnity Company,
the Haverly Furniture Company, and the
Texas Employers' Insurance Association. At
the time of the trial appellee dismissed her
cause of action as to the last-named defend-
ants, proceeding against the appellant alone.
It was shown that Geo. Durham was injured
December 22, 1917, and that death resulted
from said injuries on December 28th following.
Appellee filed her claim with the Industrial
Accident Board of Texas, which on April 26,
1918, rendered judgment for her against
appellant in the sum of \$9.52, for 360 weeks,
being 60 per cent. of a weekly wage of \$15.87.
The Accident Board refused to render judg-
ment for a lump sum. Both parties filed ob-
jections to the award of the Accident Board,
and the case was transferred to the district
court of Dallas county.

Appellant's defense is, in substance, that
George Durham did not sustain the injuries
which produced his death while in the course
of his employment, in that he, together with
one Fred Meyers, a fellow employé of the
Haverly Furniture Company, were sent by
said Company from its place of business in
the city of Dallas with an automobile truck
loaded with furniture to be delivered to a
customer at Arlington, a town situated in
Tarrant county, about 16 miles west of the
city of Dallas, and midway between Dallas
and Ft. Worth; that, contrary to the rules
and regulations of said furniture company,
prohibiting employes from drinking intoxicat-
ing liquors while on duty, and while in the
course of their employment, the said George
Durham and Fred Meyers, after delivering
said furniture at Arlington, went in said truck
to the city of Ft. Worth, where intoxicating
liquor was purchased and drunk by both of
them; that said Meyers became irresponsibly
intoxicated, and in said condition undertook
to drive said truck from Ft. Worth to Dallas,
and while in such condition the truck was
overturned by negligence of Meyers, which
produced the injuries directly and proximate-
ly causing Durham's death; that the said
Durham accepted intoxicating liquor from
Meyers, drank the same, acquiesced in, con-
sented to, and participated in the said acts of
said Meyers in going to Ft. Worth and not
returning to Dallas from Arlington, and by

reason of their skylarking and other acts stated, and by reason of violating the instructions and rules of their employer while outside the course of their employment, and at the time of the injuries, neither the said Durham nor the said Meyers were acting in the course of their employment; that said injuries which caused the death of Durham occurred while the said Durham was in a state of intoxication.

The court submitted to the jury only two issues, the first being:

"What was the average weekly wage of George Durham for the year immediately preceding his death?"

The jury answered: "\$16.50."

The second question is:

"Would a failure of the defendant to make a lump sum settlement with the plaintiff of the compensation due her on account of the death of her husband work manifest hardship and injustice to her?"

This was answered in the affirmative.

Appellant requested first a peremptory instruction, which was refused. Whereupon it requested two special issues, as follows:

"(1) Were the injuries sustained by George Durham in the course of his employment?"

"(2) Did George Durham sustain his injuries while in a state of intoxication?"

The refusal to submit these special issues is made the ground of several assignments of error. The evidence shows that the deceased, George Durham, was a negro about 33 years of age; that he had been working for the Haverty Furniture Company, in their furniture store in the city of Dallas, for several years, performing any and all duties required of him and which he was capacitated to perform. James L. Hogg, the shipping clerk for the furniture company, testified that his employer had sold some furniture to a customer at Arlington; that he had ordered Meyers, as the truck driver, and George Durham, to load the furniture on a truck and deliver it to the customer at Arlington, to obtain the customer's receipt for the shipment, and return to Dallas; that they were not authorized to go on to Ft. Worth, beyond Arlington. He further testified that Durham was not the driver of the truck; that Meyers had charge of it, and Durham was wholly a helper and under the direction of Meyers while on the trip. The uncontradicted evidence shows that the delivery was made; that Durham had nothing whatever to do with handling or driving the truck. Meyers testified that after delivering the furniture at Arlington he went on to Ft. Worth to get some whisky for Christmas; that he did not say anything to anybody about going over there, and that Durham did not know he was going until witness told him at Arlington; that Durham said nothing but just went along. The accident occurred on the return trip after the

truck had passed Arlington en route to Dallas. On direct examination Meyers testified with reference to the issue of intoxication as follows:

"While in Ft. Worth I drank two or three glasses of beer. George Durham only took one glass of beer; that is all he took to my certain knowledge; if he drank any more, I know nothing of it. He was on the truck, and we just got off and went into the saloon. * * * I was drinking at the time. George Durham didn't have anything whatever to do with the driving of that truck at any time on that trip. He had nothing whatever to do with my going to Arlington, thence to Ft. Worth, and returning to Dallas by way of Arlington and Grand Prairie. George Durham was sober at the time of the accident and at all times on the trip."

On cross-examination upon this issue he testified:

"On the way back I opened a half pint of whisky and drank some and gave George a drink. I didn't give the half pint to him. I bought about 11 or 12 pints of whisky at Ft. Worth, and all of them were in the truck when we started on the return trip. I only took one drink of whisky after leaving Ft. Worth. George didn't drink over two or three glasses of beer at Ft. Worth. * * * George didn't buy any whisky. * * * The barkeeper made me a present of half a pint. While I was in the saloon the truck was standing out at the front. I didn't stand there and watch it, but when I went in George was on the seat. I got a glass of beer for him when I drove up, and he got out and went in and drank it, and when I came out he was sitting up there on the truck waiting for me. I was in the saloon about 30 minutes or an hour, perhaps."

The appellee testified that she saw her husband at the sanitarium in Dallas after his return and asked him how the accident happened, that he had not received any medical attention at that time, and her testimony is:

"He was not drunk at the time. He talked with just as good sense as I do, and I asked him if he was drunk, and he told me that he was not, and I know he was not, because he talked with too good sense to be drunk. I never knew him to be drunk while I knew him. * * * I never saw him drunk in my life."

Article 5246—1, Vernon's Sayles' Civil Statutes, provides that, in an action to recover for the death of an employé resulting from personal injuries sustained in the course of his employment, it shall not be a defense: (1) That the employé was guilty of contributory negligence; (2) that the injury was caused by the negligence of a fellow employé; (3) but said article further provides that the employer may defend upon the ground that the injury was caused while the employé was in a state of intoxication.

[1] Under this record we are of the opinion that the injuries were sustained by George Durham in the course of his employment. He was under the direction and control of

Meyers, the driver of the truck. While he entered no protest when he learned that Meyers intended to go to Ft. Worth, it does not appear that any objection of his would have been considered. He was not required to abandon the truck and seek other means of conveyance back to Dallas. He had the right to return to Dallas in the conveyance provided by his employer, and had no authority to demand that Meyers, who had been placed in control of the truck, and was temporarily in authority over him, should abandon the trip to Ft. Worth and return direct to Dallas from Arlington.

[2-4] Where intoxication is pleaded as a defense, the burden of proof rests upon the defendant to affirmatively establish the fact of such intoxication. 1 Honnold on Workmen's Compensation, § 142, p. 567. "To be available as a defense, intoxication must contribute to the happening of the accident or the disability resulting therefrom." *Id.* If it be admitted that the evidence quoted above is sufficient to require the submission of the issue to the jury, yet, under the circumstances, an affirmative finding upon that issue would not exonerate appellant. The injury did not result from any act of the deceased. He was not driving the truck, did not fall from the seat and was not injured until the truck overturned as the result of the negligence of his fellow employé, Meyers. Under these circumstances his intoxication could not be the proximate cause of the injury if the fact had been established. We conclude the court did not err in refusing the requested instructions.

[5] Upon the jury's findings the court rendered judgment in favor of appellee for the sum of \$3,353.13. The judgment recites in part:

"It appearing to the court from the undisputed evidence in the case, coupled with the findings of the jury, that the average weekly wages of plaintiff's husband, George Durham, for the last year immediately preceding his death, was the sum of \$16.50 per week, and that plaintiff therefore is entitled to compensation at the rate of \$9.90 per week for 360 weeks, beginning the 22d day of December, 1917, which would total the sum of \$3,564, and at the date of this judgment the sum of \$514.80, being 52 weekly payments at \$9.90 per week, commencing December 22, 1917, to December 22, 1918, is due and unpaid, and the court finds that a discount of \$210.87 should be taken from the total amount of \$3,564, and the remainder, \$3,353.13, should be awarded to plaintiff as a lump sum settlement in this case; that the court, in arriving at such discount, takes into consideration the fact of the unpaid 52 weekly payments for the year commencing December 22, 1917, to date of trial, for which plaintiff has received no benefit or interest thereon, and the court offsets the discount or interest on a like amount of \$514.80 due the plaintiff for the succeeding year; that is, from December 22, 1918, to December 22, 1919. Allowing the defendant no discount on

said sum for its payment now, the failure to pay the compensation for the preceding year being offset by payment now of compensation for the succeeding year, and then upon the balance of \$2,534.40 due during the remainder of the 360 weeks, the court allows a discount on the basis of 5 per cent. for payment now in a lump sum the sum of \$210.87, leaving a balance after the discount of \$2,323.53, which, after adding the sum of \$1,029.80, makes a total lump sum now due plaintiff of \$3,353.13, which amount the court finds to be a reasonable and proper lump sum settlement to which plaintiff is entitled, under all the facts of the case, of her total claim for compensation at the rate of \$9.90 per week for 360 weeks commencing December 22, 1917."

V. S. C. S. 1918 Supp. art. 5246—14, provides that, if death should result from the injury, the association shall pay the beneficiaries a weekly payment equal to 60 per cent. of his average weekly wages, not more than \$15, nor less than \$5 a week, for a period of 360 weeks, from the date of the injury." Article 5246—82, *Id.*, in defining the term "average weekly wages," says the same shall mean:

"1. If the injured employé shall have worked in the employment in which he was working at the time of the injury, whether for the same employer or not, substantially the whole of the year immediately preceding the injury, his average annual wages shall consist of 300 times the average daily wage or salary which he shall have earned in such employment during the days when so employed. * * * 5. The average weekly wages of an employé shall be one-fifty-second part of the average annual wages."

* While the court has not made the calculation exactly as we think the statute required, and by calculation shown to have been made by the recital in the judgment the court arrived at a sum less than our figures show should have been awarded, appellant's assignment complaining of the amount allowed will be overruled. The testimony is sufficient to support the jury's finding that the deceased was receiving a weekly wage of \$16.50 for the year preceding September 1st. The manager of the Haverty Company testified that the deceased had threatened to quit work on September 1st and pick cotton during the fall, and in order to induce him to remain until the end of the calendar year had promised him a bonus of \$2.50 per week, which the company intended to pay at the end of the year. This would have entitled the deceased to a weekly wage of \$19 beginning September 1st, or approximately for a period of 16 weeks up to the time of the injury. Allowing the deceased \$19 for 16 weeks and \$16.50 for 36 weeks would have averaged a fraction over \$17.20 per week. Sixty per cent. of this for the time allowed, less the deductions made by the court, amounted to more than the total sum decreed to appellee.

[6] The remaining contention to be disposed of is that there is no evidence which authorized the court to render judgment for a lump sum rather than for a weekly allowance. It was shown by undisputed testimony that at the time of George Durham's death he had purchased some lots, upon which he was making periodical payments; that he owed grocery bills, clothing bills, and other amounts; that after his death his wife was in bad health and was forced to support herself, her widowed mother, who was 55 years of age, and her grandmother, 89 years of age, and earn her living by cooking; that in addition to these expenses she was forced to pay out of her wages as a cook her house rent; that she was without means to pay her debts, and after the death of her husband had lost one of her lots by her inability to make the periodical payments of purchase money; that something more than \$200 was still due on the two lots left to her. She testified that as soon as she could get the money she intended to build her a house on one of the lots, and thereby save house rent. We think this evidence is sufficient to warrant the court in granting her a recovery in a lump sum. *Texas Employers' Insurance Association v. Downing*, 218 S. W. 112.

Finding no reversible error in the judgment, it is affirmed.

On Motion for Rehearing.

Appellant's motion for rehearing presents no new matter and no additional authorities. After reviewing the contentions urged in the brief, we see no reason for otherwise disposing of the issues. The motion is therefore overruled.

Appellant also files a request for additional findings of fact which is granted. We find that the rules of the Haverty Furniture Company prohibited the drinking of intoxicating liquors by its employes while on duty. We further find that George Durham did drink intoxicating liquors while at Ft. Worth.

EDWARDS v. ROBERTS. (No. 1663.)

(Court of Civil Appeals of Texas. Amarillo.
May 5, 1920. Rehearing Denied
May 26, 1920.)

1. Contracts \S 221(3)—Promise to pay if pending arrangement to "buy out" bank was perfected construed.

Where negotiations were pending for the purchase of a majority of the stock of the bank of which plaintiff was cashier, and defendant and another contracted to pay plaintiff an amount equal to his salary for the term of his contract "in case the pending arrangement is perfected by which the gentlemen organizing the F. bank and their associates buy out the

A. bank and you retire from the company," the condition was satisfied by the purchase of a majority of the stock; "buy out" not requiring a transfer of the assets of the bank to another bank and its obliteration as an entity.

2. Contracts \S 102—Personal contract of cashier not invalid because of bank's lack of power.

Where to facilitate the purchase of a majority of the stock of the bank of which plaintiff was cashier the cashier of a competing bank and a person interested in a third bank agreed to pay plaintiff an amount equal to his salary for the period of his existing contract, and plaintiff refused to accept the obligation of the two banks, the lack of power of defendant's bank to make such a promise did not affect defendant's liability on his promise, though plaintiff knew the money probably would ultimately be paid by the bank.

3. Banks and banking \S 102—Bank not cashier's undisclosed principal, where other party refused bank's obligation.

The bank of which defendant was cashier was not the undisclosed principal in a contract signed by him in his own name, where plaintiff, the obligee, refused to accept the bank's obligation, but demanded the personal obligation of the signers as the principals thereon.

4. Principal and agent \S 132(1) — Cashier's contract in his own name, after refusal to accept bank's contract, binding on him.

If the bank of which defendant was cashier was the disclosed principal in a contract signed by him in his own name, the presumption was that the other party elected to look to defendant, and not to the principal, especially where there was positive evidence that the other party refused to accept the bank as the obligor.

5. Monopolies \S 23—Contract in consideration of retirement of bank cashier to prevent organization of new bank enforceable.

Where, to induce certain persons to refrain from organizing a new bank in a city having three banks, they were persuaded to purchase a controlling interest in one, of which plaintiff was cashier, and to facilitate such purpose defendant and another agreed to pay plaintiff an amount equal to his salary under an unexpired contract, the contract with plaintiff was valid and enforceable even though the acts of the banks amounted to an illegal combination to prevent the establishment of a new bank.

6. Monopolies \S 12(1)—Facilitating purchase of interest in bank to discourage organization of new bank not unlawful.

For persons interested in competing banks to advise and induce officers, directors, and stockholders in one of them to sell their stock to men who were seeking to organize a new bank was not an unlawful combination, though they were all interested in keeping out a new bank, where there was no agreement that the old stockholders should not start a new bank or should assist in preventing the organization of another bank.

7. Contracts \Leftarrow 202(2) —Though defendant's promise was made in hope that new bank would not be organized, plaintiff not precluded from organizing one.

Though defendant and another, in facilitating the purchase of a majority of the stock of the bank of which plaintiff was cashier by persons contemplating the organization of a new bank, were acting in the hope that there would be no new bank, where, to facilitate such purpose, they promised to pay plaintiff's salary under an unexpired contract, they were not relieved of liability because plaintiff organized a new bank, where there was no agreement that he should not do so.

8. Contracts \Leftarrow 349(1)—In action against cashier, evidence of action of directors inadmissible.

In an action against a bank cashier on a contract executed in his own name, which he claimed was the contract of the bank and as such ultra vires, where it appeared that plaintiff refused to accept the bank's obligation instead of defendant's own obligation, evidence that the directors instructed defendant to close the contract, and stated that the bank would pay the money thereunder, was inadmissible, as it could not affect plaintiff's rights.

Appeal from District Court, Grayson County; F. E. Wilcox, Judge.

Action by Barlow Roberts against F. Z. Edwards. Judgment for plaintiff, and defendant appeals. Affirmed.

Wolfe & Freeman, of Sherman, for appellant.

G. P. Webb and Wood, Jones & Hassell, all of Sherman, for appellee.

HUFF, C. J. Appellee, Roberts, sued appellant, Edwards, on a contract, which was in the nature of a proposition submitted to Roberts and accepted by him. The proposition is as follows:

"Sherman, Texas, February 2, 1918.

"Mr. Barlow Roberts, Sherman, Texas—Dear Sir: In case the pending arrangement is perfected by which the gentlemen organizing the Farmers' & Merchants' State Bank and their associates buy out the American Bank & Trust Company, and you retire from that company, each of us will see and guarantee that you are paid the sum of thirteen hundred and seventy and no/100 (\$1,375.00) dollars, aggregating the sum of twenty-seven and fifty and no/100 (\$2,750.00) dollars, each of us guaranteeing one-half of the amount, provided, however, that all the salary you may receive from the American Bank & Trust Company from February 1, until the perfection of the arrangement by which that bank makes sale as aforesaid, shall be credited on said sum of twenty-seven hundred and fifty and no/100 (\$2,750.00) dollars, and provided further that if the contemplated Land Bank is organized at Sherman and you are given a position in it, which is satisfactory to you and accepted by you, then you will return to us in a lump sum an amount equal to

two hundred and fifty and no/100 (\$250.00) dollars per month, from the time your employment begins with the bank to the end of the year 1918. [Signed] F. C. Dillard.

"F. Z. Edwards."

The allegations and proof show that F. C. Dillard paid his \$1,375 in a lump sum after the purchase mentioned in the proposition, and that F. Z. Edwards paid only two months \$250, and the suit is against him for the balance of that sum, \$1,125. The Land Bank mentioned in the proposition was not organized, and Roberts obtained no employment therefrom. A month or so thereafter, however, he organized and started a bank in the city of Sherman, of which he was president, and from which he received a salary. In January and February, 1918, there were three banks in the city of Sherman; the Merchants' & Planters' Bank, the Commercial National Bank, and the American Bank & Trust Company. At that time several gentlemen, Knowles S. Loving, Lee Simmons, Leslie, and others, were endeavoring to organize a bank, and had applied for a charter therefor, named the Farmers' & Merchants' State Bank. Their application for a charter had been granted, but no charter in fact had issued. The three banks organized at that time were of the opinion that there was not room in the city of Sherman and tributary territory for a fourth bank, and endeavored to defeat the granting of a charter for the fourth bank, in which they were unsuccessful. Negotiations appear to have been instituted with the gentlemen seeking to organize the new bank, to the effect that they should buy stock in the American Bank & Trust Company. It resulted in about the condition that those gentlemen agreed to do so, provided they could obtain a controlling interest in the bank, and that the men who were named as directors and officers in the proposed new bank should be directors in the American Bank & Trust Company. The appellee, Roberts, was cashier of the American Bank & Trust Company, and had a contract with that bank for the year 1918, at a salary of \$3,000 for the year, or \$250, payable each month. The purpose of buying the stock in the bank was to make Mr. Leslie president of the American Bank & Trust Company, Loving, cashier, and Simmons, an active vice president, with other parties on the board of directors, and it seems to have effected this purpose. The proposition above set out was made to Roberts. Mr. Dillard and his law partner, Mr. Hilton Head, who were active in the negotiations, owned stock in the American Bank & Trust Company, which they were desirous of selling, and were also the attorneys and directors in the Merchants' & Planters' Bank. The appellant, Mr. Edwards, was the cashier of the Commercial National Bank. There seems to have

been a contract drawn in which the two banks, Merchants' & Planters' Bank and the Commercial Bank, were to guarantee the salary of appellee, provided he would retire. Mr. Roberts declined to accept their guarantee, on the ground that it would have to be ratified by the board of directors of the two banks, and that he might be accused of trying to create a trust, but he accepted the individual obligation of Mr. Dillard and of Mr. Edwards. The facts are sufficient to raise the issue that Roberts knew that the money to be paid him would likely be advanced by the two banks named to Dillard, and Edwards, and the facts are sufficient to show that Edwards did obtain the money paid by him, and expected to be paid by him, from the Commercial National Bank. The matter of Roberts starting another bank was discussed, but there was no agreement that he should not do so. The evidence would indicate that he represented that he expected to leave Sherman and possibly go to Oklahoma. Further than the circumstances above detailed, we find no agreement between the banks that the retiring officers should not start a fourth bank. The old officers of the American Bank & Trust Company sold their stock and retired from that bank, except Mr. Thompson, who was the active vice president. The gentlemen who were seeking to organize the new bank purchased about 1,400 shares of the stock of the American Bank & Trust Company, and its entire stock consisted of 2,000 shares. We believe this will be a sufficient statement of the facts and issues to discuss the propositions presented by appellant.

The trial court instructed a verdict for the appellee for the amount sued for, upon which judgment was rendered, and this action is assailed on several grounds as fundamental error, and by other special assignments.

[1] The first proposition presented is that, the promise to pay being upon condition that Loving, and his associates, engaged in organizing the Merchants' State Bank, would buy out the American Bank & Trust Company, and the facts showing that they did not buy out said bank, such promise was unenforceable. The contract reads:

"In case the pending arrangement is perfected, by which the gentlemen organizing the Farmers' & Merchants' State Bank, and their associates, buy out the American Bank & Trust Company, and you retire from that company."

The contract was in the form of a proposition by F. C. Dillard and F. Z. Edwards to appellee, Roberts, which he accepted "The pending arrangement" was that, of the 2,000 shares of the American Bank & Trust Company, the gentlemen organizing the proposed bank should purchase a majority of the shares. Leslie was to be president, Loving, cashier, Simmons, active vice president, and others of their associates, directors.

Roberts, who was cashier, should sell his stock and "retire from that company" (American Bank & Trust Company). "Buy out" we think referred to the thing which there was yet then pending, arrangements to be perfected; that is, the controlling stock of the American Bank & Trust Company. This arrangement was perfected. The gentlemen who were organizing the Farmers' & Merchants' State Bank became the officers of the American Bank & Trust Company, and appellee retired from that company. If, as contended by appellant, "buy out" is to be construed as buying the entire assets, change the name of the bank, move into other quarters, or, in other words, obliterate the American Bank & Trust Company, as an entity, then the clause that Roberts retire "from that company" was a useless provision. There would have been nothing to retire from. The significance of this clause clearly implies, after perfecting the then pending arrangements; the old bank would still be in existence, and the appellee as a stockholder, officer, and cashier should retire, and upon doing so he should not lose his salary contract, but the two gentlemen making the proposition would guarantee to him that they would pay it. This contract, read in the light of the circumstances then surrounding the parties, leaves no ground, as we conceive it, to doubt what was to be bought and what the proposers were guaranteeing. Roberts was not to lose the value of his contract as a cashier for the year, and they were guaranteeing him against loss in case the controlling interest placed Loving in his place by the arrangement which was then pending. By acquiring a majority of the stock such proportion of the title to the assets, franchises, name, and business were transferred to the men who were proposing the new organization. In that sense they purchased or bought out a controlling interest in the company. The company, as a company, without the consent of the stockholders, could not sell their stock or their interest in the bank. It is therefore manifest "buy out" as used in connection with the pending negotiations did not mean a transfer of the entire corpus of the concern, but only the interest therein then pending on negotiations. It is evident the contract did not contemplate a transfer to a new organization which might continue a similar business without incurring the liability of the old; that was not the arrangement then pending. The words "buy out" are qualified, both by the clauses preceding and following them, which are entitled to consideration in arriving at the meaning of the parties, as expressed in the contract. Without incorporating in the contract the pending arrangement, it referred to it in such way as it may certainly be known and ascertained, and when it is ascertained there remains no doubt as to the meaning of the term as used in the contract.

[2] A proposition is presented "that an agreement by a national bank to pay money to induce a cashier of another bank to give up his position is illegal, and the promise of appellant, growing out of such illegal contract, is void." The contract on its face to pay to appellant for his services shows to be by individuals and not by banks. The evidence shows that Dillard and his partner, Head, were stockholders in the American Bank & Trust Company, and were desirous of selling their stock therein. They were also attorneys and directors in the Merchants' & Planters' Bank. Edwards was the cashier of the Commercial National Bank, and, as we take it, had no interest in the American Bank & Trust Company. There is some evidence that would authorize the finding that his part of the obligation would be, and it was contemplated that it should be, paid out of the funds of the Commercial National Bank, and that Roberts knew that fact. Mr. Dillard paid his half of the amount agreed upon at once and upon the completion of the transfer. There is no evidence where he obtained the money—whether he advanced it from his individual funds or from the funds of the Merchants' & Planters' Bank. There is evidence which would lead to the inference that Roberts had reason to believe that the money would ultimately be paid by the two banks. He, however, refused an obligation from the two banks because he says the directors would have to pass on it to make it legal, and because he was afraid of being accused of trying to form a trust, that he expected to get his money from Mr. Dillard and Mr. Edwards, and that he did not know where they would get the money to pay. The evidence will also warrant the finding that the bank sought to defeat the proposed organizers in obtaining a charter for a new bank. The instrument in question does not purport to obligate either bank or to be the act of either bank. If the banks had no power to execute such an obligation, the contract in question would not be affected, for it was not the obligation of the banks, but the personal obligation of the persons signing it. We fail to see any reason why the rule of ultra vires the power of the banks should have application in his case. The obligation does not purport to be signed by the agents for the banks; they did not purport to bind any one but themselves. The mere fact that Roberts may have believed or have known that the individuals would get the money from the banks we do not think should affect the matter. It was no concern of his where they obtained the money so long as their obligation was with him to pay him the sum named.

[3, 4] Appellant also in this connection presents a proposition to the effect that his signature was for and on behalf of the bank. We do not think the jury would have been authorized to find that the Commercial Nation-

al Bank was the undisclosed principal in the contract. The appellee refused to accept the bank's obligation, but demanded the personal obligation of the signers as the principals thereon. If, however, the evidence in this case is sufficient to have disclosed the bank as the principal in the contract, then the rule established in this state by the Supreme Court, in *Heffron v. Pollard*, 73 Tex. 96, 11 S. W. 165, 15 Am. St. Rep. 764, would apply, which is:

"If * * * the principal be disclosed, and the face of the writing shows that the agent is bound, it is presumed that the other party has elected in the contract * * * to look to the agent, and the principal is not liable upon it."

In this case we have not only the presumption, but the positive evidence, that the appellee would not accept the banks as the obligors. The cases cited by appellant of *Fidelity, etc., v. Bank*, 48 Tex. Civ. App. 301, 106 S. W. 782, *Hanauer v. Woodruff*, 15 Wall. 439, 21 L. Ed. 224, and *Armstrong v. Toler*, 11 Wheat. 258, 6 L. Ed. 468, we do not think applicable to the propositions here urged, and now under consideration. If it should be determined that the contract by which Roberts agreed to retire as cashier was part of a scheme or combination to form a trust in violation of the statutes, the two cases last cited would bear upon the question in ascertaining the validity of the contract in question.

[5] A proposition is presented:

"A contract having for its purpose the prevention of the establishment of another bank in a city is illegal and void, as being in restraint of instrumentalities of trade and as tending to destroy competition."

The proposition is not regarded as a correct proposition of law. If the contract fell under the class denominated as a combination of capital, skill, or acts, by two or more persons, etc., for the purposes of lessening competition in the aides to commerce, it might be a trust. If the acts of the three banks, the Merchants' & Planters' Bank, the Commercial National Bank, and the American Bank & Trust Company, were sufficient to establish a combination to enter into an agreement to keep out a fourth bank in the city of Sherman, it would not necessarily follow that the contract in question was void. Appellee had a valid contract with the American Bank & Trust Company for a year's salary as a cashier. This contract was legal, which he could enforce. To further the purpose of the parties buying out the stock of certain stockholders, and to place another man in as cashier, the proposition was to have appellee retire therefrom. If he should do so, his contract being an enforceable one, they doubtless recognized that he should be compensated. They agreed, therefore, to pay him a consideration for his contract. The

consideration for the contract was not illegal, and the appellee shows he was not in any way combining with either or all of the said parties; he simply sold out, and they bought. They, it occurs to us, set up their illegal combination to defeat a valid contract based on a legal consideration. Appellant, by his contract, procured from appellee the surrender of a valid contract, in consideration of the execution and obligation which appellant now says he executed for an illegal purpose.

The case of *Armstrong v. Toler*, 11 Wheat. 258, 6 L. Ed. 469, cited by the appellant, was a case where goods had been consigned to Toler, belonging to Armstrong and others. The goods were shipped during the war with Great Britain in violation of the law. The goods were delivered to Toler as agent of Armstrong on a stipulation to abide the event of the suit, Toler becoming liable for the appraised value. Armstrong's goods were afterwards delivered to him on his promise to pay Toler his proportion for which Toler might be liable should the goods be condemned, and, the goods having been condemned, Toler paid their appraised value, and brought suit to recover from Armstrong. Armstrong resisted the demand on the ground that the contract was made upon an illegal consideration. The headnotes of that case give the rule as follows:

"But, if the promise be entirely disconnected with the illegal act, and is founded on a new consideration, it is not affected by the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act."

Chief Justice Marshall said in the course of the opinion, after discussing several cases:

"So Toler's knowledge of the illegal transactions of Armstrong, and that his money was advanced to procure the delivery of goods which had been illegally imported, could not vitiate a contract to repay that money." *Floyd v. Patterson*, 72 Tex. 202, 10 S. W. 526, 13 Am. St. Rep. 787; *Russell v. Kidd*, 37 Tex. Civ. App. 411, 84 S. W. 273; *Smith v. Booty*, 49 Tex. Civ. App. 628, 109 S. W. 979; also note, 23 L. R. A. (N. S.) at page 482, where several Texas cases are cited.

The facts in this case show, if there was any combination, the appellee was not in it, or expected to be benefited by the fruits of the combine. He sold and they purchased his right, and he surrendered the legal claim as a consideration for the obligation sued upon. Whatever the purpose of the banks

was, the appellee was not a participant therein; his money, skill, or acts were not united with the others, but held in severalty by him. Their illegal purpose could not make his rights, lawfully acquired, illegal.

[6] We are not inclined to think there was a combination such as denounced by the statute. It may be conceded that all three of the banks were interested in keeping out a fourth bank. So long as they did no illegal act, the act would not be denounced as a trust. They do not appear to have combined their capital, skill, and acts to prevent the establishment of another bank. At most, they advised and induced the old officers, directors, and stockholders in the American Bank & Trust Company to sell their stock to men who were seeking to organize a fourth bank. When that was accomplished it appears to have satisfied the ambition of those gentlemen, and, in so far as the record shows, they thereafter held their interest and their bank separate from the two other banks and were competitors. There was no agreement that the old stockholders should not start a new bank or assist in preventing the organization of another. *Gates v. Hooper*, 90 Tex. 563, 39 S. W. 1079; *Schlag v. Johnson*, 208 S. W. 369.

[7] It is asserted that the appellee having knowledge that the money which was promised on the obligation was to prevent a fourth bank and the organization of a fourth bank by him absolved appellant from the contract to pay the money. There is no such promise in the contract, and neither do we think there is sufficient evidence to find that there was a verbal agreement to that effect. Appellee says they evidently thought he could not start a new bank. It is doubtless true that the arrangement was made in the hope that there would not be another bank. We do not think the evidence sufficient to show there was a breach of an express or implied contract by the appellee, such as would defeat him in his action.

[8] The remaining assignments present substantially the proposition above discussed, and for the reasons heretofore given are overruled. We think there was no error in excluding the evidence of Judge Hare as to the action of the board of directors of the Commercial National Bank, directing Edwards to close a contract with Roberts, and that the bank would pay the money. We do not think such action could have affected the appellant's rights under his contract.

The judgment will be affirmed.

**LEE et al. v. EMERSON-BRANTINGHAM
IMPLEMENT CO. (No. 8366.)**

(Court of Civil Appeals of Texas. Dallas.
April 24, 1920. Rehearing Denied
May 22, 1920.)

**1. Exemptions — 48(2)—Compensation agreed
on after service "current wages," within ex-
emption provision.**

Under Const. art. 16, § 28 (Vernon's Sayles' Ann. Civ. St. 1914, art. 306), providing that current wages for personal service shall not be subject to garnishment, wage of \$75 a month, totaling \$300, agreed upon by widow and decedent's manager and brother as fair compensation to defendant for taking charge of decedent's business during his illness, was exempt as "current wages for personal service," though at time agreement for services was made no particular compensation was agreed on; purpose of the provision being to exempt wage until due and in possession of earner, provided, if he is unable to collect, exemption continues until he can collect, in exercise of ordinary diligence.

[Ed. Note.—For other definitions, see Words and Phrases, Current Wages.]

**2. Fraudulent conveyances — 51(1)—Creditors
without interest in exempt property.**

Creditors have no interest in exempt property of debtors, and cannot claim conveyance thereof is void, as fraudulent as to them.

**3. Fraudulent conveyances — 87(2)—Delivery
by insolvent of value in excess of debt
fraudulent and void.**

When insolvent debtor, in payment of pre-existing debt, delivers value in excess of debt, thus placing surplus beyond reach of creditors, conveyance is fraudulent in law, and void as to excess.

**4. Fraudulent conveyances — 181(1) — Seller
to insolvent debtor not liable to creditors for
purchase money.**

Where debtor with equivalent of money purchased oil lease from one who acted in good faith, though knowing debtor was insolvent, seller is not liable to debtor's creditors for money received on any theory of fraudulent conveyance.

Appeal from District Court, Dallas County;
M. B. Muse, Judge.

Action by the Emerson-Brantingham Implement Company against R. H. Lee, wherein, after judgment for plaintiff, writ of garnishment was issued and served on the American National Insurance Company; defendant Lee and another intervening. From a judgment for plaintiff for the fund garnished, defendant and the other intervenor appeal. Reversed and rendered.

Scott & Fagan, of Dallas, for appellants.
Spence, Haven & Smithdeal, of Dallas, for appellee.

RASBURY, J. Appellee, having judgment against appellant R. H. Lee, by its agent made the statutory affidavit and procured the issuance and service of the writ of garnishment upon the American National Insurance Company, which in answer thereto admitted it was indebted to Lee \$440.65. Lee intervened, and asserted, in substance, that the debt due him was exempt from garnishment because it represented wages for personal services rendered by him to W. T. and Leona Hicks, which they were unable to pay at the time, and in payment of which, after the death of W. T. Hicks, his wife, Leona, assigned that much of insurance on the life of her husband owing by the American National Insurance Company. Lee also asserted that before the service of the writ he had transferred his interest in said fund to Will Sayers. Sayers also intervened, and asserted that the fund assigned by Mrs. Hicks to Lee had been in turn assigned to him for value. Trial was by the court, resulting in judgment for appellee for the fund. From that judgment this appeal is taken.

The facts deducible from the evidence, which is not in conflict on essential matters, are in substance these: The American National Insurance Company was indebted to Leona C. Hicks in the amount of \$5,000.67 on account of insurance policies on the life of her husband, W. T. Hicks. Before the debt was paid she assigned \$440.65 thereof to Lee, and directed the insurance company to pay him that amount. Hicks, prior to his death, was in business in Dallas, and became seriously ill with a malady that required a surgical operation. He requested Lee to assume charge of his business, and agreed to compensate him for his labor. No stipulated period of employment or compensation was agreed on. Lee rendered service for a period of four months. Hicks died. After his death Lee reached an agreement with Mrs. Hicks, Hicks' manager and brother, that \$75 per month, or a total of \$300, was satisfactory compensation for the services he had rendered. That amount was covered by the assignment to the insurance company. The balance, \$140.65, represented an indebtedness due Lee by Hicks—in fact, a part of the premium due on the policies of insurance Hicks had with the insurance company, and which Lee had induced him to take. One day before the service of the writ of garnishment upon the insurance company, Lee transferred his portion of the insurance fund to Sayers in payment of an oil lease in Wichita county, assigned by Sayers to him. The bona fides of the transfer was not assailed, though Sayers testified that when he transferred the lease he thought Lee's interest in the fund was \$1,000, which Lee in his assignment to Sayers asserted it was. At the time of the transfer to Sayers

by Lee, the latter was insolvent, and known to be so by Sayers.

[1] Section 28 of article 16 of the Constitution, which is also article 306 of Vernon's Sayles' Texas Civil Statutes, enacts that "current wages for personal service" shall not be subject to garnishment. It is the contention of appellant that the facts we have recited bring the money due Lee by the insurance company within the constitutional provision, while it is the contention of appellee that they do not. Appellee relies on the ruling in *First National Bank, etc., v. Graham*, 22 S. W. 1101, as support for its contention. The substance of the holding in that case was that "current wages" contemplated a sum to be paid for personal services as they were rendered, as by the hour, day, week, month, or year, and that the fee due an attorney for professional services in a single case was not such current wages for personal services. In the case at bar Lee was employed to and did perform personal services in conducting Hicks' business during his illness. That the services were rendered by him personally is not denied. There was, however, no agreement fixing the amount of the compensation or the period of employment, whether for an hour, day, week, or month. The agreement merely was that Hicks would compensate Lee, if he would render the service. Do such facts make the amount any the less exempt by the Constitution? We conclude not, in view of the holding in *Dempsey v. McKennell*, 2 Tex. Civ. App. 284, 23 S. W. 525. *Dempsey*, while ill, employed *McKennell* to nurse him. There was no agreement between the parties fixing either the period of employment or the compensation. On that issue the court declared:

"The mere circumstance that the rate of compensation is not agreed on in advance ought not * * * to take the case out of the exemption. In nursing [appellant], appellee was actually occupied by the day, and his right to compensation accrued as he served, being measured by customary or reasonable rates, rather than by express contract."

The facts in the case cited and the one at bar are practically identical, and comment as a consequence is unnecessary. Then, was the amount due Lee "current" at the time of service of garnishment? In *First National Bank v. Graham*, supra, "current" was said to mean "running; now passing, or present in its progress." In *Bell v. Indian Live Stock Co.*, 11 S. W. 344, 3 L. R. A. 642, it was held that, when wages included in the provision are voluntarily left with the one owing them, they thereby lose their exemption; in short, cease to be current. It was said:

"The wages are payable monthly, and were exempt for the month current at the time of the service of the writ; but the exemption ceased to apply when the wages became past due."

The court further said in that case:

"Cases may arise, however, in which a party would not be entitled to the benefit of the writ of garnishment sued out after the wages became due."

The court did not, however, instance such a case. Subsequently, in the case of *Davidson v. Logeman Chair Co.*, 41 S. W. 824, it was decided that, where the wages were involuntarily left with the employer because of inability to collect them, the exemption continued until the sum was collected, or remained current. Such was Lee's situation. He was unable to collect before the writ impounded the fund. The tendency of the decisions, it thus appears, and in our opinion the purpose of the constitutional provision, is to exempt the wage until it is due and is in possession of the wage-earner, provided that, if he is unable to collect same when due, the exemption then continues to such time when he can collect same in the exercise of ordinary diligence. We therefore conclude that \$300 of the fund was exempt, and the court as a consequence erred in subjecting that amount to the writ of garnishment either against Lee or Sayers; for, if exempt, Lee's creditors had no right to the money because of Lee's insolvency and Sayers' knowledge of that fact.

[2, 3] The foregoing conclusion presents in natural order appellant's attack upon the finding of the court that Lee was notoriously insolvent, of which Sayers was cognizant at the time he accepted the transfer of the fund in payment of the oil lease and the court's conclusion of law in that connection that such transfer was a fraud on creditors. Such issue can, of course, only affect the fund to the amount of \$140.65, for as we have indicated, and as is well settled, creditors have no interest in the exempt property of debtors. As we have shown in our statement of the facts, the bona fides of the sale of the lease by Sayers and the transfer of the fund by Lee in payment thereof is not denied. But because Lee was insolvent, and Sayers aware of it, the court was of opinion that the transfer was in law a fraud upon creditors. It has, of course, been repeatedly held, and is settled law, that when an insolvent debtor, in payment of a pre-existing debt, delivers property in value in excess of the debt, thereby placing the surplus beyond the reach of creditors, the conveyance is fraudulent in law and void as to the excess.

[4] The transaction between Lee and Sayers, however, is not, in our opinion, such a one. The most that can be said of it is that Lee, with the equivalent of money in hand, purchased an oil lease, as he might have purchased any other commodity he desired. We know no rule that denies another the right, in good faith, to sell his property to a known insolvent person, or of any rule that makes

the seller liable to the purchaser's creditors for the money received in payment thereof, save in the class of cases first mentioned. Even in those cases when the pre-existing debt is genuine, and the debtor receives no more than sufficient to pay the debt, the transaction is not fraudulent. *Bruce v. Koch*, 94 Tex. 192, 59 S. W. 540. In the case at bar there is no showing that the oil lease was of any less value than the money Sayers received; in fact, the value set on the lease was \$1,000, while the money paid was \$440.65.

Holding the views above stated on the law of the case, and the facts being without conflict, the judgment of the court below is reversed, and judgment here rendered for appellant Sayers for the fund in dispute and all costs in this court and the court below.

Reversed and rendered.

GINNERS' MUT. UNDERWRITERS' ASS'N v. FISHER et al. (No. 1658.)

(Court of Civil Appeals of Texas. Amarillo.
April 28, 1920. On Motion for Re-
hearing, June 2, 1920.)

1. Insurance ⇨131(1)—Entire contract may be oral, though application written.

An insurance contract may be entirely oral and is not objectionable as varying the terms of the written application for insurance.

2. Insurance ⇨130(3)—Distribution among items of property at insured's request held not a counter offer.

Where an applicant for fire insurance covering a cotton gin agreed with a soliciting agent that the company should distribute the insurance in the policy among various items of property particularly described therein, and the company did so and sent the policy to the applicant, such apportionment, if fairly made, could not, especially upon insurer's insistence, prevent the policy from being an acceptance instead of a counter offer to insure.

3. Insurance ⇨130(3)—That policy provides for payment to lienors held not to make it counter offer instead of acceptance.

Where an application for fire insurance covering a cotton gin did not directly specify that loss was to be payable to lienors as their interests might appear and the policy as written provided for payment of loss to such lienors, such fact did not make the policy a counter offer not binding until acceptance by insured; there being no variance in fact between the application and the policy, and the application not being presumed to contain all the details of the policy.

4. Insurance ⇨130(7)—Retention of fire policy without opposition beyond reasonable time held acceptance.

Where a fire insurance policy was delivered to insured for his acceptance, as insurer claimed, and was retained by insured without

objection beyond a reasonable time, such retention constituted an acceptance of the policy, even if the policy be construed to constitute a counter offer and not an acceptance of an offer contained in the application for insurance.

5. Insurance ⇨668(15)—Waiver of payment of premium by insurer held for jury.

In an action on a fire insurance policy covering a cotton gin, where it appeared that the policy had been delivered together with a bill for the first premium which had not been paid prior to the fire, evidence held to make the issue of waiver of payment by insurer a question for the jury.

6. Insurance ⇨141(2)—Payment of first premium waived by unconditional delivery of policy.

Unconditional delivery of a policy, by its terms requiring payment of the premium as a condition precedent to its taking effect, is sufficient to constitute a waiver of such term; it being presumed from such delivery that the insurer intended to extend at least a temporary credit to insured.

7. Insurance ⇨136(3) — Delivery of policy held not made conditional by agreement to return policy if not satisfactory.

Where a fire insurance policy was delivered to insured on condition that it should be promptly returned if not satisfactory, with bill for premium inclosed with request for remittance if the policy was satisfactory, the condition was not one of payment and did not have the effect of making the delivery of the policy conditional.

Error from District Court, Collin County; T. E. Wilcox, Judge.

Action by R. C. Fisher against the Ginnings' Mutual Underwriters' Association. Judgment for plaintiff, and defendant brings error. Affirmed.

Locke & Locke, of Dallas, for plaintiff in error.

White, Cartledge & Wilcox, of Austin, and E. W. Merritt, of McKinney, for defendant in error.

BOYCE, J. Defendant in error, R. C. Fisher, brought this suit, on a fire insurance policy, issued by the plaintiff in error, the Ginnings' Mutual Underwriters' Association, insuring a gin owned by the said R. C. Fisher against loss by fire. The defendant pleaded that it was not liable because there was no completed contract of insurance, in that the policy of insurance referred to as being issued by it had not been accepted by the plaintiff, and further because it was provided by the terms of the application for insurance, the by-laws of the association, and the policy itself, that the insurance "should not become effective until the premium is paid," and the said premium had not been paid on the policy issued, as required. The plain-

tiff, in a supplemental petition, alleged that the said policy was delivered and accepted by him so as to become a completed and binding contract, and that the defendant waived the provision of the contract requiring prepayment of the premium. The policy contained a provision that loss should be payable to the Walter Tipps Company and the Gillett Gin Company, as their interests might appear. Such parties held liens on parts of the property and were brought into the suit for the purpose of having their interests determined. Judgment was rendered for the amount of the face of the policy and part of the judgment made payable to one of the said lienholders, the other one disclaiming.

On August 23, 1916, the insurance association's agent approached the said R. C. Fisher, and solicited insurance on his gin, situated at Frisco, Tex. The said agent was only a soliciting agent and could not himself write the insurance, his duties being to secure applications for insurance and transmit them to the company for issuance of the policy thereon in the event the application should be approved. The said R. C. Fisher signed and delivered to the said agent a written application for insurance. This application did not state the rate of the premium, the amount of insurance desired, nor how it was to be distributed as to the buildings and the machinery therein, which were to be covered in separate items by the policy. There were no blanks in the form of the insurance application for such statements. The application did contain questions, answers to which were filled in by the said Fisher and the agent, which called for a description of the various items of property to be covered by insurance, the value thereof, etc. The application also called for information as to liens on the property and the names of the holders thereof. The soliciting agent informed plaintiff that the company would not insure the property for more than \$5,000, and it was understood in effect that the policy was to be for this amount if the company was willing to insure it for said sum. It was also understood that the company would distribute the insurance in the policy that would be issued. The agent informed the plaintiff that the rate would be about 3 per cent. A form of the policy which was subsequently issued was written on the same paper with the application and preceded it. This form of policy purported to be a "standard fire insurance policy form." The application was forwarded to the secretary of the company at Tyler, Tex., by the soliciting agent, in a letter written by him, which contained the statement that the applicant wanted \$5,000 insurance, and which gave a description of the property and the value of the items thereof. The secretary of the company thereupon issued a policy on the property for \$5,000, distributing the amount on various items of the property, par-

ticularly described in the policy. The rate named in the policy was 3 per cent. It was dated August 24, 1916, and was for the term of one year from date. A description of the items of property with the statement of the amount of insurance thereon was contained in a sheet termed "Cotton Gin Form," attached to this policy. This form contained an agreement that the loss should be payable to the Walter Tipps Company and Gillett Gin Company, as their interests might appear, and also contained other warranties in respect to providing means for the protection against and control of fire on the premises. This form was not attached to the form of policy on the application at the time it was signed by Fisher. The secretary of the company sent this policy, duly signed and attested, to the plaintiff, by mail, on August 28th, and inclosed therewith a letter addressed to the plaintiff of said date, reading as follows:

"We have your application of the 23rd instant to our Mr. Allison, and in reply we are handing you herewith policy No. 41649, for \$5,000.00, for the year ending August 24, 1917, and bill for the premium, \$150.00, which amount you will please remit to us if the policy is satisfactory; if it is not satisfactory kindly return it promptly and oblige."

The bill referred to was in part as follows:

Statement.

Tyler, Tex., August 24, 1916.

Mr. R. C. Fisher, Frisco, in account with the Ginners' Mutual of Texas, for fire insurance policy No. 41649, for \$5,000.00.

To premium due on above policy, \$150.00.

The policy was duly received by the plaintiff. He was very busy at the time and merely glanced over a part of it, but considered it satisfactory, and placed it on his desk as a reminder that he should remit the premium when he should have the time to attend to it. Remittance was not made, and no further communication passed between the parties until the gin was destroyed by fire September 17th. The jury found in answer to special issues submitted that the policy was accepted by plaintiff as satisfactory; that he received and inspected the policy and intended to keep it and pay the premium thereon; and that the defendant waived the provision of the policy to the effect that it should not become a binding contract upon either party until the first premium was paid, and intended to extend credit to plaintiff for the premium due if said policy was satisfactory and accepted by plaintiff, upon its receipt.

The assignments presented are to the effect that there was no evidence sufficient to authorize the submission of any issue to the jury, and that the plaintiff in error was entitled to a peremptory instruction for the reasons already referred to in the statement of the pleading: (1) That there was no completed contract; and (2) that the policy was

not effective because the premium had not been paid. The argument made in support of the first contention is that the offer made by the plaintiff in the application for insurance was not sufficiently definite to create a contract by the mere acceptance thereof, because such offer did not contain the essentials of a definite contract, in that the amount of insurance, the rate, the distribution thereof on the specific items and the beneficiaries, were not stated; that the policy therefore constituted an offer because it first contained definite provisions as to elements on which it was essential that the minds of the parties should meet before a contract could be made, and also because the policy varied from the terms of the offer; that since the policy was not the acceptance of an offer, but the offer itself, it was necessary that it be accepted and such acceptance communicated to the insurance company before the contract could be completed. If we are to be confined to the written application to ascertain the terms of the offer, it is true that the application does not contain all of the essential terms of the contract, so that its mere acceptance might complete the contract; but we think that the oral understanding had between the plaintiff and the soliciting agent may be considered as a part of the application. There is no requirement of law that the application for insurance be in writing. *Cooley's Briefs on Insurance*, p. 409, and Supplement, § 409a.

[1, 2] It is well settled in this state that the entire insurance contract may be oral. Such oral understandings are not objectionable because they vary the terms of the written application, in this case, since they were in reference to matters with which the application did not attempt to deal; and the very fact that the application contains no reference to essential elements of the contract shows that it was not intended to be the sole expository of the negotiations for insurance up to the point of communication of the application, or offer for insurance, to the company. The understanding that the applicant wanted insurance in the sum of \$5,000, that the company was to distribute the amount of insurance on the various items of property, the description of which with its value was given in the application, and that the rate of insurance would be about 3 per cent., are therefore to be taken as a part of the application. But plaintiff in error insists that the agreement that the company should distribute the insurance would prevent the policy which did so apportion the insurance from being an acceptance. We do not think so if the apportionment were fairly made, and it certainly would not be permissible for the company to insist that it was not.

[3] The plaintiff in error also contends that the provision for payment of loss to the Walter Tipps Company and the Gillett Gin Com-

pany, as their interests might appear, is at variance from the terms of the offer and constitutes the policy a counter offer. The policy was delivered as being in compliance with the offer, and it might again be answered that the plaintiff in error cannot with good grace claim that its terms constitute a variance from the terms of the offer. But we do not think it is necessarily a variance. The application is not presumed to contain the details of the provisions of the policy.

"The application is for such insurance on such terms and conditions as, in view of the particulars submitted, the company sells. It is to be presumed that, as in other cases, the purchaser has made himself acquainted with what he is purchasing. On the delivery of the policy, therefore, the contract becomes complete without any further assent on the part of the insured. Possibly, if the policy contains any extraordinary provisions such as are not generally or often found in policies, the insured on receiving it might have a right to rescind." *Commonwealth Mutual Fire Insurance Co. v. Knabe*, 171 Mass. 265, 50 N. E. 516.

[4] The provision for loss payable to lienholders is not unusual, and, when the application disclosed the existence of such lienholders, the applicant might be held to have impliedly assented to the insertion in the policy of such provision as the company usually inserted in the policy in such cases. Our statutes provide that the insurance commission shall establish, and the insurance company shall use, uniform policies, applicable to the various risks. *Vernon's Sayles' Ann. Civ. St.* 1914, art. 4891. This provision of the statute would, we take it, apply to mutual companies, article 4907k. If this be true, it is to be presumed that the form used, including this provision of the policy, was that prescribed by the insurance commission, and that all the parties contracted in reference to it. But, even if the terms of the offer were incomplete, because the matter of the apportionment of the insurance was left to the company, or if it be true that the policy did not conform strictly to the terms of the offer, yet we think that the retention of the policy without objection and beyond a reasonable time would constitute an acceptance thereof. *Joyce on Insurance*, §§ 55b, 66g, 66i; *Cooley's Briefs on Insurance* pp. 457 and 459; same sections in Supplement; *Ribble v. Roberts*, 180 S. W. 620; *Sheldon v. Atlantic Fire Insurance Co.*, 26 N. Y. 460, 84 Am. Dec. 213; *Swing v. Marion Pulp Co.*, 47 Ind. App. 199, 93 N. E. 1004; *Rommel v. Griffin*, 81 Ark. 269, 99 S. W. 70. The policy was sent to plaintiff on his order and as in fulfillment of its terms. Under such circumstances, the applicant for the policy is not in the same position as one to whom goods have been sent without solicitation on his part, as suggested by plaintiff in error in argument; but his position is analogous to

that of the purchaser to whom goods have been sent on order, in which case the recipient of the goods is bound to object within a reasonable time to the goods as not meeting the requirements of his order, otherwise the silent retention of them will be considered as an acceptance. *Mechem on Sales*, §§ 1374 and 1380.

[5-7] As to the other proposition relied on by appellant, that the policy was not effective because the premium was not paid, we think the evidence sufficient to make an issue of waiver. The application and policy contained the provision as pleaded, but it is not questioned that this provision of the application and the policy might be waived, and the authorities all agree that the unconditional delivery of the policy, which by its terms required payment of the premium as a condition to its taking effect, is sufficient to constitute a waiver of such term; it being presumed from such delivery that the insurer intended to extend at least a temporary credit to the insured. *United Benefit Association v. Lawson*, 133 S. W. 907; 25 Cyc. pp. 726, 727; *Joyce on Insurance*, §§ 76 and 79; *Cooley's Briefs on Insurance*, pp. 482 and 507, and Supplement, §§ 482 and 507. But the plaintiff in error contends that the delivery was conditional. We must look to the terms of the letter accompanying the delivery to determine whether this is true, for, if the provision in the policy itself made the delivery conditional, then there could never be an unconditional delivery of such policy, and the rule stated would be a futile announcement. We have already quoted the letter referred to. The only condition attached to the finality of the delivery is that the policy should be promptly returned if not satisfactory. This condition is not one of payment. As we have seen, a retention of the policy beyond a reasonable time completes the delivery and acceptance. The inclosing of the bill for the premium, with the request that remittance be made if the policy is satisfactory, is not a statement of condition of delivery itself. It is merely a request for payment of the premium that would become due upon the complete acceptance of the policy. We think this issue was properly one for submission to the jury. *Sheldon v. Atlantic Fire Insurance Co.*, supra.

These holdings, as announced, dispose of all the assignments of error, and result in the affirmance of the judgment.

On Motion for Rehearing.

We may possibly have been mistaken in the conclusion that the provisions of article 4891, R. S., are applicable to mutual companies. See *Vernon's Sayles' Ann. Civ. St.* 1914, arts. 4907k and 4902. The conclusion is not essential to a decision of the case, and we withdraw it.

We are of the opinion that we correctly disposed of the assignments in our former consideration of the case, and the motion for rehearing will be overruled.

SCHAFF et al. v. MASON et al. (No. 2275.)

(Court of Civil Appeals of Texas. Texarkana.
May 26, 1920. Rehearing Denied
June 3, 1920.)

1. Railroads \S 400(10)—Contributory negligence of pedestrian on footpath held for jury.

In an action for the death of a pedestrian struck by locomotive while walking along pathway running parallel with track, contributory negligence held a question for the jury.

2. Railroads \S 265 — Railway company not proper or necessary party in negligence action against receiver.

In a negligence action against railroad in hands of receiver, the railway company is neither a proper nor necessary party to such action.

3. Costs \S 237—On dismissal on defendant's appeal from judgment for plaintiff, costs taxed against plaintiff.

In negligence action against railroad and receiver thereof, where Court of Civil Appeals, on appeal by receiver and railroad from judgment for plaintiff, dismisses action as to railroad on ground that it was not a necessary or proper party, the costs incurred by the railroad will be taxed against plaintiffs, though judgment is affirmed as to receiver.

Appeal from District Court, Cass County;
J. A. Ward, Special Judge.

Action by Mrs. Fannie Mason and others against C. E. Schaff, receiver, and others. Judgment for plaintiffs, and defendants appeal. Affirmed as reformed.

J. H. Mason was killed by a passenger locomotive while walking to the depot in a pathway running parallel with the railway track. The wife and minor children of Mr. Mason bring the suit to recover damages for his alleged wrongful death. The negligence alleged is failure to give warning of the approach of the train. The defendants answered by general denial and contributory negligence of the deceased.

The jury made answers to special issues that appellants were guilty of negligence as alleged, and that the deceased was not guilty of contributory negligence, and that damages were suffered in the sum specified in the verdict.

At the time the deceased was killed, he was going east to the depot at Hughes Springs to meet the east-bound train. He was struck in the back by the pilot of the engine and instantly killed. At the time he was struck he was not far from the depot, walking in a path-

way between the main line and the house track which had been for a long time habitually used by the public in going to and returning from the depot. At some places the pathway approached near the ties of the main line track, and deceased was near the ties. He was not walking between the rails. The track is straight for something like a half mile from the depot east. Approaching the depot the track is slightly downgrade. The house track was filled up with cars. A freight train headed west was standing near by on the passing track, and was making considerable noise. There is a conflict in the evidence as to whether the whistle was blown and the bell rung before the deceased was struck. The jury finding is that the bell was not rung and the whistle was not blown. There is evidence to show that the engineer and fireman were in a position to readily see, and that they did in fact see, the deceased before he was struck, and that they knew that he did not either see or know of the approaching train behind him. The train could have been stopped in time to avoid injuring deceased after his peril was discovered. There is evidence to support the findings of the jury on the special issues submitted to them, and such findings are here adopted as the findings of fact.

Schluter & Singleton, of Jefferson, for appellants.

S. P. Jones, of Marshall, for appellees.

LEVY, J. (after stating the facts as above). [1] It is insisted by appellants that the deceased met his death as a proximate result of his own negligence. Considering all the facts and circumstances in evidence, it is thought that there was an issue of fact to be decided by the jury as to whether or not the deceased was guilty of contributory negligence. And the evidence was such, we think, as to authorize a finding by the jury in favor of the appellees on that point. Therefore assignments of error Nos. 3, 4, 5, and 6 are overruled.

Reversible error is not warranted under the seventh assignment of error if the other findings, as they do, authorize the judgment rendered by the court. *Hill v. Hoeldtke*, 104 Tex. 594, 142 S. W. 871, 40 L. R. A. (N. S.) 672.

The deceased was a comparatively young man and had a long expectancy of life. The money he earned and the value of the farm products raised by him authorized the amount of the verdict. The verdict is not excessive, and therefore assignment of error No. 8 should be overruled.

[2] We concluded that the railway company as such was not a proper or necessary party to this suit, and that the judgment against the railway company as such should be reformed so as to dismiss them from the suit.

The question raised in the second assignment of error has been heretofore determined against the contention made by the appellants. *Lancaster v. Keebler*, 217 S. W. 1117. The judgment in this case expressly protects the receiver in the payment of the claim.

[3] The judgment as reformed eliminating the railway company is affirmed. The costs incurred by the railway company as such are taxed against the appellees.

FT. WORTH & D. C. RY. CO. et al. v.
THOMPSON. (No. 1667.)

(Court of Civil Appeals of Texas. Amarillo.
May 19, 1920.)

1. Railroads \S 484(6) — Contributory negligence in stacking fodder near track held question for jury.

Evidence that plaintiff stacked kaffir corn about 125 feet from a railroad track, that it was of a dry and inflammable character, and not protected from sparks, requires the submission of the issue of contributory negligence in an action for the burning of the corn.

2. Railroads \S 459(2)—Practice of stacking fodder near track does not lessen contributory negligence.

The fact that plaintiff had for several years previously stacked inflammable fodder on his own premises so near a railroad track as to show contributory negligence gives no prescriptive right as against the railroad company to stack it there, since the railroad company could not object, nor does it lessen plaintiff's negligence in similarly stacking the fodder which burned.

3. Railroads \S 466 — Doctrine of discovered peril held inapplicable to fire.

Knowledge by a railroad company that fodder is stacked near its tracks without protection from sparks does not render it liable under the doctrine of discovered peril for failure to use care to prevent the escape of sparks.

4. Railroads \S 481(2)—Evidence that fodder had been stacked in same place previously is incompetent.

In an action for burning fodder where the railroad pleaded contributory negligence in stacking the fodder near the track without protection, the admission of evidence that plaintiff had similarly stacked fodder on the same premises for years before time of the fire was inadmissible.

5. Trial \S 350(2) — Issue as to evidentiary facts need not be submitted.

Special issues requested which called for answer as to evidentiary facts were properly refused.

6. Trial \S 351(5) — Issues already covered need not be submitted.

Special issues requested which were sufficiently covered by a special issue already submitted need not be given.

7. Trial ¶214—Refusal to give correct request on care to prevent fire is erroneous.

Where the judge did not define the rights and duties of the railroad company in the operation of its engine in respect to preventing the escape of fire, the refusal of a correct requested instruction covering that issue would be error.

8. Appeal and error ¶216(4)—A correct request calls for correct charge on issue not covered, but not for more specific charge.

A requested instruction, though defective, is sufficient to require the submission of a correct charge on an issue made by the pleadings and evidence which has not been submitted at all; but, if the issue has been submitted generally, the party wishing a more specific charge must submit a correct instruction in order to be entitled to complain on appeal.

9. Trial ¶260(7) — Court should correctly charge railroad's duty to prevent fire in addition to general negligence.

Since certain facts establish prima facie negligence by a railroad in causing a fire, the court should submit the defense of proper equipment and operation of the engine setting out the fire, notwithstanding it had already submitted generally the issues of negligence and contributory negligence.

Appeal from Donley County Court: W. T. Link, Judge.

Action by J. A. Thompson against the Ft. Worth & Denver City Railway Company and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Thompson, Barwise, Wharton & Hiner, of Ft. Worth, E. A. Simpson, of Amarillo, and R. H. Beville, of Clarendon, for appellants.

A. T. Cole, of Clarendon, for appellee.

BOYCE, J. Appellee brought suit against the Ft. Worth & Denver City Railway Company and Walker D. Hines, Director General of Railroads, to recover damages for the burning of 73 tons of kaffir corn, pummies, cornshucks, etc., alleged to have been set on fire by sparks thrown from an engine operated on the line of road of the defendant railway company, while said property was under the control and operation of said Walker D. Hines, under authority of the Congress of the United States and proclamation of the President. It is alleged that said kaffir corn was stacked on property owned or controlled by the plaintiff, about 200 feet from the right of way of the railway company, and that the defendants, through the negligent operation of an engine near said stacks of feed, permitted sparks to be ejected from said engine, starting a fire which consumed said feed. The defendants answered, denying that they set out said fire, and specially answered that the engine in question was equipped with the best approved spark arresters and devices for preventing the escape of fire, and that such ap-

pliances were in proper condition, and the engine was being properly handled at the time. The defendants further pleaded that the plaintiff was guilty of contributory negligence in placing said kaffir corn and other feed which was of a dry and inflammable character, in such close proximity to the tracks of the railway company without covering same or otherwise protecting it from the danger of ignition from sparks from passing engines. A trial resulted in a joint judgment for the plaintiff against the railway company and the said Walker D. Hines, Director General.

[1-4] The first assignment is to the action of the court in permitting the plaintiff to show that the premises on which this feed was stacked at the time had been used for such purposes for a period of four years before the time of the fire. We are not informed on what theory this testimony was admitted. The evidence showed that the stacks in question were about 125 feet from the nearest track of the railway company; that such feed was of a dry, inflammable character, and was not protected in any way from sparks that might be thrown out by passing engines. Such facts were shown as would require the submission of an issue of contributory negligence under the law as now settled by the decision of the Supreme Court, in the case of *Railway Co. v. Arey*, 107 Tex. 366, 179 S. W. 860, L. R. A. 1916B, 1065. The feed stacks were not on the property of the railway company, and it could have taken no action to prevent such use of the premises. The plaintiff had the right during all such time to use said premises for such purpose and could acquire no rights against the railway company on any theory of consent or acquiescence by it in such use. If the plaintiff were guilty of negligence in the first place, in placing property of this character in such proximity to the tracks of the railway company, the long continuance of such negligence did not change the character of the act. *Waters-Pierce Oil Co. v. Snell*, 47 Tex. Civ. App. 413, 106 S. W. 173; *Thompson on Law of Negligence*, § 7882. Nor could the knowledge of the fact on the part of the railway company that the stacks were in close proximity to its tracks, and in danger of being set on fire, impose on it an added liability on application of the doctrine of discovered peril, for it has been expressly held that the law of discovered peril has no application in such case. *Morgan Bros. v. M., K. & T. Ry. Co.*, 108 Tex. 331, 193 S. W. 134. We think the testimony was inadmissible and calculated to have a harmful effect in the consideration of the case by the jury.

[5] There was no error in refusing to give the first and second special issues requested by the defendant. These call for answers as to evidentiary facts.

[6] The issues requested and referred to in the fourth and fifth assignments were sufficiently covered by the third special issue submitted.

[7, 8] The defendants introduced evidence to the effect that the engine which it was claimed set out the fire was equipped with the most approved appliances for preventing the escape of fire; that these were in good order; and that the engine was being properly handled at the time—and thus established, if the jury should have believed the evidence offered, a complete defense to the cause of action. The defendants requested the submission of an issue and charge in connection therewith, which was sufficient to call the court's attention to their desire to have this defense submitted, but which was incorrect in some particulars, which we need not name. The sixth assignment is to the refusal of the court to submit this issue and charge in connection therewith. The court in his charge gave the ordinary definition of negligence and submitted an issue as to whether the defendant, by the operation of its locomotive, set fire to plaintiff's feed, and as to whether such action on the part of the defendant railway company was "negligence" as that term had been defined. There was nothing in the charge defining the rights and duties of the railway company in the operation of its engine in respect to preventing the escape of fire therefrom. We do not doubt that, if the instruction and issue requested in connection therewith had been correct, then this assignment would present reversible error, for unquestionably the defendants had the right to have this defense presented to the jury. It is the rule, as we understand it, that, if an issue made by the pleadings and evidence has not been submitted at all, a requested instruction, though defective, is sufficient to call the court's attention to the matter and require the submission of a correct charge on the issue. But if the issue has been submitted generally, the party wishing a more specific charge must submit a correct instruction in order to be entitled to complain on appeal.

[9] Of course, it may be said that in this case the ultimate issue of liability, aside from the special defense of contributory negligence, was one of negligence on the part of the railway company, and that the submission of the issue of negligence generally covered this defense of the proper equipment and operation of the engine, setting out the fire. However, the law of these cases is different from that of the ordinary case of negligence, in that the court in charging the law may tell the jury that certain facts make a prima facie case of negligence and that certain other facts rebut this case so made, so that the real issues to be determined by a jury in such cases are as to whether the fire was set by the railway company and whether the

railway company had met the requirements of the law as to the equipment and handling of its engines. By the submission of a general issue of negligence without any instructions in connection therewith, as to the law applicable to this character of case, the jury was without any practical information to guide them in their decision of the facts. While only ultimate issues are to be submitted, the court ought to so frame them, or the charges given in connection therewith, as to apply to the concrete facts of the particular case. In view of our reversal of the case on other grounds, we need not decide whether we would be required to reverse the case on this assignment, but have indicated our views as to the matter for guidance of the court upon another trial.

It is contended by appellant that the court erred in entering judgment against the railway company. It has been held in a number of cases that no judgment can be rendered against a railway company for damages inflicted in the operation of the railway property by the Director General. *Baker v. Bell*, 219 S. W. 245; *G. H. & S. A. Ry. Co. v. Wurzbach*, 219 S. W. 252; *Western Union Telegraph Co. v. K. L. Wallace*, 224 S. W. —, not yet reported; *Mardis v. Hines*, Director General (D. C.) 258 Fed. 945; *Haubert v. B. & O. Ry. Co.* (D. C.) 259 Fed. 361; *Hatcher & Snyder v. A. T. & S. F. Ry. Co.* (D. C.) 258 Fed. 952; *Shumacker v. Pennsylvania Railway Co.*, 106 Misc. Rep. 564, 175 N. Y. Supp. 84. We have not ourselves undertaken an exhaustive consideration of the question, but would be disposed to follow the decisions of the other Courts of Civil Appeals and general trend of the decisions of other courts.

The judgment will be reversed, and the cause remanded.

MARTIN et al. v. MARTIN. (No. 2235.)

(Court of Civil Appeals of Texas. Texarkana.
May 27, 1920. Rehearing Denied
June 3, 1920.)

1. Evidence §419(2)—Recital of deed as to consideration contractual and subject to parol evidence rule.

Recital, in deed of father and stepmother to their son, that it was in consideration of his relinquishment of all the claim which he might have at any time in the future to any estate which they might have, held contractual in the sense that it was subject to the parol evidence rule.

2. Estoppel §22(2)—Recital as to consideration held relinquishment of claims by grantee's son.

Recital, in deed of father and stepmother to son, that it was in consideration of his relinquishment of all the claim which he might have at any time in the future to any estate they might have, held to mean that the acceptance

of the deed by the son was to operate as a relinquishment by him of all claims which he then had or might have in the future to property then owned by his father.

3. Estoppel \Rightarrow 22(2)—Recital constituting relinquishment by grantee's son estopped him to claim father's other land.

Where a son accepted from his father and stepmother deed reciting that it was in consideration of his relinquishment of all claim which he might have at any time in the future to their estate, such son was estopped by the recital to assert title in himself to any part of the land of the father not conveyed to him.

Appeal from District Court, Cass County; H. F. O'Neal, Judge.

Suit by W. A. Martin and others against Rufe Martin. From the judgment, plaintiffs appeal. Reversed, and judgment rendered for plaintiffs.

Gus Martin and Rufe Martin were the only children of J. L. Martin and his wife, Mary, who died about 1880. J. L. Martin and his said wife owned as a part of the community estate between them (it is inferred from the testimony in the record) a tract of land, which he sold after her death for about \$600. Afterward, while he was a widower, said J. L. Martin purchased a tract of 160 acres. By a deed dated April 5, 1889, he, joined by his then wife, he having married again, conveyed 80 acres of this tract to his son Rufe, "in consideration," it was recited in the deed, "of his relinquishment of all the claim which he may have at any time in the future to any estate which we may have." Gus Martin died in 1886, leaving appellants W. A. Martin, Minnie Martin, and Dollie Puckett, his only children, surviving him. Afterwards said J. L. Martin died, leaving surviving him his widow, his son Rufe, and the children named above of his son Gus. The widow died in 1918. This suit was by said children of Gus Martin, appellants here, against Rufe Martin, appellee, to try the title to the 80 acres remaining of said 160 acres tract after 80 acres thereof was conveyed to Rufe Martin as stated, which said J. L. Martin owned when he died. The theory on which appellants claimed the entire 80 acres, instead of an undivided one-half thereof, was that it conclusively appeared from the deed and recital therein set out above that the conveyance of the 80 acres to appellee was an advancement to him by J. L. Martin out of his estate which was intended by said J. L. Martin to be and was accepted by appellee as being in full satisfaction of every claim appellee then had and of every claim he might thereafter have against said J. L. Martin or his estate, and that appellee therefore was estopped to assert title in himself to any part of the estate owned by J. L. Martin at his death. Appellee denied that his acceptance

of the deed had such effect; and alleged, and over appellants' objection was permitted to adduce testimony which tended to prove, that, while J. L. Martin had conveyed the 80 acres to him, said Martin had before that time conveyed or had one Kizer to convey a tract to Gus Martin, which with the improvements thereon was of greater value than the 80 acres; and further that both the conveyance to him and the conveyance to Gus Martin were intended only to be in satisfaction of claims they respectively had against said J. L. Martin on account of the interest of their mother in the community estate between her and said J. L. Martin which he had appropriated to his own use. The trial was to the court without a jury. The appeal is from a judgment determining that appellants owned an undivided one-half and appellee the other undivided one-half of the land, and directing a partition thereof between them.

Hugh Carney, of Atlanta, for appellants.
O'Neal & Allday, of Atlanta, for appellee.

WILLSON, C. J. (after stating the facts as above.) [1-3] We agree with appellants that the recital in the deed to Rufe Martin set out in the statement above was contractual in the sense that it was subject to the parol evidence rule (17 Cyc. 567 et seq.; Kahn v. Kahn, 94 Tex. 114, 58 S. W. 825); and further that the plain meaning of the recital was that the acceptance by Rufe Martin of the deed containing it was to operate as a relinquishment by him of every claim he then had and of every claim he thereafter might have to property then owned by J. L. Martin and to property which said J. L. Martin thereafter might acquire. And, while there are plausible reasons and respectable authorities which support a contrary view of the question, we also agree with appellants that Rufe Martin having accepted said deed was estopped by said recital from asserting title in himself to a part of the land in controversy. 1 R. C. L. 673; In re Simon, 158 Mich. 256, 122 N. W. 544, 17 Ann. Cas. 723, and note page 725 et seq.; Daggett v. Barre, 135 S. W. 1099; Barre v. Daggett, 105 Tex. 572, 153 S. W. 120. The doctrine approved by the greater weight of the authorities, and which we think is supported by the better reasons, is stated in 1 R. C. L. 673, cited above, as follows:

"It is common for a child, on receiving an advancement, to release his right to any further distributive share in the donor's estate. It is now generally recognized therefore that when a child accepts and uses an advancement given and received as his full distributive share of the estate he is estopped from denying the express conditions contained in the instrument by virtue of which he received it. If he does not want to be bound thereby, he should not receive it. Whether the arrangement is called a

contract not to take, or release to take effect in the future, the principle is the same. When the estate is cast by the death of the ancestor, it operates to estop the heir to take what he has agreed he will not claim. The justice of the rule is apparent. Sometimes the present use of a certain sum is worth more to a child than the uncertain prospect of sharing in a parent's estate, although the future share may, in the end, amount to many times its present value. Therefore the law kindly permits child and parent, taking into consideration the estate of the parent, the uncertainty of life, the precarious nature of property and wealth and the ages, necessities, and surroundings of both, to fix on a certain amount which, received by the child, shall be deemed equivalent at the time of the receipt thereof to a full distributive portion of the parent's estate at the time of his death. Another reason given is that it must be presumed that the parent relied upon the agreement and release, and but for it would have made a will; and that the child should be compelled to abide by his promise and thus prevent the just expectations of the parent from being disappointed. To the suggestion that a considerable inequality of interest may be, in fact, the result of accepting an advancement as in full for the statute share, it has been replied that in most cases it is uncertain whether any advancement will not result in inequality. The ancestor, after advancing a child or children, may accumulate or may lose property, or other children may be born, and thereby the whole theory of equality of distribution will be upset. * * * The release need not be executed with any greater formality than a simple contract, and there is no necessity for its being executed under seal. It is not even essential that a child shall sign a deed from his father which contains an agreement relinquishing any further right to share in the father's estate. By accepting the deed and entering into the enjoyment of the property thereby transferred he estops himself from thereafter claiming a further share of his father's estate."

The judgment will be reversed, and judgment will be here rendered for appellants for all the land they sued for.

THEUBER v. MAREK et al. (No. 2272.)

(Court of Civil Appeals of Texas. Texarkana. May 6, 1920.)

1. Evidence \S 222(10)—Ex parte statement of defendant in cross-action inadmissible on plaintiff's behalf.

An ex parte statement under oath by a defendant, brought in by the original defendant under an order obtained by the original defendant, is inadmissible in behalf of plaintiff against the original defendant.

2. Bills and notes \S 104—Money wrongfully obtained from another is good consideration for notes in payment thereof.

Money fraudulently or wrongfully obtained from another by the maker of a note is good

consideration for promissory notes, chattel mortgages, and the delivery of property in payment thereof.

3. Appeal and error \S 1050(1) — Bills and notes \S 104—Admission of incompetent evidence held prejudicial; father and son liable on note procured by threat of prosecution for money wrongfully obtained by son.

Where a son fraudulently or wrongfully obtained property from another, both the father and the son are liable on notes and chattel mortgages executed by them in payment of the sums so obtained, though they were executed under threat of criminal prosecution, so that the admission of an incompetent ex parte statement that the son did not obtain the money wrongfully was error prejudicial to defendant in an action to cancel note.

Appeal from District Court, Burleson County; R. J. Alexander, Judge.

Action by F. F. Marek and another against Ed Theuber, in which the defendant made one Philp a party defendant. Judgment for plaintiffs and for the original defendant against the defendant Philp on the cross-action, and defendant appeals. Reversed and remanded.

The action is by F. F. Marek and his son, Ed Marek, against the appellant Ed Theuber, to cancel two notes aggregating \$2,200 and the two chattel mortgages executed to secure the same, and to recover \$170 in money paid and the value of certain live stock delivered to the appellant. It is alleged in the petition that the notes, mortgages, money, and cattle were obtained from the appellees by wrongful representations and duress by means of threats of a criminal prosecution. The appellant answered by general denial, and by cross-action pleaded that the money, notes, mortgages, and personal property were voluntarily paid, executed and delivered to him for money belonging to him which was illegally used and converted by Ed Marek and one Philp, acting together to defraud him, and prayed for judgment for the debt and foreclosure of the mortgages. The defendant made Philp a party defendant to the suit, and asked for personal judgment against him for \$5,000, alleged to be money of the defendant's in the possession of Philp and to have been converted by him. The case was submitted on special issues, and the jury made the following answers: (1) That Ed Marek was not indebted to the defendant Theuber; (2) that the notes, mortgages, and personal property were wrongfully obtained from Ed Marek and F. F. Marek under duress of threats of criminal prosecution of Ed Marek for a felony; and (3) that the defendant Philp was indebted to the defendant Theuber in the sum of \$4,868.39. In accordance with the verdict the court entered judgment in favor of the Mareks for the money paid and for the value of the cattle

delivered, and canceling the notes and mortgages in evidence. Judgment was also entered in favor of Ed Theuber against the defendant Philp.

W. M. Hilliard, of Caldwell, and Searcy & Botts, of Brenham, for appellant.

T. J. Carter, of Caldwell, and Mathis, Teague & Mathis, of Brenham, for appellees.

LEVY, J. (after stating the facts as above). [1] Appellant made James Philp a party defendant in this cause, and at the same time asked for an order requiring Philp to file a statement under oath, showing his dealings in the alleged cattle transactions. The court made a vacation order, requiring Philp to file a sworn statement as asked for by appellant. In obedience to the order of the judge said Philp filed a sworn statement, setting forth an agreement with appellant to purchase cattle, and specifying the cattle bought and the amount paid for them. The statement further recited that—

"Ed Marek never received any of Ed Theuber's money from the bank or from me, except in payment of cattle which he sold and delivered to me, and Ed Theuber got every dollar the cattle brought when sold.

"Every dollar I received for the sale of cattle I turned over to Ed Theuber. He kept books. He kept the money and I never could get a settlement out of him. I do not owe Ed Theuber one cent, and Ed Marek does not owe him a dollar in this cattle business while I was handling it. I bought a lot of cattle from Ed Marek and paid him for them. He bought quite a number from me and paid me for them, and Ed Theuber got the money."

The plaintiff offered the above statement in evidence, and the appellant excepted to the ruling of the court in admitting it. The defendant Philp did not appear in the trial, and a judgment by default was entered against him in favor of appellant on his cross-action. It is believed there was error in admitting the ex parte statement in evidence, requiring a reversal of the judgment as to both F. F. Marek and Ed Marek. For the said ex parte statement of Philp went to show that Ed Marek did not fraudulently take money belonging to Theuber and had not committed any criminal offense. And the evidence in the record is a disputed question as to whether or not Ed Marek fraudulently or wrongfully obtained the money of the appellant, and whether or not Ed Marek and Jim Philp acted together, as alleged, to defraud the appellant. The jury could easily have been influenced to decide the disputed issue by looking to and accepting the ex parte statement before them.

[2, 3] If it be true that Ed Marek fraudulently or wrongfully obtained the money of the appellant, then there is a good consideration for the notes, mortgages, and property

in evidence. For money fraudulently or wrongfully obtained from another is a good consideration for a promissory note taken in payment of it. *Thorn v. Pinkham*, 84 Me. 101, 24 Atl. 718, 20 Am. St. Rep. 335. And if it be true, as alleged in the cross-action, that F. F. Marek voluntarily gave the notes and mortgages to repay the money fraudulently or wrongfully gotten by his son, then F. F. Marek is liable on his contract. So if Ed Marek was guilty in fact of having fraudulently obtained the money of Theuber, he would be liable on his note and bill of sale in suit, even though he executed them under threat of a criminal prosecution. And if F. F. Marek did not execute the notes and mortgages under duress, but to secure the payment of the money wrongfully or fraudulently gotten by his son from the appellant, F. F. Marek would be liable on his undertakings. The evidence complained of bore directly upon the pivotal issues in the case, and was, we think, illegal evidence in the form offered.

The judgment is reversed, and the cause remanded.

GILMORE V. GRAND TEMPLE & TABERNACLE IN STATE OF TEXAS OF KNIGHTS AND DAUGHTERS OF TABOR OF INTERNATIONAL ORDER OF TWELVE. (No. 2265.)

(Court of Civil Appeals of Texas. Texarkana. May 27, 1920.)

1. Insurance —747—Beneficiary in certificate of suspended member not entitled in view of by-laws.

Where mutual benefit certificate stipulated society should not be liable unless insured when he died was in good standing with his tabernacle, endowment department, and grand temple and tabernacle, certificate accordingly was not binding on society when member died, not in good standing, but suspended for failure to pay endowment tax on certificate for a quarter.

2. Insurance —761—Requirement of by-laws as to good health prevented reinstatement on payment of delinquent endowment tax.

Where by-laws of benefit society expressly provided that, if insured was not in good health when payment of a delinquent quarterly endowment tax on his certificate was made, payment should not operate to reinstate him, provision must be given effect, such facts existing, as barring the beneficiary.

Appeal from District Court, Harris County; Henry J. Dannenbaum, Judge.

Suit by Hattie Gilmore against the Grand Temple and Tabernacle in the State of Texas of the Knights and Daughters of Tabor of the International Order of Twelve. From judgment for defendant, plaintiff appeals. Affirmed.

December 12, 1911, appellee a fraternal benefit society issued a certificate whereby it bound itself to pay \$1,000 to appellant, the beneficiary named therein, when her husband, James I. Gilmore the insured, died, if he was then "in good standing with his tabernacle, the endowment department, and the grand temple and tabernacle." At the time he died, to wit, June 26, 1916, Gilmore was appellee's grand auditor. This suit was by appellant as the beneficiary named in the certificate to recover the amount thereof, and by her as the sole heir of said Gilmore to recover the value of services she claimed he had performed for appellees as its grand auditor. After the parties had presented the testimony they respectively relied on, the court instructed the jury to return a verdict in appellee's favor. The appeal is from a judgment in conformity to such a verdict.

M. H. Broyles, of Houston, for appellant.
Fred R. Switzer, of Houston, for appellee.

WILLSON, C. J. (after stating the facts as above). Appellant insists there was testimony which warranted a finding that appellee was liable to her on the certificate she sued on, and that the trial court therefore erred when he instructed the jury to find in appellee's favor.

From the testimony it appeared that the certificate and the laws of the society as they were when it was issued, and as they might be in the future as the result of amendments and additions thereto, constituted the contract between the parties, and it was provided in said laws that—

"No subordinate temple or tabernacle, nor any subordinate officer or member, shall have the power or authority to waive any provisions of the laws or constitution of this order or of the Taborian endowment benefit."

By the terms of the certificate appellee was not to be liable to appellant as the beneficiary named therein unless the insured when he died was "in good standing with his tabernacle, the endowment department, and the grand temple and tabernacle."

By its laws as they existed prior to July, 1910, the society could issue certificates for only \$300 each. The insured as a member of the society then held a certificate for that amount. The "endowment tax" on such a certificate was \$1 per quarter.

At the time stated the laws of the society were so changed as to authorize the issuance of certificates for \$1,000 also, and as to authorize then existing members who wished to do so to exchange the \$300 certificates they held for \$1,000 certificates. The endowment tax on certificates for \$300 continued to be \$1 per quarter. The endowment tax on certificates \$1,000 was fixed at \$3 per quarter, and a member who wished his \$300 certificate changed to one for \$1,000 was required to "pay," quoting, "twelve calendar months \$3

a quarter from the date that his policy is changed before the \$1,000 policy becomes effective or in full force."

It appeared without dispute in the testimony that the insured did not comply with the requirement that he pay \$3 per quarter during said 12 months, but that he instead paid only \$1 per quarter during that time. By amendments of the laws of the society made in 1914 the endowment tax on certificates for \$300 was increased to \$1.35 per quarter and on \$1,000 certificates to \$4.50 per quarter. Thereafter the insured, who theretofore had paid an endowment tax of only \$1, began to pay \$1.35, and never afterward paid more than that sum as such a tax.

The insured never having paid the endowment tax he should have paid on a certificate for \$1,000, but having always instead paid the tax he should have paid on a certificate for \$300, the society at his death treated the certificate issued to him as one for \$300, and paid to appellant that sum, less a tax of \$10, chargeable against it by a law of the society.

In the amendments referred to it was provided that the endowment quarters should begin with the 1st days in December, March, June, and September, and that the failure of a member to pay the endowment tax "on or before the first day of the first month of the endowment quarter * * * ipso facto suspends such member and his or her beneficiary from the right to participate in the endowment fund, until the said endowment tax and other dues and assessments and taxes have been paid and the said endowment tax has reached the office of the chief grand scribe." And further that—

"Any member suspended for nonpayment of endowment tax may be reinstated upon the payment within 60 days from the date of the suspension of all arrearages of every kind, including the current endowment tax; provided, however, that he be in good health at the time of the reinstatement. Whenever any endowment tax is tendered by a member or any one else for him for the purpose of reinstatement such tender shall be in effect a warranty by such member that he is in good health, and when paid by the member or any one on the member's behalf after such member's suspension the same shall be received and retained without waiving any of the provisions of this section; provided further, that the receipt and retention of such payments in case the suspended member is not in good health shall not have the effect of reinstating said member or entitling such member or his beneficiaries to any right under his endowment certificate."

It appeared without dispute in the testimony that the endowment tax due from the insured for the quarter beginning June 1, 1916, was not paid to the lodge of which he was a member until the 22d day of that month, that he was then suffering from paralysis, and that he died three or four days thereafter. When the tax reached the office of the

chief grand scribe does not appear from anything we have found in the record.

[1] Conceding, but not deciding, that the certificate was effective notwithstanding the provision in the by-laws which declared it should not be if the insured failed, as he did, to pay an endowment tax of \$3 a quarter during the twelve months following its date, it is plain it nevertheless was not valid and binding on appellee at the time the insured died, because he was not then in good standing in the society, as it was stipulated in the certificate he must be, but instead stood suspended because of his failure to pay the endowment tax on or before the first day of the quarter beginning June 1, 1916. The provision of the by-laws applicable was that such failure should ipso facto suspend a member and the right of his beneficiary to participate in the endowment fund until the tax and all other dues and assessments had been paid and the "endowment tax had reached the office of the chief grand scribe."

[2] Even if it appeared, and it does not, that the endowment tax paid to the local lodge June 22, 1916, reached the chief grand scribe's office before the death of the insured, it could not be held that the insured was thereby reinstated, for it appeared that he was then fatally sick, and it was expressly provided in the by-laws that if the insured was not in good health at the time payment was made it should not operate to reinstate him. 3 Vernon's Statutes, arts. 4830, 4834, 4847; Grayson v. Grand Temple, etc., 171 S. W. 489; 3 Joyce on Insurance, §§ 1261, 1261a; Fletcher v. Knights and Ladies of Honor, 135 S. W. 201; Day v. Woodmen Circle, 174 Mo. App. 260, 156 S. W. 721.

Appellant urges as another reason why the trial court should not have instructed the jury as he did that there was testimony which would have warranted a finding that appellee was liable to her for the value of the services the insured rendered it as its auditor during his lifetime. She does not set out such testimony in her brief, nor cite us to it in the record. In reading the testimony sent to this court, we did not find any which we think would have supported such a finding.

The judgment is affirmed.

NEILL v. PRYOR et ux. (No. 6401.)

(Court of Civil Appeals of Texas. San Antonio. May 12, 1920.)

1. Appeal and error \S 1062(1) — Erroneous special issue as to location of division line held harmless.

In a suit to determine the boundary line marked by a former picket fence, a special issue as to where the present fence was located

with reference to the center line of the former fence including the posts, if erroneous because of the latter clause, was harmless, where the jury found the existing fence was on appellee's side of the line, even if the posts were not included in determining the center line of the former fence.

2. Boundaries \S 35(5) — Evidence of division line according to deeds admissible to show location of admitted boundary.

In a suit to determine a boundary line, where it was agreed that a former fence had been on the true line, evidence establishing the division line according to the deeds was admissible to show the location of the picket fence, and a requested instruction withdrawing such evidence from the jury was properly refused.

3. Appeal and error \S 731(1) — Assignment that verdict was contrary to evidence too general.

An assignment that the verdict is contrary to the preponderance of the evidence, and against the evidence, and shows that the jury either misunderstood the case or disregarded the evidence, is so general that the trial court could not have been thereby apprised of the theory on which plaintiff requested that the verdict should be set aside.

4. Boundaries \S 37(3) — Evidence held to sustain verdict finding boundary as claimed by defendant.

In a suit to locate a boundary which the parties agreed had been marked by a former picket fence, evidence of two witnesses, that they built the present fence with care not to encroach on plaintiff's lot as marked by the former fence, held sufficient to warrant a verdict for defendants, notwithstanding testimony of witnesses who had no particular reason to observe carefully that the new fence was on plaintiff's side of the former fence.

5. Appeal and error \S 930(1) — Testimony most favorable to party securing verdict presumed true.

The appellate court, in deference to the verdict, must accept as true the testimony most favorable to the party for whom the verdict was rendered.

6. Appeal and error \S 1001(1) — Verdict supported by evidence must be upheld unless contrary to physical facts.

The appellate court must uphold the verdict, unless the direct testimony supporting it cannot be correct because of physical facts or other evidence admitted to be correct.

Appeal from District Court, Bexar County; R. B. Minor, Judge.

Suit by Mrs. Dora M. Neill against Ike T. Pryor and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

Guinn & McNeill, of San Antonio, for appellant.

Deuman, Franklin & McGown, of San Antonio, for appellees.

MOURSUND, J. This is a suit by Mrs. Dora M. Neill against Ike T. Pryor and wife, Myra S. Pryor, which, in view of averments in the defendants' answer and cross-action and admissions in reply thereto by plaintiff, resolved itself into a suit to determine the location of a certain picket fence, admitted to have marked the line between the lot owned by plaintiff and that owned by Mrs. Pryor, both of which were out of block 10 in the city of San Antonio. This fence had been removed by defendants and a new fence erected which plaintiff contended had been so constructed as to deprive her of a 12-inch strip of land and place same in possession of defendants. There was also a controversy concerning another strip of land 5 inches in width, but on the trial the plaintiff abandoned her claim to such strip.

The court submitted the following question:

"Is the present fence located east or west of the old picket (or paling) fence, and how far? Answer by reference to the east side of the present fence and the center line of the old picket fence (meaning the center line of the average thickness of the old picket fence, including pickets and posts)."

The jury answered:

"We, the jury, find that the east side of the present fence is located three inches west of the center line of the old picket fence."

Judgment was rendered that plaintiff take nothing by her suit to recover any property sued for situated west of the east line of the present division fence; also, that she take nothing by her suit in so far as it involved the five inch strip. That part of the judgment relating to the line, the location of which was left to the jury, does not follow the verdict, for the reason that defendants in open court stated that they did not care to recover the three inches between the east line of the new fence built by them and the center of the old picket fence as located by the jury.

[1] By the first assignment complaint is made of the wording of the issue submitted to the jury, the contention being that the court erred in assuming or holding as a matter of law that the division line between the properties would be the center line of the average thickness of the old picket fence including pickets and posts, instead of requiring that the line should be established by ascertaining the distance from the new fence of a line marking where the west line of the pickets of the old fence were located or at least the east line of the pickets. In other words, that the thickness of the posts should not have been taken into consideration. It having been agreed that the old picket fence was 5½ inches thick, and the jury having found that the east side of the new Pryor fence is 3 inches west of the center line of the old paling fence, it appears that, even if either of the appellant's theories is adopted as the proper method to determine the bound-

ary line as made by the old fence, nevertheless the appellant would not be entitled to recover, for the true line even under the theory most favorable to appellant, would be one-half inch on appellant's side of the new fence. We are unable to see how the appellant could have been prejudiced by the form of the question, and the appellant under the judgment of the court got all the land on which the picket fence had been situated and a half inch in addition. It follows that no error is pointed out by assignments 1 and 2 such as would require or justify a reversal of the judgment.

[2] The court did not err in refusing to give special charge No. 1 requested by plaintiff. The effect of such charge would have been to withdraw from the jury evidence showing where the division line between the parties was located according to their deeds, which evidence was admissible to be considered with the other facts and circumstances, several of which indicated that the old picket fence had been constructed on that very line. The purpose of plaintiff in asking the charge seems to have been to impress upon the jury the fact that under the admitted facts each party owned the land in her inclosure up to the old picket fence, but its effect would have been to prevent the jury from considering, in deciding where the picket fence was situated, the inference that it would naturally be placed on the true line.

[3] By the fourth assignment complaint is made that the verdict is contrary to the preponderance of the evidence and against the evidence and shows that the jury either misunderstood the case or disregarded the evidence. This assignment is so general that the trial court could not have been thereby apprised of the theory upon which the plaintiff relied to show that the verdict should be set aside.

[4] We have, however, carefully read the statement of facts and examined the exhibits sent up with the record, and conclude that it cannot be held that the verdict is so contrary to the great preponderance of the evidence as to warrant an appellate court in setting it aside. In fact, we do not believe that it can be said to preponderate in favor of plaintiff's contention. The testimony of Dietz and Campbell, who built the Pryor fence, is unequivocally to the effect that the present fence was placed a half inch or an inch west of the old picket fence line. They were instructed not to encroach on Mrs. Neill's lot, and they testified they did not do so. Their claim is not contradicted by any one who is shown to recollect definitely where the old fence line was situated. It is attempted to be fixed by reference to two objects, a tree and the brick post at the corner of the Pryor front fence. There is no uniformity in the theories as to location of the old fence line with reference to the brick post. Appellant testified that the brick post, not counting the cap, which protruded 3 inches, came over on

her line 4 to 6 inches. The brick pillar, or post, as it is sometimes called by the witnesses, is 18 inches wide. Afterwards she testified:

"The old picket fence butted up against this pillar near the center, more towards Mrs. Pryor's side than my own. * * * This old picket fence struck the pillar from the side next to me about 12 inches or more."

The witness Norris, who built the Pryor fence in 1907 against the old picket fence, first testified that the red line on Exhibit 3, which would be approximately two-thirds of the distance across the pillar, represented practically the place where the fence built by Pryor struck the pillar. This fence line was admittedly 7 or 8 inches from the old picket fence line. Later he testified the fence line built by him came to the left of the pillar. The jury was warranted in concluding that the recollection of appellant and Morris furnished no more certain basis for a conclusion as to the location of the old fence than the statements of Dietz and Campbell who claimed to have given particular attention to the location of the line.

The appellant relies with much confidence upon the theory that a certain tree was in the fence line of Pryor's fence constructed in 1907, but here again there is much doubt. Norris first testified that he remembered "that there were one or two trees along the fence line somewhere on Pryor's side"; then that he believed the fence he built struck the second tree as it went by. He then testified that the edge of the tree was in the line of property. Dietz testified that the trees were on Pryor's side of the fence; he had no recollection of either being in the line. Campbell testified that he remembered there were trees in the line of fence he and Dietz pulled down. He was not accurate in his conception of when a tree may be said to be in the line, for he said it was in the old line and also that it was in the fence line they built. Appellant's recollection was that the tree was partially on her side of the Pryor fence and thus created a break in the fence. Pryor's recollection was that the fence built by him did not touch the tree, but came close to it. He estimated that the tree was about 2 inches on his side of the fence built in 1907. He also testified, and this was not contradicted, that the tree bore no mark indicating that it had ever come in contact with a fence. Certain photographs

were introduced in evidence, and the testimony of a photographer concerning what was disclosed by the same with reference to the tree; but his eyesight was tested and discovered to be less keen than that of jurors. We have closely examined the original photograph relied on by appellant, and are unable to find anything which convinces us that at the time it was taken the tree was partially upon appellant's side of the fence. The sidewalk in front of appellant's lot terminates at a point 3 inches on her side of the present fence; the curb also terminates short of the fence line. The sidewalk and the old picket fence were constructed before appellant purchased. It is a natural inference that the owner would construct the sidewalk as far as the partition fence, or that, if the sidewalk was first constructed, the partition fence would be made to coincide with the location of the sidewalk. There is a stub of an old cedar post about 3 inches on appellant's side of the present fence, and in line with the point of termination of the sidewalk, and this is relied on by appellees on the theory that it was a part of the old picket fence; but this is denied by appellant, who testified to seeing the stub in 1907 at the time the Pryor house was built.

The recollection of persons with regard to the exact location of trees, fences, and especially of relative distances, there being at the time they were viewed no controversy which would lead to a close inspection, is necessarily unreliable, and the jury probably concluded that there was no more certain guide than to accept as correct the testimony of Dietz and Campbell, who claimed that it was their specific purpose to ascertain the old line and stay within it.

[5, 6] The province of the jury is to pass upon the credibility of witnesses and the weight to be given their testimony. The appellate court, in deference to their verdict, must accept as true the testimony most favorable to appellees, and uphold the verdict, unless it is shown that the direct testimony supporting it cannot be correct by reason of physical facts or other evidence admitted to be correct.

When these well-settled rules are applied in this case, we conclude there can be no doubt of the sufficiency of the evidence to support the verdict.

The judgment is affirmed.

TWYMAN v. CLARK. (No. 2012.)

(Court of Civil Appeals of Texas. Texarkana.
Oct. 30, 1919.)**Bills and notes** \S 539—**Finding in suit on note and to foreclose vendor's lien held properly construed.**

In suit to recover the amount of a promissory note for \$1,125 and for foreclosure of lien on the east half of a survey conveyed by plaintiff trustee to defendant maker, which lien secured payment of the note, finding that plaintiff and defendant agreed, when the note was signed, that money derived from the sale of timber on land constituting the west half of the survey should be credited on the note, *held* properly construed as a finding the agreement was that the credit against the purchase money due defendant on the land on account of the timber was to be entered as of the dates the payments for the timber were made by plaintiff.

Appeal from District Court, Harrison County; P. O. Beard, Judge.

Suit by W. T. Twyman against Isom Clark. From a judgment for defendant, plaintiff appeals. Affirmed.

Appellant, Twyman, was the plaintiff in the court below. By his suit he sought (1) a recovery of the amount of a promissory note for \$1,125, interest, and attorney's fees, payable to his order on or before January 1, 1917, which he alleged appellee, Clark, made January 1, 1916; and (2) a foreclosure of a lien on the east half of the James Mitchum survey of 320 acres in Harrison county, which, he alleged, he conveyed to said Clark by a deed dated said January 1, 1916, and on which, he further alleged, a vendor's lien existed in his favor to secure the payment of said note.

In his answer Clark alleged that the note sued on was without consideration, and further alleged, and at the trial proved, in substance, that in January, 1909, he owned the west half of the James Mitchum survey, and that Mrs. M. J. Burress owned the east half thereof; that, having arranged to sell the timber on the entire survey, he, on January 30, 1909, purchased the east half thereof of Mrs. Burress, agreeing to pay her \$1,120 therefor out of the proceeds of the sale of said timber; that the purchasers of the timber were to pay for same from time to time as they cut same; that Twyman agreed to act as trustee for him and Mrs. Burress in collecting the money to be paid for the timber, and in paying over to Mrs. Burress out of same the \$1,120 and interest thereon which he (Clark) had agreed to pay for the land; and that Mrs. Burress was then to execute and deliver a deed conveying said east half to him (Clark). In his said answer Clark further alleged that Twyman, as such trustee,

collected on account of said timber approximately \$1,500, out of which he paid Mrs. Burress the amount he (Clark) had agreed to pay her for the land; that, having so paid for the land, Twyman had Mrs. Burress to convey same to him, instead of to Clark; that thereafter, to wit, on January 27, 1916, Twyman represented to him that the proceeds collected by him of the sale of said timber were not sufficient to pay the sum he (Clark) had agreed to pay Mrs. Burress therefor, and requested him (Clark) to execute the note sued on, assuring him that same, when executed, would be credited with the amount of said proceeds; that he (Clark) did not then, nor until the institution of this suit, know how much said Twyman had collected on account of said timber, and, having implicit confidence in Twyman, and relying on his said statement and assurance, he (Clark) executed said note.

In a supplemental petition Twyman alleged that, shortly after Mrs. Burress conveyed the land to him, he had a settlement with Clark, in which it was agreed that Clark owed him \$750 on account of the land; and that Clark then executed and delivered to him his promissory notes for sums aggregating that amount. In said petition Twyman further alleged that about January 1, 1916, he "had another and further settlement" with Clark, in which it was agreed that Clark owed him on account of said land the sum of \$1,125, to cover which Clark then executed the note sued on. Twyman was a merchant; Clark, a negro about 60 years of age, who could neither read nor write—was a farmer. He had been one of Twyman's customers during many years. It appeared from testimony heard at the trial that in January, 1916, Twyman held four notes in his favor, for \$187.50, each, purporting to have been made by Clark on January 1, 1911, and to be secured by a vendor's lien on the east half of the Mitchum survey, mentioned above; and that in January, 1916, and at the date of the trial, he held a note for \$1,125, purporting to have been made by Clark January 1, 1916, and to be secured by a vendor's lien on said land. Twyman testified that the amount including interest, due January 1, 1916, on the four notes for \$187.50 each, was \$1,125, and that the note for that amount was made by Clark to take the place of the four notes. It further appeared from said testimony that, at the time the four notes for \$187.50 purported to have been made, Twyman, acting for Clark, had collected \$720.28 on account of timber cut on said east half of the Mitchum survey, and had paid same over to Mrs. Burress, and that he had collected sums aggregating \$493.72 on account of timber on the west half of said survey, which he credited on an open account he had against Clark. Twyman testified that, in addition to the \$720.28 he had

paid Mrs. Burress, as stated out of the proceeds of the sales of timber, in January, 1911, he paid her \$634.93 as the balance then due her for the land, out of his own funds, and had her convey the land to him. He further testified that the \$634.93 was less than the balance Mrs. Burress claimed to be due her, and that in a settlement he had with Clark, January 27, 1911, he claimed, and Clark agreed, that the latter was due him on account of the land, not only the \$634.93 he had paid Mrs. Burress, but the difference between that sum and the sum Mrs. Burress claimed to be due her. That difference, he said, added to the \$634.93, made \$750, which Clark then agreed he owed on account of the land. The four notes for \$187.50, purporting to have been made by Clark January 1, 1911, but really made said January 27, 1911, Twyman said, were for the \$750. Clark, testifying as a witness, denied that he had such a settlement with Twyman, and denied that he executed said four notes.

On special issues submitted to them the jury found with Twyman on his contention that he had such a settlement with Clark in January, 1911, but they further found (and the finding is not attacked, as without the support of testimony or otherwise) that in the settlement Twyman agreed that the amount (afterwards ascertained to be \$493.72, as stated above) he had received for Clark on account of timber on the west half of the Mitchum survey, and credited on the open account between them, should be credited instead against the \$750 represented by the four notes. It is obvious that, had the credit been accordingly given, it would have appeared that in January, 1916, there was a balance remaining unpaid by Clark on the purchase money of the land of only \$256.28 and interest, or \$384.42 instead of \$750 and interest, or \$1,125, the amount of the note sued on. Referring to that note, Clark testified that he—

"didn't know what it was; didn't know what was in it, nor what it was for." "I signed this paper [note]," he said, "without having read or knowing what it was. I signed it with his [Twyman's] word. He told me, if I signed this note, he would give me a deed and credit the timber. I thought it was a deed. Yes, sir; I said just now, if I would sign this note, that he would give me credit for my timber."

"Q. Then you did know it was a note? A. He said note and deeds, too. I didn't know it. No, sir; I did not know as a matter of fact it was a note. I didn't know, because they hadn't read it."

The witness Brown testified that he was employed by Clark to represent him in adjusting a controversy between him and Twyman in regard to the open account between them.

"I made arrangements with Mr. Twyman," the witness said, "to come to my office and fix up this personal account. He brought this

land note along with him, this note for \$1,125, and after we got the personal account all straightened out I told Mr. Twyman I wanted all the notes and everything he had in his possession relating to Isom's personal account; wanted him to turn them over to Isom when he made the \$250.00 note. He said he would, and did bring a lot of notes and papers relative to Isom's personal account, and at the same time he brought this note along. After Isom signed the note for \$250, Mr. Twyman took it and looked it over, and then I says: 'Mr. Twyman, where were the notes and other obligations you hold against Isom?' He said: 'They are there in an envelope.' I said: 'Give those to Isom, and that will square the thing up.' He says: 'No; I have a note here on some land Isom must sign, if I give him these receipts; a note, he will have to sign, if I give him these receipts.' Then he pushed this note here out, and told Isom to sign that. Isom turned to me and says: 'Mr. Brown, must I sign it?' I said: 'Isom, I don't know anything about that transaction at all.' Isom says to Mr. Twyman: 'What land is that?' Mr. Twyman says: 'A part of that land you are living on.' Isom says: 'What part of it, Mr. Twyman?' He said: 'The east part.' Isom says: 'Mr. Twyman, what are you going to do about the timber?' Mr. Twyman said: 'You and me can straighten that all up together, and Mr. Brown don't know anything about it; you just sign it; Mr. Brown don't know anything about it.' Isom said: 'What are you going to do about the timber? Those men have taken it off.' He said: 'You go ahead and sign there, and you come with me to the store, and we will straighten it out.' Isom said: 'Are you going to give me credit for my timber?' Twyman said: 'Certainly I will; you know I give you credit for everything due you.' Isom turned and put his mark on there, and Mr. Twyman asked me to witness it, and I did."

Twyman as a witness denied that he agreed, when Clark signed the note, to credit same as Clark and Brown testified he did. On the issue thus made the jury found that Twyman and Clark did agree, at the time the latter signed the \$1,125 note, "that the money derived from the sale of timber on the west half of the Mitchum survey should be credited on said note." Twyman insisted that the finding made it the duty of the court to render judgment in his favor for the amount of the \$1,125 note, after crediting same as of the date of the trial with the \$493.72 he had collected on account of the timber on the west half of the Mitchum survey. The trial court, however, construed the finding to the agreement was that the credit against the purchase money due Clark on the land on account of said timber was to be entered as of the dates the payments for the timber were made to Twyman, and, instead of rendering judgment for Twyman for \$631.28, rendered judgment in his favor for \$476.85 as the balance due on the \$1,125 note. We think the court correctly construed the finding and did not err when he refused to render

judgment in Twyman's favor for a greater sum than he adjudged in his favor.

S. P. Jones and J. T. Casey, both of Marshall, for appellant.

Bibb & Bibb and Brown & Hall, all of Marshall, for appellee.

WILLSON, C. J. (after stating the facts as above). We have carefully considered the assignments in appellant's brief, and are of the opinion neither of them shows error which requires a reversal of the judgment. Therefore it is affirmed.

BARLOW v. GREER. (No. 532.)

(Court of Civil Appeals of Texas. Beaumont. April 28, 1920. Rehearing Denied May 19, 1920.)

1. Appeal and error \S 1043(7)—Refusal to continue for illness of witness no error, where testimony of witness was taken at his home before end of trial.

Refusal of continuance because of illness of witness was not error, where before the trial was closed the court, with the jury and counsel, proceeded to the home of the witness, where his testimony was given in full.

2. Continuance \S 6—Refusal to continue to permit defendant to have land surveyed in boundary dispute action held not abuse of discretion.

In action involving a boundary dispute, refusal of continuance to permit defendant to have a survey made of the land was not an abuse of discretion, in absence of showing that such survey could not have been previously made.

3. Evidence \S 274(11)—Statements of deceased remote grantor in possession of land, against his interest, admissible in boundary dispute action.

In action involving boundary dispute, declarations by defendant's remote grantor, since deceased, made at the time he was in possession of the land, that the boundary line was as claimed by plaintiff, held admissible, being statements against his interest.

4. New trial \S 102(5)—Properly denied for lack of diligence in procuring newly discovered evidence.

In boundary dispute action, motion for a new trial on the ground of newly discovered evidence held properly overruled for lack of diligence, where the newly discovered witness resided within 2 miles of the land in controversy for approximately 63 years, was well acquainted with the land and the history of that locality, and where there was no reason why such witness had not been approached prior to the trial, with a view of ascertaining what he knew in regard to the matter.

Appeal from District Court, Shelby County; Chas. L. Brachfield, Judge.

Suit by T. G. Greer against J. B. Barlow. Judgment for plaintiff, and defendant appeals. Affirmed.

D. M. Short & Sons, of Center, for appellant.

Sanders & Sanders, of Center, for appellee.

HIGHTOWER, C. J. Appellee, Greer, sued appellant, Barlow, in the district court of Shelby county for the title and possession of 129 acres of land alleged to be a part of the Z. K. Walker head-right survey; the form of the action being trespass to try title, but appellee also specially pleaded title by limitation under the statutes of 5 and 10 years. Appellant's answer consisted of the usual plea of not guilty, and also interposed title by limitation under the 5 and 10 year statutes. The case was tried with a jury, upon special issues submitted, and the verdict was in favor of appellee for the land claimed by him, and judgment was rendered accordingly.

The real issue between the parties was one of boundary; it being the contention of the appellee that the land sued for by him was a part of the Z. K. Walker survey, as originally made, and the appellant claiming that the land appellee was claiming was a part of the John D. Merchant survey, as originally made, and owned by appellant. At the time these two surveys were originally made, Huana bayou was the boundary line between them at the point in controversy; the Merchant survey lying south of the bayou, and the Walker lying north of the bayou. It was the contention of appellee that the channel of Huana bayou had changed its bed since said surveys were originally made, and that in consequence of the change the 129 acres of land sued for by him was now on the south side of the present channel of the bayou. This contention was denied by appellant, who claimed that the bed of the bayou had not changed, as claimed by appellee, and that the land described and sued for by appellee was a portion of the Merchant survey as originally made, and was owned by appellant. Upon this issue the whole controversy between the parties hinged. Motion for new trial was timely made and overruled, and appellant appealed to this court.

The first assignment of error complains of the action of the trial court in overruling appellant's motion for a continuance, based upon three grounds. The first ground was that of surprise. The suit was originally filed July 17, 1918, and appellee's first amended petition, which appellant claims occasioned the surprise, was filed March 13, 1919, the day on which the case went to trial. It is the contention of appellant in this connection, substantially, that there was a material difference as to the description of the 129 acres of land sued for by appellee. Upon consideration of this matter, we have concluded that appel-

lant's contention cannot be sustained. We think that the original petition is substantially the same as the amended petition with reference to the description, except that the amended petition more definitely describes the land sued for, by specific metes and bounds, than were contained in the original; but it is manifest that appellant could not have been surprised by reason of the practically immaterial change or difference in description as contained in the two petitions.

[1] It is next contended, under this assignment, that the motion should have been granted because of the absence of a witness for appellant, whose testimony he claimed was material in refuting the contention of appellee that there had been a change in the bed of Huana bayou, as claimed by appellee. Before the trial was closed, however, the court, with the jury and counsel, proceeded to the home of this witness, and his testimony was given in full, and appellant had the benefit thereof, and no showing whatever is made of any injury.

[2] It is next contended that the case should have been continued to permit appellant to have a topographical survey made of the land in controversy. He claimed that the issue of boundary between the parties could not be directly and correctly determined without such survey. It is manifest from the record that appellant was notified from the time the original petition was on file that the question of boundary would be the sole controversy between the parties, and he had from that time at least until some time in the fall of that year in which to have a survey made if he so desired. He claims in this connection that the weather became bad in the fall of the year 1918, and creeks became swollen, and for that reason a survey touching the land in controversy could not be made. There is no showing, however, that such survey, if desired, could not have been made some time in the summer before, and after the suit was filed, or at some time prior to the bad weather in the fall. We think the court did not abuse its discretion in overruling the motion for a continuance as to any of the grounds contained in the motion.

[3] The second assignment of error complains of the action of the trial court in permitting appellee to testify to certain statements and declarations made by one W. J. Lister, who at the time of the trial had been dead for many years, but who, at the time of such statements, was the owner of the land on the Merchant survey now claimed by appel-

lant. These statements by Lister were in the nature of declarations against his own interests, and tended strongly to show that the true boundary between the Merchant and the Walker surveys was as the same is claimed to be by appellee. Lister being a remote vendor in appellant's chain of title to the Merchant, and being the owner of the land at the time of such statements against his interests, and being in possession, the evidence was admissible upon the issue here in dispute, and the court did not err, as contended under this assignment. *Snow v. Starr*, 75 Tex. 411, 12 S. W. 873; *Rose v. Hays Inv. Co.*, 205 S. W. 140. The assignment is overruled.

Appellant's third, fourth, and fifth assignments of error are grouped, though we seriously doubt that they were properly so, under the rules. These assignments challenge the verdict and judgment: First, on the ground that there was no evidence in support thereof; second, that the evidence was insufficient to support the verdict; and, third, that motion for new trial should have been granted because of newly discovered evidence. We shall not discuss the evidence touching the first two assignments; but, after consideration of same, we hold that there was evidence, and sufficient evidence, to warrant the verdict and judgment.

[4] As to the ground of newly discovered evidence, it will suffice to say that the witness by whom it is alleged such evidence as was desired would be given is shown to have resided within 2 miles of the land in controversy for approximately 63 years, and was well acquainted with the land and the history of that locality, and appellant's main desire in having his evidence was to show that Huana bayou had not changed its bed, as claimed by appellee. There is no reason in the world shown why this old citizen had not been approached by appellant prior to the trial, with a view of ascertaining what he knew about the matter, and it is clear that appellant was lacking in diligence in not ascertaining what the witness knew. The court did not, of course, abuse its discretion in overruling the motion for new trial on the ground of newly discovered evidence.

The whole issue between the parties, as stated before, was one of boundary, and it was purely a question of fact, and the evidence is abundantly sufficient to support the verdict and judgment in appellee's favor on the issue. All assignments are therefore overruled, and the judgment will be affirmed; and it is so ordered.

WELLS v. SCALES. (No. 8370.)(Court of Civil Appeals of Texas. Dallas.
May 8, 1920.)**1. Evidence §253(1)—Declarations of conspirators in furtherance of the common design are admissible against others.**

Acts and declarations of conspirators pending the conspiracy and in furtherance of the common design are admissible against a co-conspirator, though done and said in his absence; consequently, where a mother and daughter conspired to extort money from defendant, and, when the mother was unable to make good her assertion that she was defendant's common-law wife, the daughter sued for breach of marriage promise, etc., evidence of acts and declarations by the mother in absence of the daughter was admissible.

2. Appeal and error §926(3)—Preliminary evidence of conspiracy to justify admission of declarations presumed.

Where the question whether a conspiracy between a mother and daughter to extort money from defendant was not submitted to the jury, there being no request for submission, and the court admitted as against the daughter, plaintiff in a suit for breach of marriage promise, etc., evidence of declarations of the mother that she was defendant's common-law wife, etc., made in the daughter's absence, which would not have been admissible but for the conspiracy, it will be presumed that it was established.

3. Evidence §253(1)—Letter by coconspirator admissible.

In a daughter's action for breach of marriage promise, etc., where there was evidence that mother, daughter, and another had conspired to extort money from defendant, a letter written by the mother, stating she was defendant's common-law wife, *held* admissible.

4. Appeal and error §1002—Findings on conflicting evidence not disturbed.

The jury's findings on conflicting evidence will not be disturbed.

Appeal from District Court, Kaufman County; Joel R. Bond, Judge.

Action by Thelma Wells, by next friend, against H. L. Scales. From a judgment for defendant, plaintiff appeals. *Affirmed.*

John T. Spann and Allen & Allen, all of Dallas, for appellant.

Wynne & Wynne and Woods & Morrow, all of Kaufman, for appellee.

TALBOT, J. This is a suit for damages for breach of promise of marriage and for assault to rape, brought by the appellant against the appellee. Appellant alleged that she was 17 years of age when she was engaged to the defendant, and that defendant, on the 15th day of June, 1918, repudiated his contract of marriage with her, and that by

reason thereof she has suffered actual damages of \$50,000 and vindictive damages in the sum of \$50,000. Appellee answered by certain special exceptions, general denial, and a special answer in which he charged that the suit was not founded in good faith, but was the result of a conspiracy on the part of plaintiff and her mother and father to blackmail him. Appellee alleged that he was about 60 years of age; that he had accumulated property of considerable value; that appellant's mother, Mrs. Della Wells, in pursuance of a conspiracy between herself, husband, and daughter, to put him in a position to extort money from him, came to appellee and engaged herself to him as his housekeeper on his farm near Scurry in Kaufman County, Tex.; and that she and her daughter became members of his household, both representing that the mother was a widow and that the appellant was her daughter and the husband dead. Appellee further alleged that appellant's mother, in furtherance of the conspiracy formed, began a course of lascivious conduct with him, he believing she was a widow; that such course of conduct on the part of the mother continued with appellee until the spring of 1918, when the real purpose of appellant and her mother became known to appellee; that at this time appellant's said mother, Mrs. Della Wells, asserted that she was the common-law wife of appellee, and as such demanded large sums of money of appellee to have her abandon her claim upon him and his property; that appellee refused to pay money to the said Mrs. Wells, or to the appellant, and that they then threatened to sue appellee for damages because he had been living with Mrs. Wells and because he had engaged himself to marry the appellant, and had refused to do so; that, appellee continuing to refuse to pay appellant's mother money and refusing to marry appellant, they moved away from the home of appellee, resurrected Darius Wells, father of appellant, and this suit was filed. Appellee further charges that he does not believe that the appellant ever had any feelings toward him other than that of a friend, and as a father; that she frequently expressed herself to the effect that she looked upon appellee and felt towards him as a father. Appellee set out the conspiracy in detail, and denied as absolutely false the charge that he attempted to take advantage of the appellant or ever intended or thought of causing her hurt or injury, or lead her to believe that he entertained for her any other feeling than that of the kindest friendship and regard. Appellant, by supplemental petition, denied the conspiracy alleged by appellee and charged that the same was interposed by appellee, knowing that it was false and done for the purpose of prejudicing her case.

The case was tried before a jury, and, from a judgment in favor of appellee, appellant appealed.

[1, 2] The first three assignments of error presented complain of the admission of certain testimony over the objection of the appellant upon the ground that such testimony was inadmissible because the conspiracy charged had not been proved. This testimony consisted of acts and declarations of Mrs. Delia Wells, mother of the appellant, and the proposition advanced is that—

"Before any evidence could be given of any act on the part of the plaintiff's mother not in the presence or within the knowledge of the plaintiff, a conspiracy must be established by proof between the plaintiff and her mother, and, there being no proof of any such conspiracy, it was error in the trial court to admit evidence of such acts on the part of the mother of the plaintiff."

The bills of exception show that the court permitted the witness Mrs. G. A. Smith to testify by deposition that Mrs. Delia Wells, mother of the appellant, had a conversation with the daughter of the witness, in which Mrs. Wells had stated that she was the common-law wife of H. L. Scales and had lived with him for three years, and permitted Miss Elsie Smith to testify that she had a conversation with Mrs. Delia Wells, the mother of the plaintiff, in the absence of the plaintiff, in which Mrs. Wells stated to her that she was a common-law wife of H. L. Scales and lived with him for three years and was going to bring suit against him as such common-law wife or would bring suit for breach of promise of marriage against defendant, and requested said witness to consult a lawyer for her in Corsicana as to bringing such suit. The conversations referred to were not had in the presence of or hearing of the appellant, and their admissibility turns on the question of whether or not the testimony adduced established prima facie the conspiracy alleged. The testimony bearing upon the question is voluminous, and appellant does not point out wherein or why it is insufficient to show that the conspiracy charged existed. We have, however, examined the testimony and without detailing it hold that it is sufficient to establish prima facie at least the conspiracy alleged by appellee. If this is correct, there was no error, in our opinion, in admitting the testimony of which complaint is made. The rule is well established that acts and declarations of conspirators pending the conspiracy and in furtherance of the common design are admissible against a coconspirator, though said and done in his absence. Appellant's able counsel does not deny this rule of evidence, but simply asserts that the evidence in this case was insufficient to establish the conspiracy charged. The issue of whether or

not the conspiracy charged had been established by the evidence was not submitted to the jury for its determination, and no requests for its submission appear to have been made. In such case, the evidence being sufficient to authorize it, the presumption will obtain that the court found that the conspiracy had been established.

For the reasons given above, there was no error in admitting the testimony complained of in assignment 3A. Besides, as we understand the record, the conversations detailed by some of the witnesses referred to in this assignment were had in the presence of the appellant.

[3] The third assignment of error is to the effect that the court erred in admitting in evidence a letter written by appellant's mother, Mrs. Delia Wells, to Miss Elsie Smith, which is as follows:

"May 19th, 1918.

"Miss Elsie Smith, Jewett, Texas: I am going to trust to your honor in writing you this letter. I am going to tell you something I think you should know. Please do not tell Mr. Scales what I am going to tell you. He is my man. I have been living in his home as his wife for three years and I am his wife in the eyes of God. You are a woman; I guess you know the ways of mankind. Please do not let him visit you anywhere. I have been honest with you and I hope you will be the same with me, for I think you are a good true woman. If you answer this letter, address it in a plain envelope.
Delia Wells."

Practically the same objections were urged to the introduction of this letter as were urged to the introduction of the testimony complained of in the assignments above discussed, and, for the reasons given in holding that testimony admissible, we conclude there was no error in admitting the letter in question.

[4] The fourth assignment of error asserts that the answer of the jury to special issue No. 1 is not supported by the evidence and is contrary to the preponderance of the evidence; and the fifth assignment of error is that the answer of the jury to special issue No. 3 is likewise not supported by the evidence, and contrary to the preponderance thereof. Special issue No. 1 is as follows: "Was there a mutual promise or agreement on the part of the plaintiff, Thelma Wells, and the defendant, H. L. Scales, to marry?" And special issue No. 3 is as follows: "Did the defendant, H. L. Scales, commit an assault to rape upon plaintiff, Thelma Wells?" Both of these issues were answered in the negative by the jury, and, the evidence being conflicting upon both, they became issues of fact and not issues of law, and the jury's findings are binding upon this court.

Finding no reversible error in the record, the judgment is affirmed.

CITY OF DALLAS et al. v. CRAWFORD
et al. (No. 1641.)

(Court of Civil Appeals of Texas. Amarillo.
April 21, 1920. On Motion for Re-
hearing, June 2, 1920.)

1. Eminent domain \S 266—Petition to cancel judgment of condemnation held to set up cause of action as distinguished from motion.

Petition of landowner and husband to cancel and annul, for want of service and citation or other notice, judgment in a condemnation suit by defendant city, *held* to set up a cause of action as distinguished from a mere motion to correct an error of entry.

2. Eminent domain \S 266—County court with jurisdiction of condemnation proceedings proper court in which to file petition attacking judgment.

County court empowered by its judgment to vest title to realty in city in condemnation proceedings *held* the proper court for the landowner to file petition attacking the judgment of condemnation on the ground that recitals essential to jurisdiction in the record were false, and to establish aliunde the record that the court in truth was without jurisdiction.

3. Eminent domain \S 190—Condemnation proceeding could be instituted by city only by petition.

A condemnation proceeding could be instituted by a city only by petition presented to the judge of the county court describing the land, giving the names of the owners, etc., the petition being that which would give jurisdiction.

4. Eminent domain \S 226—Appointment of commission in condemnation proceedings not invalid for lack of agreement between parties.

Despite Charter of the City of Dallas, art. 11, § 5, appointment of commission in the city's condemnation proceeding, under Rev. St. 1911, art. 6508, was not invalid for lack of agreement between the parties as to the commissioners, though the application should state a failure to agree or an excuse therefor, as by showing that the landowner is a minor.

5. Infants \S 79—Court cannot appoint guardian ad litem without service on minor.

Until service on a minor is had, the court has no power to appoint a guardian ad litem.

6. Infants \S 81—Appointment of mother with adverse interest as guardian ad litem for minor illegal.

Appointment as guardian ad litem for a minor of her mother holding an adverse interest to her would be illegal.

7. Eminent domain \S 180—Notice of condemnation proceedings to owner essential.

Until the statutes requiring notice to the landowner are complied with, the commissioners in a city's condemnation proceedings have no authority to assess damages or to make a report, and the county court has no jurisdiction to declare condemnation.

8. Eminent domain \S 266—Infant owner not notified of proceedings not required to request new trial before suing to set aside judgment.

In a city's proceedings to condemn land, the infant owner, for lack of notice to her, was not required to request a new trial on the proceedings, petition and report of which were void, before suing to set aside judgment of condemnation.

9. Eminent domain \S 234(1) — County court could not condemn land at city's instance without report of commission.

County court entertaining a city's condemnation proceedings without a report of the commission, after first acquiring jurisdiction under the statutes, could not condemn the land.

10. Pleading \S 228—Exceptions to petition of infant to set aside judgment of condemnation properly overruled.

In suit by an infant, whose land was condemned by a city, to set aside the judgment of condemnation on the ground that she was not notified of the proceedings, etc., exception to the owner's petition on the ground that certain facts alleged were immaterial, some of the matters being proper, and none of them immaterial or irrelevant, *held* properly overruled.

11. Process \S 149—Evidence held not to show personal notice on infant landowner in condemnation proceedings.

In suit by an infant landowner to set aside judgment condemning her land at the instance of a city, evidence *held* insufficient to show the personal notice on the landowner required by Rev. St. 1911, art. 6514.

12. Judgment \S 525—Correct judgment reciting wrong reason not affected.

Where it is shown that judgment condemning land at a city's instance was invalid for lack of service of notice on the infant landowner, other matters recited in the judgment vacating such judgment do not affect it, because, if void for one reason, it is void for all; a wrong reason given in part and recited in the judgment not affecting the conclusion warranted by facts and law.

On Motion for Rehearing.

13. Eminent domain \S 266—Landowner suing to set aside judgment of condemnation not required to ask city again to institute proceedings.

An infant landowner had a right to show that judgment of condemnation in favor of a city was obtained without jurisdiction over her person for lack of personal service of notice, but she was not required, in suing to set aside such judgment as a piece of evidence against her title, to ask that the city proceed again to condemn.

Appeal from Dallas County Court; T. A. Works, Judge.

Action by Mrs. Dorsey Gibbs Crawford and another against the City of Dallas and others. From judgment for plaintiffs, defendants appeal. Affirmed.

Jas. J. Collins, W. S. Bramlett, and Edward P. Dougherty, all of Dallas, for appellants.

W. L. Crawford, Muse & Muse, W. J. J. Smith, and W. A. Kemp, all of Dallas, for appellees.

HUFF, C. J. This is an action brought in the county court of Dallas county at law, on April 23, 1918, by Mrs. Dorsey Gibbs Crawford, joined by her husband pro forma, William Lester Crawford, against the city of Dallas, Mrs. S. A. Gibbs, Carl Hoblitzelle, Joe S. Kendall, Texas Land & Mortgage Company, and Real Estate Loan Company of Galveston, for the purpose of canceling and annulling for want of service and citation upon the plaintiff, Mrs. Dorsey Gibbs Crawford, or other notice, in a condemnation suit, and for fraud, the reports being made by the special commissioners in said condemnation proceeding, and the judgment of the said county court of Dallas county at law awarding condemnation to the city of Dallas for certain tracts of land described in the petition, and in the reports and judgment, situated in the city and county of Dallas, and claimed by the city of Dallas under the condemnation proceedings. The Texas Land & Mortgage Company and Real Estate Loan Company of Galveston each filed disclaimers, disclaiming any interest whatever. Mrs. S. A. Gibbs filed a general denial. The city of Dallas answered by general exceptions, various special exceptions, general denial, special denial, and pleas of estoppel. Kendall and Hoblitzelle each answered by a general demurrer, and the adoption of the demurrers and exceptions of the city of Dallas, and by general denial. The case was tried before a jury, but upon an instructed verdict judgment was rendered for the plaintiff, Mrs. Dorsey Gibbs Crawford, canceling and annulling the reports of the special commissioners, and the judgment in condemnation by said court, and all proceedings under the application for condemnation, so far as the same affected the rights of Mrs. Dorsey Gibbs Crawford. It is shown there had been two applications for condemnation filed by the city of Dallas against Mrs. Dorsey Gibbs Crawford and others for different tracts of land, in which said application Dorsey Gibbs Crawford was alleged to have an interest in the land sought to be condemned or to claim an interest therein, and the said applications were carried under the respective docket numbers of 19419 and 19425 of the county court of Dallas county at law. The court consolidated these two cases on the motion of the city, under consolidated number 19425. The application of the city for condemnation in each case was presented to the judge of that court, and each filed with him on the 23d day of April, 1913. They were immediately docketed under the respective docket numbers, and filed with the clerk of

the county court on that day. The judgment annulling the order, in so far as pertinent to the issues discussed, provided as follows:

"This judgment shall not be construed as affecting or setting aside any proceeding had or judgment rendered in said cause No. 19419 and 19425, or either of them, except so far as the rights and interests of Dorsey Gibbs Crawford are concerned, but as to Dorsey Gibbs Crawford, and every interest of hers in any of said lands, same and every part of said judgment, reports of special commissioners, and all proceedings thereunder are vacated, annulled, and declared void."

The trial court recited several special findings in his judgment, which are not deemed by us to be necessary to set out. The effect of the judgment was to hold that the court rendering condemnation judgment did not have jurisdiction over the appellee.

[1] The first assignment presents as error the action of the court in overruling the city's general exception to the petition. It is asserted that a petition in an action of this kind must not only allege facts authorizing the vacation of the decree, but should seek a new trial, which should be awarded, and in effect asserts it should show that the complainant has a meritorious cause of action, and that upon a new trial the result would likely be different. It is apparently appellants' contention that appellee is proceeding upon motion to correct an error of entry. We think the petition set up a cause of action as distinguished from a mere motion.

[2] Since the county court of Dallas county at law had power by judgment to vest title to real estate in the city upon condemnation proceedings, it is the proper court in which to file the petition, attacking the judgment therein, on the ground that the recitals in the record were false, and which recitals were necessary as precedent conditions to give jurisdiction and to establish aliunde the record in truth that the court was without jurisdiction to render the judgment. *Ellis v. Railway Co.*, 203 S. W. 172. The petition alleges that the appellee is and was the owner of the land sought to be condemned; that at the time of the condemnation proceeding she was a minor and had no guardian of her estate; that she had no notice of the proceeding, and was not represented at the hearing before the commissioners, either in person or by attorney; that the award to her of \$500 therein was grossly inadequate to pay for her interest in the property taken; that such sum in fact was never paid to her, and she has never received anything therefor; that she owned one-third of the property condemned, and that the commissioners and judgment only awarded to her about one-fiftieth of the damages sustained by the entire property; that her interest taken was at that time of the value of over \$30,000; that the city had taken charge of the land and proper-

ty and was trespassing thereon, etc. We think the petition shows on its face a meritorious case, and, if the judgment and report are set aside, probably a different result would be obtained. Upon setting aside the judgment in an ordinary action a trial would be had on the merits, as set up by the pleadings.

[3] The action instituted by the city, however, was a condemnation proceeding, which it alone could institute. A petition must be presented to the judge, describing the land, giving the name of the owners, etc. It is the petition which gives jurisdiction. The owner of the land and the city could agree on a commission to assess the damage, and the statute provides the judge should give preference to such persons. It is probable, under the condition of this case, the county court could not have proceeded under the old application and the commissioners appointed to condemn the land.

[4] It is also asserted by the appellee that the appellant, before seeking condemnation proceedings, did not offer to settle the damages, or to agree upon the damages with appellee, as required by the statute. We do not think the appointment of the commission invalid because there was no agreement between the parties as to the commissioners. The county judge appears, under article 6508, R. C. S., to have the power to appoint three disinterested freeholders. *Johnston v. Galveston*, 85 S. W. 515; *Railway Co. v. Railway Co.*, 57 S. W. 312. If he so appointed the commissioners, such act would not be invalid. It is not our understanding of the statutes that it was essential to his power to appoint that an agreement between the parties upon the commissioners' should first be had.

Section 5, article 11, of the city charter, gives the board of commissioners of that city the power to take private property for public use in order to open, change, or widen any public street. Such property may be taken for such purposes by making just compensation to the owner. If the amount of such compensation shall not be agreed upon it is made the duty of the board of commissioners to state in writing the real estate or property sought to be taken, the name of the owner, his residence, etc., and present the same to the county court of Dallas at law, or to the judge of the court, who can, either in vacation or term time, appoint three disinterested freeholders and qualified voters of the county to assess damages. The special commissioners so appointed are governed by the laws for the condemnation of right of way for railway companies. Article 6506, R. C. S., provides:

"If such company and said owner cannot agree upon the damages, it should be the duty of said company to state in writing," etc.

There is a slight difference in the verbiage used in the city charter and the statute. The

city charter stipulates if the amount of the compensation "shall not be agreed upon," while the statute provides if the parties "cannot agree upon the damages." The city charter would seem to authorize the application in writing if no agreement is made, whether there was any effort to agree previous to the application, while the statute seems to indicate that an effort is first required and a failure to reach an agreement established. It has been held that neither the county judge nor the commissioners appointed to assess damages can inquire into the truth of the statements contained in the written application. Such inquiry would be proper only upon a hearing in the county court on appeal from the commissioners. But that case leaves it inferable if there was a chance of agreement this might be shown upon appeal in the county court. *Rabb v. La Feria, etc.*, 62 Tex. Civ. App. 24, 130 S. W. 918. In this case the application appears to have alleged a failure to agree between the owners and the city, and that they could not agree upon the damages. There is a conflict of authority on the question as to whether a failure to agree is a condition precedent to confer the right of eminent domain. "Statutes conferring the power of eminent domain usually require that an attempt shall be made before instituting proceedings to condemn it. In whatever form of words this direction is couched, it is generally held to be imperative as a condition precedent to the exercise of compulsory power." *Lewis on Eminent Domain*, vol. 2, § 497. "If the record fails to show such inability to agree, the proceedings are generally held to be void." *Id.* In Massachusetts, however, in a statute apparently worded as that of our own, it is held an attempt to agree is not necessary before application. *Id.* If, however, the owner is under disability, no attempt to agree need be made. It seems, however, that in the application it is essential that the inability to agree and reason for such inability should be set forth in the petition. *Id.* arts. 499, 500, 501; *R. C. L., Eminent Domain*, vol. 10, §§ 172, 173, p. 204. The exact question raised by us has not been passed upon by our courts in so far as we have been able to ascertain, but in general it seems to be recognized by our courts as a condition precedent that the application should state a failure to agree or an excuse therefor. *Barnes v. Railway Co.*, 33 S. W. 601; *Railway Co. v. Railway Co.*, 86 Tex. 537, 26 S. W. 54; *McKenzie v. Imperial, etc.*, 166 S. W. 495; *Ellis v. Houston Railway Co.*, 203 S. W. 172. The Supreme Court has recently given emphasis to the necessity of alleging and showing the necessary jurisdictional facts in condemnation proceedings. *Haverbekken v. Hale (Sup.)* 204 S. W. 1162. The facts and the petition in this case show that appellee was a minor, and therefore show the futility of an effort to agree

as a condition precedent to the right of instituting condemnation proceedings.

The court finds appellee was not served, and that she did not appear and waive her rights, and her petition herein so alleges. Again the petition alleges the mother of appellee was appointed guardian ad litem for her before and without service on the appellee.

[5] It appears until service on the minor is had the court has no power to appoint a guardian ad litem. *Sprague v. Haines*, 68 Tex. 215, on page 218, 4 S. W. 371.

[6] It is also alleged that her mother was holding an adverse interest to appellee. If this is true, the appointment of the mother as guardian ad litem would be illegal. This court in the case of *Knight v. Waggoner*, 214 S. W. 692, had occasion to look into this question, and reached the conclusion that the purpose of appointing a guardian ad litem is to secure the disinterested services of a proper person to see that the minor's interests are fully protected and presented to the court. We call attention to the discussion of the question in that case.

[7] Until the statutes requiring notice are complied with, the commissioners have no authority to assess damages or to make a report, and the court has no jurisdiction to declare the condemnation. *Parker v. Railway Co.*, 84 Tex. 333, 19 S. W. 518; *Vogt v. Bexar County*, 5 Tex. Civ. App. 272, 23 S. W. 1044. It is necessary, in order to give jurisdiction, that notice to the owner first be had. *McIntire v. Lucker*, 77 Tex. 259, 13 S. W. 1027; *Adams v. San Angelo Waterworks, etc.*, 25 S. W. 165; *Haverbekken v. Hale* (Sup.) 204 S. W. 1162.

[8] The petition in this case alleges appellee's interest in the land did not vest by the judgment for the reason the court rendering it had no jurisdiction over her. The appellee had no power to bring into operation condemnation proceedings; that power is in the city alone. We do not understand that the appellee was required to request a new trial upon proceedings the petition and report of which were void, according to her allegations.

[9] The county court could only set aside the judgment, and without a report of the commission after first acquiring jurisdiction, the court, as we understand the statutes, could not, without such, condemn the land. *Johnston v. Galveston, etc.*, 85 S. W. 511.

[10] The second assignment presents, in effect, that the court should have sustained exception 3 to the petition of appellee. It seems that the exception was urged on the ground that certain facts alleged were immaterial. Some of the facts go to the failure in the application for condemnation to sufficiently designate appellee's interest in the land, and the failure to prepare a plat by the city engineer of contiguous property to that sought to be condemned, and of the owners

of such property, who would be required under the charter to pay their prorated proportion of the damages by reason of opening the street, and the report of the special commissioners to the mayor and city commissioners, and other matters, among which is an alleged agreement by appellee after the condemnation, which is assailed on the ground that it was not binding as to her for the reason that she was then a minor, and that she had since her marriage repudiated such agreement. Some of the matters alleged were proper, and none of them immaterial or irrelevant, as a history of the transaction; at least, we think there was no reversible error in overruling the exception.

The third assignment is based on the action of the court in peremptorily instructing the jury that appellee was not legally served in either of the condemnation proceedings, and instructing the jury to return a verdict for appellee. Appellee testifies she was never served with notice or citation. The deputy sheriff who claims he had the process for her testifies that he never delivered the notice to appellee, but left it with her mother, with the request that she deliver it to the appellee. Her mother, Mrs. Gibbs, testifies she never notified appellee or gave her any such notice, and, in fact, she testifies no such notice was left with her to serve or give appellee, with the instructions claimed by the deputy sheriff. The president of the special commissioners appointed to assess the damage testified that the question of notice and obtaining it was left entirely to the city attorney, and that the commissioners made no investigation in that matter. It is contradicted that neither Mrs. Gibbs nor appellee was present before the commissioners in person or by attorney. It is recited in the report that legal notice was served upon all the parties, among whom is named appellee, and that Mrs. Gibbs, the mother, was served as guardian ad litem of the appellee. This recitation in the report is carried forward in the judgment. We find in the record notice directed to all of the alleged owners set out in the application except the appellee, and returns showing service of notice on all the parties except appellee. There is no notice to Mrs. Gibbs as guardian ad litem for appellee or service on her as such. There is an order appointing Mrs. Gibbs guardian ad litem, dated May 9, 1913. The notice issued to Mrs. Gibbs was addressed to Mrs. S. A. Gibbs, personally, dated April 28th, and served on the 30th of April, 1913.

[11] We fail to find any notice or return showing notice and service on appellee except the recitals in the report and in the order approving the report. There is, we think, no evidence of notice on appellee as required by the statute (article 6514). We do not understand that it is asserted that appellee had a guardian of her estate; the only evidence of such notice being in the report where the

president of the board says as to notice, the commissioners intrusted that to the city attorney to look after. The city attorney of that date does not testify in this case. The officer who had the notice to execute testifies positively that he did not serve it on the appellee. We see no fact which would authorize the issue to be submitted to the jury. We understand the minor must be personally served, and no guardian ad litem could be appointed until such service. *Sprague v. Haines*, 68 Tex. 215, 4 S. W. 371; *Evans v. Livestock*, etc., 81 Tex. at bottom of page 624, 17 S. W. 232. The Supreme Court has said: "Notice to the owner of the land sought to be condemned is necessary to jurisdiction, and this cannot be presumed from declarations contained in the report of the commissioners, nor from recitals in the decree of condemnation, but must be proved." *Parker v. Railway Co.*, 84 Tex. 333, 19 S. W. 518; *Adams v. San Angelo*, etc., 25 S. W. 165; *Crawford v. Frilo*, 153 S. W. 390; *Cooke County v. Dudenhafer*, 196 S. W. 976; *Moseley v. Bradford*, 190 S. W. 624, and authorities cited under the first assignment. Under the authorities above cited there was no controverted fact to submit to the jury, and there was no error in so instructing the jury. This being true, the court was without jurisdiction to render judgment condemning appellee's interest in the land to public use.

We do not think the second, third, and fourth propositions under this assignment present reversible error. It seems to be the contention of appellant that because, under the will of appellee's father, her mother had a life estate in the land, and because there is a provision with reference to property which may have been charged with a mortgage thereon, for that reason it was unnecessary to give appellee notice. Without trying to determine appellee's interest in the land, we think it sufficient to say, for the purpose of this case, that appellant stated in its application for condemnation proceedings that she had an interest in the land sought to be condemned, and showed the necessity of the proceedings to condemn it and of making her a party thereto. We do not understand it to be true that the county court can try title to the land, but, if proper steps were taken, its judgment may vest an easement or right under condemnation proceedings. We think if the judgment is valid as to other parties, and they in fact had the title thereto, such as would, under the proceedings, pass all the interest in the land, then the city could not be ousted, but that issue could not be determined in the county court, nor by us on this appeal. That question must be adjudicated in another tribunal.

The fourth assignment presents what is termed fundamental error. This seems to be based upon objections urged to the judgment of the court, on the ground that in part the court based its judgment vacating the former

decree on other facts than that of notice, of which there was no evidence, for such supposed findings. This, as we conceive the question, cannot be fundamental error.

[12] Where it is shown the judgment was invalid because there was no valid judgment, other matters recited therein would not affect the judgment rendered; if void for one reason, it is void for all purposes. A wrong reason, given in part and recited in the judgment, will not affect the conclusion warranted by the facts and the law rendering the judgment void.

We believe there is no reversible error, and the judgment will be affirmed.

On Motion for Rehearing.

We set out the judgment, which declares the former judgment shall not affect the interest of Mrs. Crawford in the land. It is declared only that the judgment, "and every part of said judgment, report of special commissioners and all proceedings thereunder, are vacated, annulled, and declared void." It is only the judgment and the report of the commissioners and the proceedings thereunder which are vacated. It says nothing as to the institution of the proceedings upon the application by the city to condemn the land. We held that, as Mrs. Crawford was at that time a minor, it was not necessary, as a condition precedent, to allege or show a failure to agree with her; that such failure would not be sufficient to set aside the judgment. Mrs. Crawford's disabilities as a minor are now removed. The reason that then applied would not now apply. The authorities, as we pointed out, on this question are not in harmony; that is, as to showing the necessity of the failure to agree before instituting the proceedings. It was not then, and is not now, as we conceive it, necessary to decide that question in order to dispose of this case. We cited several decisions from this state which were called to our attention, bearing, as we thought, upon the question. As suggested, the city must institute condemnation proceedings, and, as we understand, it was for it to determine what course it should pursue—whether it would first seek an agreement with Mrs. Crawford, or would file a new application, or proceed under the old petition. We did not believe that it was necessary for Mrs. Crawford to allege and show or to request that a hearing be had upon the old petition. We did not feel, and do not now think, it our duty to direct the course which should be pursued. Certainly the city cannot take Mrs. Crawford's land without condemning it by a proper judgment. If it does not see proper to institute proceedings for that purpose, she can sue for her interest. Should the city be able to show that it has all her title, by condemning the property as that of others, and paying therefor, it doubtless can defeat

Mrs. Crawford in a recovery of the land or damages.

[13] A suit for the land or for damages may force the city to take the statutory method of condemnation, or proceed under article 6531, Vernon's Sayles' Civil Statutes. *Railway Co. v. Benitos*, 59 Tex. 326; *Railway Co. v. Ortiz*, 75 Tex. 602, 12 S. W. 1129. But these statutes and decisions are a long way from holding that the owner of land can institute condemnation proceedings. The city, having a void judgment, did not acquire thereunder the appellee's land. She had a right to show this judgment was obtained without jurisdiction over her person; but, as we believe, she was not required in setting aside that judgment, as a piece of evidence against her title, to ask that the city proceed to condemn. This, as we believe, was not necessary to her rights, under the statutes and decisions of our courts. However, if the city desires so to proceed, that is for its determination, and the question presented by appellant in its motion may then properly be determined; but we think it was not necessary on this appeal that we should attempt to forestall any course of action the city may take or any decision that might be made on such action.

We believe the case was properly disposed of by the trial court, and the motion for rehearing is overruled.

KRAUSE et al. v. HARDIN et al. (No. 6391.)

(Court of Civil Appeals of Texas. San Antonio. April 28, 1920. Rehearing Denied May 26, 1920.)

1. Adverse possession §68 — Possession of land not described in deed as intended gives title.

Actual adverse possession of the land in controversy for more than 20 years gives title to the land, though the deed under which possession was originally intended to be taken described a different tract of land.

2. Quieting title §44(2)—Quitclaim to another irrelevant where plaintiffs have title by adverse possession.

In suit to quiet title, where plaintiffs established title by adverse possession, a quitclaim deed given by one of the defendants to another conveying her interest as heir of the common source of title is irrelevant.

3. Quieting title §44(2)—Agreement affecting land not claimed is immaterial.

In a suit to quiet title to land which plaintiff had acquired by adverse possession, though his deed described a different tract, an agreement between defendants relating to the tract described is irrelevant and immaterial.

4. Adverse possession §110(1)—Defense to trespass to try title without confession and avoidance.

Under the statute making possession of land under certain circumstances a perfect defense to trespass to try title if pleaded and proved, such possession is a defense, though not pleaded by way of confession and avoidance.

5. Adverse possession §31—Possession sufficient notice to start statute running.

Actual possession and cultivation of the land in controversy is all the notice required to start the running of the 10-year statute of limitations, whether the possessors had any deed to the land or not, and whether the record owners knew of their own interest.

6. Limitation of actions §187—Privilege of infancy or coverture is waived by failure to plead.

Infancy and coverture as an avoidance of the bar of limitations are personal privileges which are waived by a failure to plead them.

7. Reformation of instruments §2—Mistake in giving grantee possession of land not described does not warrant correction of field notes.

Where deeds correctly described a tract of land in accordance with the field notes, but by mistake the grantor put the grantees in possession of a different tract, and such possession was retained long enough to give title to the tract, there was no basis for a correction of the field notes.

Appeal from District Court, Bexar County; J. T. Sluder, Judge.

Suit by Louis Krause and others against Martha Hardin and others to remove a cloud on title and to correct a mistake in deeds. Judgment for defendants, and plaintiffs appeal. Reversed, and judgment rendered for plaintiffs.

Guinn & McNeill, of San Antonio, for appellants.

S. D. Hopkins, of San Antonio, for appellees.

FLY, C. J. This is a suit instituted by Matilda Krause, joined by her husband, Louis Krause, and L. W. Wilson, against Martha Hardin, her husband, T. H. Hardin, and Carrie Hardin Cornelson and her husband, Richard Cornelson, the name of the last-mentioned woman having been changed, on some ground not disclosed, from that given to "Carrie Hardin Cornelson Vinson, Jr.," seeking to remove cloud from the title to a certain 100 acres of land in Bexar county and to correct a mistake and misdescription in certain deeds, and in the alternative for the value of improvements made in good faith. After a lengthy pleading of facts, appellees prayed for "judgment for the title and restitution of the above-described property," for damages, costs, and general and special relief, and filed a cross-action in tres-

pass to try title. A verdict was instructed and the jury in response returned the following verdict:

"We, the jury, find against plaintiffs and in favor of defendants for title to the property herein in controversy, and we further find against defendants on their cross-action."

On that verdict the court rendered judgment in favor of Martha R. Hardin and her husband, T. H. Hardin, and Carrie Hardin Cornelson Vinson, Jr., and her husband, W. M. Vinson, Jr., for the land in controversy; that they take nothing on their cross-action and recover all costs.

The first assignment of error assails the action of the court in overruling certain exceptions, which were probably intended as special exceptions, to the answer of appellees, but which were so general as to be nothing more than a general demurrer. The first is that the answer states that appellants claim the property through appellees because the allegation is irrelevant and states no defense. The second is that the answer states no legal defense to appellants' special claim of title. The answers are not subject to the objections, which are vague and indefinite, and the assignment of error is overruled.

The common source of title was James H. Coker, who executed a will in which he bequeathed to his son James M. Coker 40 acres of land lying between the land of said James M. Coker and the land of A. Maltzberger; to his daughter Martha R. Hardin 100 acres of land in survey 80, and known as lot No. 1, adjoining Z. F. Autrey tract on west side; to his daughter Ruthasun Maltzberger 100 acres of land in survey 80, known as lot No. 4, adjoining the tract of Julia E. Kelley; and to his son John H. Coker about 187 acres and other real and personal property possessed by him, "provided he shall take care of and provide a comfortable home and other necessities that may be required by my wife, Josey Ann Coker, during her natural life, or so long as she remains unmarried, provided also that my son, John H. Coker, shall pay all just debts that I may be owing at my death." The testator's brother, N. B. Coker, and his son John H. Coker were appointed independent executors of his estate. The will was dated October 3, 1888, the testator died on October 2, 1892, and his will was probated on January 21, 1893. John H. Coker took charge of the estate as executor. On March 18, 1896, John H. Coker, independent executor of the estate of James H. Coker, deceased, in consideration of \$900, sold to Leopold Fincke 100 acres of land out of the estate; it being recited in the deed and testified to by John H. Coker that the sale was made to obtain money with which to pay off a certain sum secured by a mortgage on the land conveyed, executed by the deceased, James H. Coker, in June, 1892, a few months before his death. The executor intended to sell to Fincke the lot

known as 1A, described in the will as lot No. 1, and given to Mrs. Hardin, and he placed Fincke in possession of that tract, but the description by field notes was of lot No. 4, belonging to Mrs. Maltzberger. This mistake was carried by Fincke into the deed made by him to R. F. Pipes, who took possession thereunder of lot No. 1, and in the same way it passed from Pipes to the Krauses, who also took possession of lot No. 1. Since 1896 parties claiming under the deed to Fincke by the executor in 1896 have held undisturbed possession of lot No. 1. Appellants sought to correct the description so as to conform it to the actual land sold. While living, James H. Coker made, executed, and delivered to John H. Coker a deed to 163 acres which some three years before he had named in his will as a bequest to John H. Coker. In September, 1896, all of the heirs of James H. Coker, deceased, among the number Mrs. Hardin, ratified the sale by John H. Coker to Fincke, and one of the notes secured by vendor's lien was given to Mrs. Hardin and accepted by her as her portion of the estate of her father. The misdescription of the land was never discovered until Krause sought to sell to L. W. Wilson, probably in 1915.

Appellees introduced in evidence a document, dated January 2, 1889, executed by James H. Coker, deceased, to Martha R. Hardin in which he conveyed to her 100 acres of land to be held by her during her life and then to go to her heirs born or to be born. Appellees also introduced in evidence a quitclaim deed by the Hardins, which was executed to John H. Coker on January 10, 1893, to all interests held by them in the estate of James H. Coker, deceased. Mrs. Vinson is the only offspring of Mrs. Hardin. The latter swore that the deed in trust to the 100 acres of land was delivered to her by her father, but was returned to him by her, in order that he might convey the title to her unincumbered with a trust. He did not make such a deed and did not return the other deed. Mrs. Hardin got the original deed after her father's death. Mrs. Carrie Hardin Cornelson Vinson, Jr., only child of Mrs. Hardin, was born on September 11, 1896, several months after Leopold Fincke had gone into possession of the land in controversy.

Appellants pleaded three, five, and ten years' limitation in replication to a cross-action in trespass to try title filed by appellees. Disability of marriage or infancy was not pleaded by appellees in answer to pleas of the statute of limitations by appellants. It was admitted by appellees that one of the appellants, Matilda Krause, who held title from her husband, "is now, and with those under whom she claims for the last 20 years has been, in actual peaceable possession of the tract of land sued for herein by metes and bounds." The evidence showed without attempt at contradiction that the possession was not only peaceable, but was adverse to the whole world.

Pipes bought the land in 1897, took possession of it, and put the tillable land in cultivation. The land was fenced. Pipes raised crops on the land for five years, and then sold it to Krause. He says: I claimed the land as my own against all persons." No one ever disturbed his possession. The whole of the 100 acres was under fence, and all the tillable parts of it were put into cultivation by Pipes. Krause bought the land in 1902 and went into immediate possession of it. All the taxes were paid by Pipes and Krause, and the latter held possession adverse to every one all the time until this suit was instituted in 1919.

[1] The evidence fails to disclose that Mrs. Hardin was ever in possession of the land in controversy, although it is stated in the brief of appellees that Mrs. Hardin was in possession of it in 1893, 1894, and 1895. If that had been proved, the fact remains that Fincke took possession of the land in the first part of 1896, and that adverse possession has been held of it from 1897 to the present. How the evidence as to limitations was avoided does not appear from the record, nor does the brief of appellees reasonably account for it. The trial judge filed no conclusions of fact and law, and we cannot determine upon what theory he instructed a verdict for appellees. If he did so on the ground that appellants went into possession of a tract of land not described in their deed, the answer is they went into possession of the tract of land in controversy and held it adversely, using and cultivating it as their own for over 20 years, and the fact that they had no deed to the land could not affect their title by limitations. They went into possession of land which was pointed out to them by their vendor, and which he, as well as they, honestly believed had been faithfully described in the deed. We may ignore the deeds altogether and still the land belongs to appellants, even if it be admitted, as claimed by appellees, that the adverse possession of the land began after the birth of Mrs. Vinson; that is, when it was sold by Fincke to Pipes.

[2] Mrs. Hardin and her husband made a quitclaim deed to John H. Coker on January 10, 1893, releasing all claims they might have to 187 acres of land "as well as in other interests to and included in, by, and under written will or wills made by James H. Coker, late of Bexar county, Texas, dec'd." This was introduced by appellees over the protest of appellants. It tended to show, if anything, that Mrs. Hardin had parted with all the interest she had in her father's estate as evidenced by a will made by him. We fail to understand why appellants should have objected to it. It had no possible effect on the issues in the case, and should not therefore have been admitted in evidence.

[3] Some time in September, 1896, all of the heirs of James H. Coker, deceased, among the number T. H. Hardin and Mattie R. Hardin, entered into a written agreement wherein it

was recited that James H. Coker had given a note for \$500 to one S. S. Thomas, and secured its payment by a deed of trust on 100 acres of land out of his estate; that the maker of note and mortgage had died without providing in his will for the payment of the debt; that John H. Coker, executor, on March 18, 1896, sold the land to Fincke for \$736 cash and a vendor's lien note for \$164.64, due seven months after date, and it was agreed that the note for \$164.64 be transferred and delivered to Mattie R. Hardin, as her part out of the estate of her father, and each and all of them released John H. Coker from all liability for his acts in connection with the estate. The evidence shows that the agreement was not acknowledged for ten years after its execution, and the only evidence of its record is the statement of John H. Coker that he did not know where the document was, but that it was "in the abstract and records," whatever that may mean. However, not being acknowledged until 1906, if recorded, it could not have been before September, 1906. It could have had no effect except to show that Mrs. Hardin had released all her claim to any part of her father's estate and could in no wise have affected the interest of Fincke, Pipes, or Krause to the land in controversy. They were not parties to the agreement, had no interest in it, and it could not affect their adverse possession of 1A, because it was in regard to lot 4A, which they have never claimed. The parties to the agreement were referring to a mortgage on lot 4A, which appellees admit was the lot on which the mortgage was given by James H. Coker, and not to lot 1A, which was in the possession of Krause and vendors. If any effect is given to the agreement in this case, it would be that it had conveyed the life interest of Mrs. Hardin in lot 1A to her brother, and would preclude her from any recovery in this suit.

[4] Appellees contend that, if appellants pleaded limitations as "defensive matter" to an action of trespass to try title, such pleading would "have no force or effect in confession and avoidance"; but limitation is a defense to an action of trespass to try title without reference to any plea in confession and avoidance. The statute makes possession of land for three, five, or ten years under certain circumstances a perfect defense, with no conditions except that either be pleaded as prescribed by statute and then proved.

[5] Possession of the land in controversy was all the notice required to start the running of the statute of ten years, whether the possessors had any deed of conveyance to the land or not. If Mrs. Vinson knew nothing about having any interest in the land until this suit was instituted, that could have no effect on the running of the statute.

[6] Infancy and coverture are personal privileges, and can and will be waived by a failure to plead them, and any pleading seeking to avoid a plea setting up the statutes

of limitation should state such facts as show that the statute could not have run. Infancy and coverture were not pleaded in bar of the statute nor are they or either of them urged in the brief of appellees. *Campbell v. Wilson*, 23 Tex. 252, 76 Am. Dec. 67; *Foster v. Eoff*, 19 Tex. Civ. App. 405, 47 S. W. 399.

[7] The evidence showed that there was no mistake made as to the description of the land placed in the deed executed by John H. Coker to Fincke, but that the field notes were taken from the mortgage given by James H. Coker to Thomas. The only mistake made was that by which John H. Coker placed Fincke in possession of the tract of land not described in the deed. It follows that there was no basis in the evidence upon which to correct the field notes.

Because the evidence showed without controversy that appellants had title to the 100 acres of land known as lot 1A by limitation of ten years, the judgment of the trial court is reversed, and judgment here rendered that appellants recover of appellees the said land and be quieted in their title thereto, and that appellants recover of appellees all costs in this behalf expended.

TALERICO et al. v. GARVIN. (No. 6405.)

(Court of Civil Appeals of Texas. San Antonio. May 5, 1920. Rehearing Denied June 2, 1920.)

1. Witnesses \S 345(1) — Not impeached by showing idiotism.

A witness cannot be impeached by showing that he had been indicted.

2. Witnesses \S 345(2)—Not impeachable by conviction of other than infamous crime.

A witness is not incompetent and so cannot be impeached, in a civil case, by reason of having been convicted of a crime, not an infamous crime under the common law, as defrauding a railway company, in violation of the Interstate Commerce Act.

Appeal from District Court, Bexar County; J. T. Sluder, Judge.

Action by W. H. Garvin against Frank Talerico and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

P. H. Shook, and Carl, Swearingen & Clifton, all of San Antonio, for appellants.

Victor Keller, of San Antonio, for appellee.

FLY, C. J. Appellee sued Blas Catalini, Frank Talerico, and Willie Talerico, doing business under the firm name of Frank Talerico, to recover the sum of \$1,197.02, alleged to be due on a car of fancy Bartlett pears shipped to them by appellee from the state of Colorado, and for which they refused to

pay. The appellants defended on the ground that the pears arrived in a damaged condition, and appellants refused to accept the same and so notified appellee, and they impleaded the Galveston, Harrisburg & San Antonio Railway Company, and prayed for judgment over against it in case of a recovery by appellee. The cause was presented to a jury on one special issue:

"Did defendant Talerico accept the car of fruit on the team track of the defendant railway company?"

The jury answered in the affirmative, and the court rendered judgment in favor of appellee against appellants for \$1,400.00, principal and interest, and that appellants take nothing on their cross-action against the railway company. This appeal is prosecuted as between appellants and appellee, the railway company being omitted from the appeal bond.

[1, 2] The principal witness for appellants was Willie Talerico, and, with his testimony discredited, the defense presented to the claim of appellee was greatly weakened, if not destroyed. Under this state of facts, appellee, over the objections of appellants, introduced in evidence the copy of an indictment returned to the United States District Court for the Western District of Texas charging Willie Talerico with offenses against the Interstate Commerce Act (24 Stat. 379) in defrauding certain railway companies. Appellee was also allowed to prove that the witness was convicted on the charge and fined \$1,000. All of the testimony in connection with the charge in the federal court was objected to by appellants, on the grounds that the witness was not convicted of a felony, nor could the witness be impeached by such testimony. The sole object of the testimony was the impeachment of the witness, and not to disqualify him as a witness. No objection was interposed to Willie Talerico being introduced as a witness on the ground that he was disqualified by his conviction, but he was allowed to testify, and then the testimony objected to was introduced on cross-examination for purposes of impeachment alone. In the case of *Railway v. Creason*, 101 Tex. 335, 107 S. W. 527, the Supreme Court, in answer to a certified question from the Court of Civil Appeals of the Second District, held:

"That it was not competent on cross-examination to impeach the witness Apple by proving by him that he had been indicted for a felony or other crime."

So in the case of *Western Assurance Co. v. Hillyer*, 167 S. W. 816, this court held:

"That it is not competent to impeach a witness by proving that he has been indicted for a felony or other crime, and the inquiry should be confined to proof of general reputation for truth."

That rule is well established in Texas *Railway v. Dumas*, 93 S. W. 493; *Railway v. Burleson*, 157 S. W. 1177; *Cooper Grocery Co. v. Neblett*, 203 S. W. 365.

In the last-cited case, it was held that a conviction for unlawfully engaging in the business of a retail liquor dealer and imprisonment in the penitentiary was not a conviction for such infamous crime as would render a witness incompetent to testify, and not being incompetent his former conviction was not admissible to impeach his testimony. It must be kept in view that there is no law in civil cases, as in criminal cases, disqualifying a witness if convicted of a felony, and the common-law rule in civil cases must prevail. Under the common law, a person who had been convicted of treason, felony, and what was denominated *crimen falsi*, rendered a witness incompetent to testify. As stated by Mr. Greenleaf in his work on Evidence, § 373, the extent and meaning of the term *crimen falsi* is not laid down with precision, however, the common law does not make the term so extensive as does the civil law, and does not as in the civil law include deceits in the quality of provisions, deceits by false weights and measures, conspiracy to defraud by spreading false news and several others. The author gives as examples of crimes, conviction of which render a witness incompetent, forgery, perjury, subornation of perjury, suppression of testimony by bribery, or conspiracy to procure the absence of a witness, or other conspiracy, to accuse of a crime, and barratry. To generalize, it is a conviction of a crime which may injuriously affect the administration of justice, by the introduction of falsehood and fraud.

The crime, for which Willie Talerico was convicted in the federal court, was that of perpetrating a fraud on a railway company and obtaining money from it, and was not, under the common law, a conviction for an infamous crime. The conviction did not render the witness incompetent, and consequently he could not be impeached by showing the conviction. *Railway v. Burleson* and *Grocery Co. v. Neblett*, herein cited.

It is held in this state that, where a party has pleaded guilty to a misdemeanor under an indictment charging both felony and misdemeanor, the conviction is not admissible to impeach him as a witness. *Railway v. Dumas*, hereinbefore cited, in which a writ of error was denied by Supreme Court. In the cases of *Railway v. De Bord*, 21 Tex. Civ. App. 691, 53 S. W. 587, and *Winn v. Winn*, 23 Tex. Civ. App. 617, 57 S. W. 80, it was held that convictions for theft cannot be shown to impeach a witness in a civil case.

The judgment is reversed and the cause remanded.

D. SULLIVAN & CO. v. SCHREINER et ux.
(No. 6396.)

(Court of Civil Appeals of Texas. San Antonio. April 28, 1920. Rehearing Denied May 26, 1920.)

1. Evidence §419(2)—Consideration for deed may be shown by parol.

The real consideration for the execution of a deed may be shown to be different from that expressed therein by parol testimony, and the admission of such testimony does not depend upon the existence of fraud or mistake.

2. Evidence §441(1)—Parol evidence to contradict, change, or add to written contract, inadmissible.

The execution of a contract in writing is deemed to set aside all oral agreements theretofore made, and any representation made prior to or contemporaneously with the execution of the contract is inadmissible in the absence of accident, fraud, or mistake of fact to contradict, change, or add to the plain terms.

3. Evidence §442(1)—Parol evidence admissible when contract incomplete.

If it is apparent from a written contract that it contains only a part of the agreement, oral testimony will be permitted to supply the omission.

4. Evidence §419(1)—Consideration may not be varied by parol if contractual in nature.

The rule permitting the true consideration of written instruments to be shown by parol does not apply, where the statement in the contract as to the consideration is more than a mere receipt or acknowledgment of payment and is of a contractual nature.

5. Evidence §441(8)—Provision of deed that debts were not released could not be contradicted by parol.

Where a deed recited that the consideration was a credit on a note and the payment of other debts to a specified amount which were a lien on the property, and further provided that the grantee did not release or change any security it had on other property to secure the balance due on the note or any of the debts of the grantor due it, but that all such other security was specially retained, such provision could not, in the absence of accident, fraud, or mistake, be contradicted by evidence that the grantee agreed to cancel all the grantor's indebtedness, though the evidence was offered under the guise of showing the true consideration.

Appeal from District Court, Bexar County; J. T. Sluder, Judge.

Action by D. Sullivan & Co. against Charles F. Schreiner and wife. From a judgment for defendants, plaintiff appeals. Reversed and rendered.

Denman, Franklin & McGown, of San Antonio, for appellant.

Ryan & Matlock, of San Antonio, for appellees.

FLY, C. J. Appellants sued Charles F. Schreiner and his wife, M. L. Schreiner, to recover on four promissory notes: Two for \$1,000 each, dated December 1, 1909, due December 1, 1914; one for \$12,500, dated June 4, 1915, payable one year after date; and one for \$5,500, dated September 27, 1915, due on September 27, 1916. The first two notes were executed to Gus J. Groos, as well as a trust deed on 182 acres of land to secure same, and the Cowans sold the land to Schreiner, and a vendor's lien was reserved thereon, and they passed into the hands of appellants. The third note named was given to appellants by Charles F. Schreiner and his mother, Louise B. Schreiner, and a deed of trust given on lots in San Antonio and lands in Wilson and Guadalupe counties, to secure it. On that note was a credit of date November 2, 1915, for \$3,447.38, and another of date November 21, 1916, for \$7,500. It was also alleged that since the filing of the suit appellants had acquired from Emma Camerer a note for \$1,000 signed by appellees, secured by trust deed on certain city lots. The answer of appellees sought to defeat the claim of appellants and recover a judgment for themselves in the sum of \$1,500 on the allegation in brief that appellants had secured a deed to certain land from appellees in San Antonio at the corner of North Flores and Salinas streets in consideration of the cancellation of all the indebtedness due and to become due by appellees to appellants and the sum of \$1,500 in addition which was to be paid to the appellees, although it was recited in the deed from appellees to appellants that the consideration was that \$7,500 be credited on the \$12,500 note and the additional sum of \$3,000 on certain indebtedness due by appellees. The cause was submitted to the jury on six special issues with the injunction that, if the first was answered in the affirmative, no other questions need be answered, to which first question they responded in the affirmative that the consideration for the execution of the deed by appellees to appellants of the North Flores street property was the complete cancellation of all indebtedness by Schreiner to appellants and in addition the payment to Schreiner of \$1,500. Upon that answer judgment was rendered in favor of appellees to the effect that the deed be corrected to show the true consideration, that the whole of the indebtedness be canceled and all liens set aside, and that appellees recover of appellants the sum of \$1,500 with 6 per cent. interest from November 17, 1916, and all costs.

The petition alleged, and Schreiner swore, that El J. Altgelt approached him to buy his homestead at the corner of North Flores and Salinas streets in the city of San Antonio, offering on the part of appellants, whom he claimed to represent, that they would, in consideration of a deed to the property, cancel

all of his indebtedness to appellants and that they would in addition pay him \$1,500 in cash on the trade. It was the claim of Schreiner that appellants employed Altgelt to purchase the property for them and make the offer he made to Schreiner. The latter also testified that Altgelt told him not to say anything about the offer and he would get the money for Schreiner. All of this was denied by Altgelt, and he and D. Sullivan swore positively that Altgelt had no authority from appellants to make such an offer and that Altgelt was not the agent of appellants. Appellants were not informed by appellees of the statements made by Altgelt, and appellants never made any statement to appellees about cancellation of the indebtedness and payment of \$1,500 cash, and there was no testimony tending to show that they ever made any such offer to appellees or any one else. If Altgelt made any such offer to appellees, it was made before the deed was executed, and the terms of such agreement were not carried into and made a part of the deed from appellee to appellants. The deed to the North Flores street property is as follows:

"Know all men by these presents: That we, Charles F. Schreiner and M. L. Schreiner, his wife, for and in consideration of the sum of seven thousand, five hundred dollars this day paid by Charles F. Schreiner to D. Sullivan & Company, a partnership composed of Daniel Sullivan and W. C. Sullivan, and by said D. Sullivan & Company credited on a certain promissory note for the sum of twelve thousand five hundred dollars, dated June 4th, 1915, executed by the said Charles F. Schreiner and payable to the order of D. Sullivan & Company, and secured by deed of trust upon the hereinafter described property; and for the further consideration that the said D. Sullivan & Company have paid existing indebtedness of the said Charles F. Schreiner, constituting claims or liens upon said property and aggregating the sum of three thousand dollars, have granted, bargained, sold and conveyed, and do hereby grant, bargain, sell and convey unto the said D. Sullivan & Company, said partnership so composed of the said D. Sullivan and the said W. C. Sullivan, all and singular the following described property and premises situated in the city of San Antonio, Bexar county, Texas, viz.:

"Lots numbers two (2) and three (3) in block 149, described by metes and bounds as follows: * * *

"It is specially understood and agreed, however, that the said D. Sullivan & Company in making said credit upon said note and accepting this conveyance of said premises do not release or change in any way whatsoever any security they may have in and to any other property than the property herein conveyed to secure the balance remaining due upon said note or to secure any of the debt or debts due or to become due by the said Charles F. Schreiner to the said D. Sullivan & Company; but all such other security in whatsoever shape the same may be is specially retained by the said D. Sullivan & Company to secure the bal-

ance due upon said notes hereinbefore described, and any and all other indebtedness of the said Charles F. Schreiner to the said D. Sullivan & Company however said indebtedness may be evidenced.

"Witness our signature this the 17th day of November, 1916. Charles F. Schreiner.
"M. L. Schreiner."

The only testimony tending in the least to show that Altgelt was the agent of appellants was his statement to appellees that he was authorized by appellants to make the statement that he did to appellees. It is true that appellants suggested that the property be placed in the hands of Altgelt for sale by appellees; but there was no allegation that there was a fraudulent agreement between appellants and Altgelt to obtain a deed by the representations which the appellees swore he made, and the evidence does not tend to show such an agreement.

[1] There was no allegation of fraud or mistake in connection with the execution of the deed, but appellees admitted understanding the recitals of the deed. Appellees admit that there is no proof of fraud or mistake, when they state in their brief:

"The controlling major question in the case was: 'What was the real true consideration for the deed from Schreiner and wife to Sullivan & Co. to the North Flores street property?'"

Again appellees say:

"In other words, the only real important question is, could we by oral testimony, or otherwise, explain and show the true consideration for the deed and the actual agreement of the parties fixing such consideration?"

It is undoubtedly well settled that the real consideration for the execution of a deed may be shown to be different from that expressed therein, by parol testimony, and the admission of such testimony does not depend upon the existence of fraud or mistake. The rule enunciated is based on the ground that proof of the true consideration does not vary, but is consistent with, the terms of the contract, and does not change the rule that a parol agreement cannot be ingrafted upon a written contract, clear in its terms, in the absence of fraud, accident, or mistake, but merely explains a consideration which was not fully expressed in the written contract. So in the case of an instrument which on its face appears to be a deed it may be shown to be a mortgage or a trust. It is also well settled that, while the consideration may be shown by parol, the terms of the written contract cannot be varied.

[2, 3] The execution of a contract in writing is deemed to set aside all oral agreements theretofore made, and any representation made prior to or contemporaneously with the execution of the written contract is inadmissible, in the absence of accident,

fraud, or mistake of fact, to contradict, change, or add to the plain terms of the written contract. This rule is founded upon the recognition of the danger and inextricable confusion and untold injury that would result if inferior testimony could be used to alter or destroy a solemn contract in writing entered into by the parties thereto. It follows that when a written instrument on its face purports to be a complete expression of the whole agreement, and contains all the essentials of a complete contract, the presumption arises that every important and material matter connected with the agreement has been incorporated into the writing, and parol evidence is not admissible to vary its terms or add others to it. If, however, it is apparent from the writing that it contains only a part of the agreement, oral testimony will be permitted to supply the omission. 10 Ruling Case Law, p. 1030, § 208 et seq.

[4] The rule permitting the true consideration of written instruments to be the subject of inquiry, through parol testimony, does not apply where the statement in the contract as to the consideration is more than a mere receipt or acknowledgment of payment, and is of a contractual nature. In explanation of this rule it has been held that oral evidence cannot be introduced where it is stated in the conveyance that it is made for the settlement and release of specified claims. *Baum v. Lynn*, 72 Miss. 932, 18 South. 428, 30 L. R. A. 441; *Railway v. Houlihan*, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787; *McNinch v. Thresher Co.*, 23 Okl. 386, 100 Pac. 524, 138 Am. St. Rep. 803; *Diven v. Johnson*, 117 Ind. 512, 20 N. E. 428, 3 L. R. A. 308.

In the Mississippi case cited, Mary Irving executed a deed to Mary Grace Lynn, in consideration of the discharge and release of a certain debt due by the vendor to the vendee and \$10 in cash, to certain land. Evidence was offered to show that not only was the debt mentioned in the deed to be paid by its execution, but also other debts due the vendee, and it was rejected by the trial court. The Supreme Court of Mississippi said:

"The deed now under examination contains, as is clearly to be seen, no mere recital of a consideration paid or to be paid. Its recital is only of the facts necessary to be stated to intelligently apply the contract of the parties to the subject-matter. Having set out the relationship of debtor and creditor, and the history of the transaction from which it arose, the deed then proceeds to state what the parties agreed, contracted, and did in reference to the dissolution of the relationship. Mrs. Irving did something. She conveyed the land to Mrs. Lynn. Mrs. Lynn did something. She released the debt to Mrs. Irving. One transferred a right; the other released a right. If it be said that the release was a mere recited consideration for the conveyance, it may with equal accuracy be replied that the convey-

ance was a mere recited consideration for the release; and therefore, if one of the terms of the contract may be varied by parol, because it is a consideration, so also may the other for the same reason, and by this process a solemn and executed written contract would be totally eaten away. The true rule is that a consideration recited to have been paid or contracted for may be varied by parol, while the terms of a contract may not be, though the contract they disclose may be the consideration on which the act or obligation of the other party rests. When the stipulation as to consideration becomes contractual, it, like any other written contract, is the exclusive evidence, and cannot be varied by parol."

[5] In the case under consideration, not only did the deed recite the crediting of \$7,500 on a note due by appellees and the payment of other debts amounting to \$3,000 which were a lien on the property, but it went further and stated that the execution of the deed was not to affect any lien or other debts held by appellants. It is provided, after reciting payment of \$10,500 on the debt:

"It is specially understood and agreed, however, that the said D. Sullivan & Company, in making said credit upon said note and accepting this conveyance of said premises do not release or change in any way whatsoever any security they may have in and to any other property than the property herein conveyed to secure the balance due upon said note or to secure any of the debt or debts due or to become due by the said Charles F. Schreiner to the said D. Sullivan & Company; but all such other security in whatsoever shape the same may be is specially retained by the said D. Sullivan & Company to secure the balance due upon said notes hereinbefore described, and any and all other indebtedness of the said Charles F. Schreiner to the said D. Sullivan & Company however said indebtedness may be evidenced."

In the face of this firm written contract under the guise of showing another consideration for the execution of the deed, parol evidence was introduced that there were no other liens, no other debts, but all had been paid by the deed. The evidence had the effect of destroying the contract evidenced by the deed and creating another based on the oral testimony of appellees. To sustain such action would destroy the force and effect of written contracts made with the full knowledge and assent of the parties, and free from accident, mistake, or fraud, and consequently cannot be permitted. *Railway v. Garrett*, 52 Tex. 133; *Railway v. Pfeuffer*, 56 Tex. 66; *Coverdill v. Seymour*, 94 Tex. 1, 57 S. W. 37; *Kahn v. Kahn*, 94 Tex. 114, 58 S. W. 825; *Paris Grocer Co. v. Burks*, 101 Tex. 106, 105 S. W. 174. As said in the last case cited:

"Whatever may be the nature sought to be ascribed to the claim asserted under the parol evidence, it is in truth an attempt to ingraft upon the deed a parol condition. That

this cannot be done we understand the authorities to hold uniformly. In connection with allegations of fraud, accident or mistake such a stipulation and its nonperformance may be employed in equity as the basis for a cancellation; but the bare effort to use it as in itself furnishing a ground for defeating or qualifying the deed is opposed to the well-settled rule that such instruments cannot be added to by parol. This cannot be evaded by calling the promise the consideration of the deed and invoking the rule often laid down that a consideration different from or in addition to that expressed may be shown."

The contract evidenced by the deed is on its face complete, not indicating that something not embraced therein had been agreed to by the parties. In no instance have we seen any case under such circumstances permitting such instrument to be varied by parol, even though proposed under the guise of showing the true consideration. In the case of *Railway v. Jones*, 82 Tex. 156, 17 S. W. 534, which we are told by appellees "is almost on all fours with this," it is stated in no uncertain terms that—

"It is clearly to be inferred from the instrument of writing executed at the same time the deed was executed that these instruments did not evidence the entire contract or all the contracts entered into between the parties"—and on that ground parol proof was admitted.

So in the later case of *Warehouse Co. v. Davis*, 108 Tex. 422, 195 S. W. 184, the rule is thus stated by a majority of the court:

"The general rule is that parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a valid written contract. But one of the exceptions to the general rule is, that if the written instrument itself shows to be either ambiguous or incomplete parol testimony is admissible to show what the real contract was to the extent necessary to remove the ambiguity, and to make the contract complete in its terms which show to be incomplete."

To the same effect are all the cases cited by appellees, notably the case of *Chapman v. Witherspoon*, 192 S. W. 281, in which is copied and approved the declaration by Chamberlayne in his work on evidence that—

"Evidence of a prior or contemporaneous parol agreement or understanding is frequently received, where it is consistent with the writing in question, and it is apparent that the instrument was not intended as a complete embodiment of the undertaking."

In the present case, not only was the parol evidence inconsistent and irreconcilable with the terms of the written contract, but that contract was complete and bore on its face evidence that it was intended to embody and contain the whole contract.

The judgment of the lower court is reversed, and judgment here rendered that appellants recover of appellees the sums of

money prayed for by appellant, with interest and attorney's fees, with foreclosure of the liens described and all costs in this behalf expended.

(May 6, 1920.)

The evidence showing that the 182 acres of land described in the pleadings as the "Schreiner ranch" was the homestead of Schreiner and wife at the time it was sought to place a lien on it, to secure the notes, one for \$12,500 and the other for \$5,500, it was not the intention of this court, although not clearly expressed in its decision heretofore rendered, to foreclose a lien on said homestead as security for such notes, but the vendor's lien alone was intended to be foreclosed on said property to secure the notes originally given to Gus J. Groos and described as the Chandler notes. The judgment has been rendered and recorded as herein indicated.

DALLAS RY. CO. v. EATON et al.
(No. 1627.)

(Court of Civil Appeals of Texas. Amarillo.
April 28, 1920. Rehearing Denied
June 2, 1920.)

1. Negligence \S 82—Contributory negligence not bar, unless proximate cause of injury.

Negligence on the part of the plaintiff will not bar recovery for injuries resulting from the negligent act of the defendant, unless plaintiff's negligence was the proximate cause of the injury.

2. Negligence \S 136(25) — Proximate cause question for jury.

The question of proximate cause is one of fact for the jury, unless the facts are such that reasonable minds might not differ as to the conclusion to be drawn therefrom.

3. Street railroads \S 117(34) — Proximate cause of jitney passenger's injuries held for jury.

In an action for injuries to a jitney passenger, riding on the running board struck by a street car when jitney driver turned onto track in front of car, so that passenger was crushed between the jitney and the car, whether passenger's negligence in riding on running board in violation of a city ordinance was the proximate cause of injuries held under the evidence a question for the jury.

4. Street railroads \S 118(1)—Charge submitting jitney driver's negligence held justified by pleadings.

In action against street railroad for injuries to jitney passenger riding on running board, when jitney collided with street car, the pleading of jitney driver's negligence in driving at a reckless rate of speed and in driving on track in front of street car, and the pleading, in connection with plea of contributory negligence, that passenger violated an ordinance

in riding on running board, without pleading that driver was negligent in permitting passenger to so ride, held to have justified charge submitting issue of driver's negligence, where court directed finding that passenger was negligent in riding on running board, since jury could not have understood such charge to have reference to violation of ordinance by driver.

5. Appeal and error \S 1062(1)—Submission of negligence of jitney driver in jitney passenger's action against street railroad held not prejudicial to street railroad.

In action against street railroad for injuries to jitney passenger in collision with street car, the action of the court in submitting the question of jitney driver's negligence in operation of car, if error, was not prejudicial to street railroad, where the evidence showed car employes to have been negligent, since concurring negligence on part of jitney driver would not have defeated recovery.

6. Street railroads \S 112(1)—Street railroad has burden of sustaining its plea that jitney driver's negligence caused passenger's injury.

In an action for injuries to jitney passenger in collision with street car, where street railroad pleaded as an affirmative defense that the accident was caused solely by the negligence of the driver, the street railroad had the burden of sustaining such plea.

7. Appeal and error \S 1068(1) — Error in charging on burden of proof on issue cured by peremptory charge thereon.

In negligence action, any error in charging the jury as to the burden of proof on the issue of negligence of the plaintiff was obviated by the peremptory charge on the issue and the finding of the jury in response thereto.

8. Negligence \S 122(1) — Defendant must prove that contributory negligence was proximate cause of injury.

To establish the defense of contributory negligence, defendant must prove, not only that plaintiff was negligent, but also that such negligence was the proximate cause of the injury.

9. Damages \S 216(8) — Instruction as to mother's damages in action for services of injured minor son held not misleading.

In mother's action for injury to minor son, instruction submitting as a measure of mother's recovery such sum of money "as, paid now will be reasonable compensation to the plaintiff for the loss of the services, if any," of the son "until he becomes 21 years of age," held not misleading as against contention that it authorized damages for loss of services until he became 21 years of age, though evidence did not warrant conclusion that disability might continue until such time.

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Suit by Mrs. Nevada M. Eaton and another against the Dallas Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Templeton, Beall, Williams & Calloway, of Dallas, for appellant.

S. C. Lewis, of Dallas, for appellees.

BOYCE, J. Mrs. Nevada M. Eaton sued the appellant railway company, in her own behalf and as next friend for her minor son, A. Y. Eaton, for damages on account of injuries inflicted upon the person of the said A. Y. Eaton in a collision between a street car, operated by the appellant, and a jitney, on which the said Eaton was riding. The defendant, denied negligence in the operation of its said car, and alleged that the negligence of the jitney driver was the sole proximate cause of the injury, and further that the said A. Y. Eaton was guilty of such contributory negligence as would bar a recovery. Judgment was rendered for the plaintiff on the findings of the jury, and defendant prosecutes this appeal.

A. Y. Eaton was at the time of the accident about 18 years old, living with his mother, and contributing to her support. A street car operated by the appellant, ran into a jitney on which Eaton was riding, and he was injured thereby. The jitney, at the time it was struck, had all seats occupied, and the said A. Y. Eaton was standing on the running board on the left side. The jitney and the street car were going in the same direction. The testimony is conflicting as to whether the collision occurred as the jitney was attempting to pass the street car, or whether the street car came up behind the jitney and struck it. In view of the verdict of the jury, we find that the jitney was running along the street in front of the street car; that another vehicle turned out into the street in front of the jitney, and the jitney driver, in order to avoid this vehicle, turned out to the left, so that the left wheels of the automobile were across the right rail of the street car track. The street car struck the jitney while in this position, and pushed it along in front of the car. As it did so the jitney was moving around in front of the street car, and plaintiff Eaton was crushed between the side of the jitney and the front of the street car. The street car pushed the jitney, after it struck it, from 25 to 100 feet; the distance being variously estimated by the different witnesses. After the street car was stopped, there was some little delay in backing it off, so as to relieve plaintiff Eaton from his predicament. The jitney was not overturned, and none of the other occupants were injured. The evidence is sufficient to warrant the conclusion that the driver of the jitney was not negligent in his operation of the car, and that the collision was the result of negligence on the part of appellant's employees, operating the street car. There was at the time a city ordinance in force in Dallas, where the accident occurred, by which it was made unlawful to drive a motor bus while any person was standing or sitting on

the running board, and by which it was also made unlawful for any person to stand on the running board of such motor bus while it was in operation.

The court instructed the jury that the plaintiff A. Y. Eaton was guilty of negligence as a matter of law in riding on the running board of the automobile at the time of the accident, but submitted to the jury the question as to whether this negligence "caused or contributed to cause the injury." The jury answered this question in the negative. Appellant, under various assignments, contends that there was no evidence to support the submission of such issue, or the finding of the jury in answer thereto; that it results, from the very manner of the infliction of the injury upon plaintiff Eaton, that his position on the automobile contributed to the injury, and that but for his position he would not have been injured, so that it ought to be held as a matter of law that A. Y. Eaton's violation of the city ordinance constituted such contributory negligence as would preclude recovery in this case.

[1, 2] Negligence on the part of the plaintiff will not bar recovery for injuries resulting from the negligent act of the defendant, unless plaintiff's negligence was a proximate cause of the injury. The question of proximate cause is one of fact for the jury, unless the facts are such that reasonable minds might not differ as to the conclusion to be drawn therefrom. The same principles of law governing the application of the law of proximate cause in the ordinary negligence case are applicable in cases of contributory negligence; these general principles have been so often stated by our courts that it is not necessary to restate them here. The leading case in this state is that of T. & P. Railway Co. v. Bigham, 90 Tex. 223, 38 S. W. 163. It can be certainly said that it conclusively appears from the facts of this case that plaintiff would not have been injured in the manner and way he was injured, but for his position on the running board of the jitney. But can it be said with certainty that he would not have been injured at all, but for such position? It can never be known whether, if the occupants of the automobile had all been on the inside, it might not have been overturned, with even more serious results to the occupants than was sustained. It is certain that plaintiff Eaton's weight on the outside of the center of gravity of the jitney, and on the side from which the impact was delivered, had a tendency to prevent its overturning. But, laying aside speculations of this character, and assuming that the evidence sufficiently shows that plaintiff would not have been injured at all, if he had not been on the running board of the car, we are nevertheless of the opinion that the question of proximate cause remained one of fact. The act of the defendant in running

into the jitney was the immediate cause of the injury. Plaintiff Eaton's position had nothing to do with this act. His negligence merely placed him in a position to be injured by the negligent act of the defendant. The following statement has been frequently approved by the decisions as announcing the law in such cases:

"A prior and remote cause cannot be made the basis of an action, if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated, and efficient cause of the injury. If no danger existed in the condition, except because of the independent cause, such condition was not the proximate cause. * * * But, where the condition was such that the injury might have been anticipated, it will be the proximate cause, notwithstanding the intervening agency, or where such condition rendered it impossible to avoid injury from another contributing cause." 29 Cyc. p. 496.

To the same effect see the following authorities: *Wells-Fargo v. Benjamin*, 107 Tex. 331, 179 S. W. 513; *Railway Co. v. Kelley*, 13 Tex. Civ. App. 1, 34 S. W. 813, 46 S. W. 863; *Railway v. Votaw*, 81 S. W. 133; *Railway v. Ford*, 56 Tex. Civ. App. 521, 121 S. W. 713; *G., H. & S. A. Ry. Co. v. Pendleton*, 30 Tex. Civ. App. 421, 70 S. W. 996; *Keevil v. Ponsford*, 173 S. W. 518; *Smith v. T. & P. Ry.*, 24 Tex. Civ. App. 92, 58 S. W. 151; *Steele v. Burkhardt*, 104 Mass. 59, 6 Am. Rep. 191; *The Santa Rita (D. C.)* 173 Fed. 413; 20 R. C. L. pp. 136, 137; *Thompson on Law of Negligence*, § 216.

In the case of *Wells-Fargo Express Co. v. Benjamin*, 107 Tex. 331, 179 S. W. 513, decided by our Supreme Court, plaintiff was injured by the negligence of the express company in so loading its truck that an article fell off of it and struck the plaintiff, who was standing nearby. The defendant claimed that plaintiff was guilty of contributory negligence in putting himself in danger by going near the truck. It is certain that in that case the plaintiff would not have been injured, if he had not been in such position, yet the Supreme Court held that it would have been error to have submitted a charge which would bar recovery upon a finding of negligence by the plaintiff in going near the truck, without permitting the jury to pass on the question of proximate cause in that connection. This conclusion is based on the theory that reasonable minds might differ as to whether injury might be anticipated from the plaintiff's alleged negligent act in going near the truck. In the case of *Railway Co. v. Ford*, 56 Tex. Civ. App. 521, 121 S. W. 713, the plaintiff took a position in front of an approaching engine, for the purpose of mounting the pilot. His foot caught between the ties and he was injured. It was held that, even if plaintiff was negligent in going in

front of the engine, yet such act was not necessarily the proximate cause of the injury, since that resulted from the unforeseen circumstance of his foot becoming fastened between the ties; the condition of the ties being unknown to the plaintiff. In the case of *Steele v. Burkhardt*, 104 Mass. 59, 6 Am. Rep. 191, plaintiff left his team standing on the streets of a city, in violation of the city ordinance, and it was held that this act was not the proximate cause of an injury to the team, caused by the defendant's servant negligently driving against them.

[3] The plaintiff Eaton might be held to be bound to anticipate the danger of falling off the running board, or, if his body projected beyond the automobile, of being struck by some vehicle passing in the crowded streets of the city; but ordinarily one is not bound to anticipate the negligence of another. But, even if plaintiff were bound to anticipate the possibility of a violent collision, it does not necessarily follow that he was in the most dangerous position in such event. As it turned out, he was in the most dangerous position in the particular way in which this collision occurred, but in many imaginable cases of collision a position on the outside of the car might be the safest. Under the facts we have concluded that the court properly submitted to the jury as a question of fact the issue of proximate cause.

The court submitted issues as to whether the jitney driver was negligent, and whether such negligence, if found to exist, was the sole proximate cause of the injury. Under the fifth and sixth assignment, appellant insists that it was error for the court to submit any issue as to negligence on the part of the jitney driver, because it was undisputed that he was violating a city ordinance in driving the jitney with plaintiff Eaton on the running board. The defendant did not plead negligence on the part of the jitney driver in operating the jitney with passengers on the running board, but did plead that the said driver was driving said jitney at a dangerous and reckless speed, and that just as he passed in front of defendant's car the rear wheel of the jitney caught on the front of defendant's car, thereby swinging said jitney diagonally across in front of the street car, and that the driver of said jitney was guilty of negligence in these acts, which negligence was the direct, sole, and proximate cause of the injury.

The defendant did plead that the plaintiff was violating the city ordinance in riding on the running board of the jitney; this allegation being made in connection with the plea of contributory negligence. The court charged the jury that it was the duty of the jitney driver to exercise ordinary care with respect to the time and manner of the operation of his jitney, for the safety of the plaintiff and other passengers, and a failure to exercise such care would be negligence. The

court further charged the jury that it was the duty of the plaintiff Eaton to exercise ordinary care for his own safety, and that a violation of the ordinance in reference to riding upon the running board of a motor bus was negligence. Following these instructions the court submitted an issue as to whether "the jitney driver was negligent, as the term 'negligence' has been defined in paragraph 4 of this charge." The jury answered "No" to this issue. Following this issue the court required the jury to answer, in the event such preceding issue was answered in the affirmative, the further issue as to whether the negligence of the jitney driver was the sole proximate cause of the injury to the plaintiff Eaton. As we have already seen, the court directed the jury to find the plaintiff guilty of negligence by reason of his riding on the running board, but submitted to the jury the issue as to whether such negligence was the proximate cause of the injury.

[4, 5] It will be thus seen that the court's charge corresponded exactly to the pleading of the defendant. The issue of negligence on the part of the jitney driver submitted was evidently in reference to the manner of driving the jitney at the time, independent of the defense based on the plaintiff's riding on the running board. The pleading made such issue, and the court was justified in submitting it. There was no issue made by the pleading as to the negligence of the jitney driver in allowing the plaintiff to ride on the running board, and the jury evidently did not misunderstand the issues as submitted. Even if the defendant had pleaded negligence of the jitney driver in permitting the plaintiff Eaton to ride on the running board, there would be no reversible error in the charge of the court. The negligence of the jitney driver in such matter would be only a concurring cause with the act of the defendant in striking the jitney and thus producing the injury, and since the jury found that the defendant was guilty of negligence in striking the car, this concurring negligence on the part of the jitney driver in allowing the plaintiff to ride on the running board of the car would not defeat a recovery.

[8-9] No reversible error is shown by the ninth assignment. The defendant pleaded as an affirmative defense that the accident was caused solely by the negligence of the jitney driver, and the burden was upon it to sus-

tain this plea, so that there was no error in the charge so placing such burden. Any error in charging the jury as to the burden of proof on the issue of negligence of the plaintiff was obviated by the peremptory charge on the issue and the finding of the jury in response thereto. As we have seen, an essential element of the defense of contributory negligence was that the plaintiff's negligence alleged should be found to be a proximate cause of the injury. Therefore a prima facie cause of contributory negligence was not made by the mere showing of negligence on plaintiff's part, so as to bring the case within the rule announced by the Supreme Court in the case of G., C. & S. F. Railway Co. v. Shieder, 88 Tex. 152, 30 S. W. 904, 28 L. R. A. 538. The burden was upon the defendant, in order to establish its defense of contributory negligence, to show both the fact of plaintiff's negligence and that it was a proximate cause of the injury. A conclusive showing of negligence did not shift the burden on the issue of proximate cause. T. & P. Ry. Co. v. Bailey, 150 S. W. 962. Therefore there was no error in instructing the jury that the burden was on the defendant on this issue.

[9] The tenth assignment complains of that part of the charge which submits, as a measure of the mother's recovery in her own behalf, such sum of money—

"as, paid now, will be reasonable compensation to the plaintiff Mrs. Nevada Eaton for the loss of the services, if any, of the plaintiff A. Y. Eaton until he becomes 21 years of age, and for reasonable physician's and sanitarium bills, if any, incurred by her, as the direct and proximate result of the negligence of the defendant if any."

The complaint brought against the charge is that the evidence shows that the injury was temporary, and does not warrant a conclusion that it may continue until the said A. Y. Eaton should reach his majority. There is no claim that the verdict is excessive. We do not think that the jury could have been misled by the terms of this charge into awarding plaintiff any damages to which she was not entitled.

The other assignments are necessarily disposed of by the conclusions announced in the discussion of the assignments considered.

We find no reversible error, and the judgment will be affirmed.

TIMPSON & H. RY. CO. v. STATE.
(No. 2882.)

(Court of Civil Appeals of Texas. Texarkana.
May 31, 1920.)

Appeal and error ⇨489—Execution of bond suspended order appointing receiver and obligated him to return property.

The legal effect of execution of supersedeas bond by defendant railroad, proceeded against by the state for appointment of receiver, was to suspend order appointing receiver until railroad's appeal therefrom had been disposed of, and it became duty of receiver, if he had taken charge of property, to return it to railroad, and to refrain from exercising powers under appointment when notified of execution and approval of bond.

Application for injunction by the Timpson & Henderson Railway Company against the State of Texas. Writ granted.

R. E. Minton, of Groveton, for plaintiff.

C. M. Cureton, of Austin, and C. L. Stone, of Henderson, for the State.

HODGES, J. On October 3, 1919, the state of Texas, through the attorney general, filed in the district court of Rusk county an application for a receiver to be appointed to take charge of the Timpson & Henderson Railway Company. On March 5, 1920, the application was heard in vacation by Hon. C. L. Brachfield, judge of that judicial district, and an interlocutory order entered appointing H. Y. Noble as receiver and fixing his bond at \$10,000. The bond was promptly executed and approved, and Noble thereafter took possession of the railway property. For some reason the order appointing the receiver was not entered of record until April 13th following. The Timpson & Henderson Railway Company perfected an appeal from that order within the time prescribed by law, and executed a supersedeas bond, which had been fixed by the court at the sum of \$5,000, conditional as required by law.

This is an original application, filed by the railway company, asking that this court grant a writ of injunction restraining H. Y. Noble from retaining possession and attempting to exercise the functions of a receiver. It is alleged that notwithstanding the execution of the supersedeas bond above referred to, Noble retains control and refuses to surrender possession of the railroad equipment, books, papers, offices, depots, and other property belonging to the railway company. The legal effect of the execution of the supersedeas bond was to suspend the order appointing the receiver until the appeal therefrom had been disposed of. *Carter v. Carter*, 40 S. W. 1030; *Cemetery Ass'n v. Cemetery Ass'n*, 24 Tex. Civ. App. 668, 60 S. W. 679; *Waters-Pierce Oil Co. v. State*, 107 Tex. 1, 106

S. W. 326; *Houston, B. & T. Ry. Co. v. Hornberger*, 141 S. W. 311; *Id.*, 108 Tex. 104, 157 S. W. 744. It was the duty of the receiver, if he had previously taken charge of the property, to return it to the railway company and refrain from attempting to exercise any of the powers conferred upon him by the order of appointment, when notified of the execution and approval of the supersedeas bond.

We are of opinion that the writ prayed for should be granted; and it is so ordered.

HOUSE v. HOUSE. (No. 2253.)

(Court of Civil Appeals of Texas. Texarkana.
April 28, 1920. Rehearing Denied
May 27, 1920.)

1. Wills ⇨372—Trial court exclusive judge of facts and credibility of witnesses.

In proceedings to probate a will, the trial judge was the exclusive judge of the facts proved, the credibility of the witnesses, and the weight to be given their testimony.

2. Evidence ⇨590—Court could disregard testimony of interested witness.

The trial court, in proceedings to probate a will, had a right to discredit any portion of the testimony of proponent, an interested witness, which he regarded as having been colored by her interest.

3. Appeal and error ⇨931(5)—Court must assume trial judge disregarded interested testimony.

Court of Civil Appeals must assume trial court disregarded any portion of testimony of interested witness which he regarded as colored by her interest, if assumption is necessary to sustain judgment rendered.

4. Trial ⇨142—Undisputed evidence, giving rise to different inferences, presents a question of fact.

That evidence concerning material issues was undisputed does not make them any the less issues of fact, as it is only when reasonable minds would not differ as to the inferences to be drawn from a given state of facts that the question becomes an issue of law.

5. Wills ⇨288(1)—Proponent, 13 years after testatrix's death, had burden to show she was not in default.

Under Rev. St. 1911, art. 3248, providing that no will shall be admitted to probate after 4 years from testator's death, unless the party applying was not in default, proponent, proceeding for probate 13 years after testatrix's death, had the burden to show she was not in default.

6. Wills ⇨260 — Coverture of testatrix's daughter-in-law did not excuse failure to move for probate in time.

A married woman, daughter-in-law of testatrix, is not exempt from the limitation of

Rev. St. 1911, art. 3248, requiring proceedings for probate of a will to be instituted within 4 years from the death of testator, though her coverture probably might be looked to as a circumstance tending to excuse her delay.

7. Wills §300—Evidence held to justify finding testatrix's daughter-in-law failed to exercise proper diligence.

In proceedings to probate will by testatrix's daughter-in-law, divorced after testatrix's death, evidence held to justify finding of trial court that daughter failed to exercise degree of diligence imposed by Rev. St. 1911, art. 3248, on those who have right to probate testamentary instruments, in failing to move for probate of will for 18 years after testatrix's death, and 9 years after her own divorce.

Appeal from District Court, Harris County; Henry J. Dannenbaum, Judge.

Proceeding for probate of the will of Mary West House by Rosa Cave House, contested by Henry C. House. From an order refusing probate, proponent appeals. Affirmed.

A. L. Abraham, of Los Angeles, Cal., and Kittrell & Kittrell, of Houston, for appellant.
E. P. & Otis K. Hamblen and A. R. & W. P. Hamblen, all of Houston, for appellee.

HODGES, J. This appeal is from an order of the district court of Harris county refusing the probate of an instrument claimed to be the last will and testament of Mrs. Mary West House. The facts show that prior to 1904 Mrs. Mary West House resided with her husband in Houston, Tex. They had but one child, Henry C. House, the appellee in this suit, who was at that time married to the appellant Rosa Cave House. Some time prior to her death Mrs. House prepared in her own handwriting and placed in the family safe the following instrument:

"Mary House, born New York, July 17, 1834—Texan since March, 1838—a Daughter of the Republic when it was no United States, but under brave Sam Houston: Wishes Ladies Parish Association, Ladies Annex of Y. M. C. A. and all old Houstonians to attend my obsequies. My nephew Jonie to have my horse Ned and my carriage. My diamonds to my niece L. B. My Solitaire ring and gold thimble to Eva House, Cali. Whatever furniture Rosa does not want give to my Cousin Emily—Henry knows who—I have forgotten her name, am sorry to say. May 3d, 1900. When Mr. House dies Rosa and Henry will have all we own but must see that Joe never wants. Want to be dressed in white cashmere with white satin ribbon, white silk hose and nice white underwear. Laid out by my old friends Carrie Keegans and Lottie C. Barret, if living themselves, with Tillie the nurse to help them."

This instrument was inclosed in an envelope which bore the following indorsement in the handwriting of Mrs. House:

"Mrs. H. C. House.

"Mother's Wishes, open if anything happens."

After the death of Mrs. House, which occurred on May 8, 1904, the envelope was opened by Henry C. House. The contents were read by him, the appellant (his wife), and her two sisters. The wishes of Mrs. House with reference to her burial and the disposition of the personal property mentioned were observed and her directions carried out. The instrument has continuously since that time, until it was produced in court on the trial of this case in 1918, remained in the possession of Henry C. House. Mr. House, Sr., survived his wife for a few years, and died some time during the year 1911. In the latter part of 1917, more than 13 years after the death of Mrs. Mary West House, the appellant filed her application in the county court of Harris county to probate an instrument, the substance of which is described as follows:

"I, Mary West House, of the state of Texas, born in the state of New York, do hereby will and bequeath to my daughter Rosie and my son, Henry, all of the property that I own or possess, share and share alike.

"I leave to my niece Lillian Barden all of my diamonds and cut glass.

"I want Rosie to see that my nephew Joe shall never want, and any household effects that she cannot use I want her to give to my nephew, Johnny Tucker. I want my friends, Carrie Keegans and Lottie Barret to lay me out, and I wish to be dressed in white."

As a reason for not presenting the writing itself, the proponent alleged that it was not at that time and never had been in her possession or under her control, and was not then within the confines of the state of Texas. The above application was contested by Henry C. House upon two grounds: (1) That more than 4 years had elapsed since the death of Mrs. Mary West House; and (2) because no such will as that alleged in the application had been executed by the deceased. The contestant admitted that a written memorandum of her wishes had been left by his mother, but denied that it was a will or a testamentary document entitled to probate. On the trial in the county court the written instrument heretofore set out was produced in evidence, and it appears to be now agreed by the attorneys representing both parties that such instrument was the memorandum executed by Mrs. House. The county court refused the application, and an appeal was prosecuted to the district court by the proponent. While the case was there pending she filed an amended application, asking that the written instrument produced by the contestant in the county court be probated as the last will of Mrs. Mary West House. The contest was continued upon the two grounds above mentioned—that is, that the right to have the instrument probated as a will was barred by the statute of limitations, and that

it was not a testamentary document entitled to probate. From a judgment of the district court, refusing the application to probate, this appeal is prosecuted.

The trial court filed findings of fact and conclusions of law, from which we quote the substance, in so far as it embraces facts material to be considered in the determination of the question now presented:

After the death of Mrs. Mary House in 1904 the contestant and proponent continued to live together as husband and wife until their divorce in March, 1908, at which time their property rights were adjusted by a decree of the court as well as by deeds; but the settlement then made did not include or dispose of any interest of the proponent in the estate of Mrs. Mary West House, claimed by virtue of the alleged will. While the divorce proceedings were pending, the proponent mentioned to her attorney, Capt. James A. Baker, the existence of a written instrument left by Mrs. Mary West House, and described substantially the contents thereof, but told him that the instrument was not signed, whereupon her attorney advised her that it was not a will. The contestant had been in possession of the alleged will and envelope since the date of his mother's death. He had never denied its existence, had never refused to exhibit the same, and was never called on by the proponent to produce the same until the trial in this suit. The contestant continued to reside in Houston after his divorce until the fall of 1914, since which time he has maintained a home at Pasadena, Cal. In 1914 the proponent had a phone conversation with the contestant, during which she asked him if he intended to probate his mother's will, and he replied that he did not. She thereupon informed him that she considered that the will should be probated. The will referred to by her in that conversation was the instrument filed for probate in this suit, and which she had read immediately after the death of Mrs. Mary West House, in 1904. Proponent, however, had a different impression at the time of its verbiage and form, as was made to appear from her pleadings and testimony. At all times subsequent to their divorce the relations between the contestant and the proponent were unfriendly. The contestant has performed the directions contained in the written instrument offered for probate with reference to the horse, carriage, diamonds, solitaire ring, gold thimble, and furniture of Mrs. Mary West House; and if those directions are testamentary there now exists no necessity to probate said instrument for the purpose of executing them.

The court then concluded as a matter of law that in executing the instrument offered for probate Mrs. Mary West House did not contemplate or intend that proponent should receive one-half of her estate, but that the language used was merely an explanation of why she had not by the instrument given pro-

ponent and contestant mementoes in the way of trinkets. He also concluded that, since proponent knew that Mrs. Mary West House had executed the above instrument, knew that contestant was in possession of the same, had read it in 1904, and did not thereafter ask that it might be examined by her or her attorneys, that since she was contending in 1914 that said instrument was a will, and was then told by contestant that he would not probate it, in failing to move for the probate of the instrument or any instrument until 1917, she had not met the requirements of the statute, or shown herself entitled in equity to the probate of that instrument at this time, even if it be a will.

There are two assignments of error presented by the appellant. The first complains of the ruling of the court in holding that the instrument offered for probate was not a will; the second complains of the action of the court in holding that the proponent was in default in failing to sooner offer the instrument for probate. Logically, we think, the second assignment of error should be the first considered, since, if it should be determined against the appellant the difficulties presented in the other assignment will be obviated. Article 3248 of the Revised Civil Statutes is as follows:

"No will shall be admitted to probate after the lapse of four years from the death of the testator unless it be shown that the party applying for such probate was not in default in failing to present the same for probate within four years aforesaid. And in no case shall letters testamentary be issued where a will is admitted to probate after four years from the death of the testator."

[1-4] Thirteen years had elapsed between the death of Mrs. Mary West House and the first attempt made to probate that instrument as a will. A little more than 9 years of that time the proponent was a feme sole. The court to whom were submitted the issues of fact concluded that the proponent was in default, and for that reason was not entitled to have the instrument probated, even if it should be considered a will. The question before us is: Was the evidence such as to require the court to make a contrary finding? We are of the opinion that it was not. In this instance the trial judge was the exclusive judge of the facts proved, of the credibility of the witnesses, and of the weight to be given to their testimony. Proof of the conditions which tended to excuse the proponent for not sooner presenting the instrument for probate depended almost exclusively upon her own testimony. She was an interested witness, and the court had a right to discredit any portion of her testimony which he regarded as having been colored by that interest. We must assume that he did this, if such an assumption is necessary to sustain the judgment rendered. That the evidence concerning material issues was undisputed does not

make them any the less issues of fact. It is only when reasonable minds would not differ as to the inferences to be drawn from a given state of facts that the question becomes an issue of law. The question before us may be stated in this form: The proponent knew of the existence of the instrument offered for probate, and was aware of its contents at the time the alleged testatrix died. She had the opportunity continuously thereafter to offer it for probate. She failed to offer it for more than 13 years. Query: Did she, under the circumstances, exercise reasonable diligence in filing her application? To say that reasonable minds might differ as to the answer that should be given to that question is, we think, to indulge as much liberality in favor of the appellant as she can justly claim. Had a jury been impaneled in the case, clearly that question should have been submitted to them.

[6] Under the terms of the statute quoted, the proponent had the burden of showing that she was not in default. The only ground relied upon to excuse her delay is that she was advised by her attorney that the instrument in question was not a testamentary document, and therefore was not subject to probate as a will. The term "default" means failure to do the act required; but, as used in the statute quoted, it means a failure due to the absence of reasonable diligence on the part of the party offering the instrument. When that party knows of the existence of the instrument and has full opportunity to file it for probate, a delay occasioned solely by doubts as to the legal character of the instrument is not, as a matter of law, excusable. The probate courts are the proper tribunals for the settlement of such questions. The proponent testified in substance that she knew of the existence of this instrument and read it immediately after the death of her mother-in-law; that she and H. C. House were then living together as husband and wife, and continued to live together for nearly 4 years thereafter. Her attorney, Capt. Baker, whom she consulted at the time the divorce was granted, told her the instrument was not a will. He did not see the instrument, but she repeated to him what she remembered as its contents, gathered by reading it upon the occasion above referred to. Capt. Baker then advised her that the instrument was not a will. She further stated that she afterwards discussed the instrument with many of her friends, some of whom were lawyers. In 1914 she called Mr. H. C. House over the phone and asked him if he was going to probate his mother's will. She told Mr. House then that she considered that the will should be probated; that she had never received her portion of the property,

and gave him an opportunity. He replied that he did not intend to probate the instrument. She then told Mr. House that she was going to get a lawyer, and thereafter, in 1917, she consulted Mr. Abrahams, of California, who afterwards filed her application to probate the instrument.

There is nothing in the evidence tending to prove that she and her lawyer could not have inspected the document at any time they sought permission to do so. The court could not fairly assume that Mr. House would have refused to exhibit the instrument to them, had they requested the privilege of inspection. The testimony of the proponent clearly indicated that in 1914, if not before that time, she had ceased to fully rely upon the judgment of Capt. Baker, who had advised that the instrument was not a will subject to probate; yet, without any reason being shown, she thereafter waited for approximately 3 years before taking any steps to seek legal assistance in having the instrument offered for probate. While there is no specific command in our law that wills shall be probated within any given length of time, it is manifestly a part of the public policy of this state that this shall be done as early as practicable after the death of the testator. It seems reasonable to hold that, in order to escape the consequences of default, a degree of diligence above that usually adopted as a measure of ordinary prudence or care should be required of those having the privilege of probating testamentary instruments. The considerations which underlie the public policy increase the urgency of the performance of the duty which the law has coupled with the privilege of probating wills.

[6] The appellant, it is true, was a married woman for nearly 4 years after the death of Mrs. House, Sr.; but the law did not place any obstacle in the way of her filing an application for the probate of this instrument, if it be subject to probate. A married woman is not exempt from the limitation which requires such proceedings to be instituted within 4 years from the death of the testator. While her coverture probably might be looked to as a circumstance tending to excuse her delay, it did not exempt her from the limitation.

[7] We are of the opinion that the state of the evidence was such that the trial court had a right to conclude that she failed to exercise that degree of diligence which the law imposes upon those who have the right to probate testamentary instruments.

The judgment will be affirmed upon the grounds stated. We deem it unnecessary to discuss the other questions raised in the appeal.

GRAHAM et al. v. KNIGHT. (No. 2295.)

(Court of Civil Appeals of Texas. Texarkana. May 20, 1920.)

1. Injunction §118(1) — Petition of fence owners insufficient to entitle to relief.

Petition for injunction by fence owners, alleging that defendant tore the fence down, converted the material to his own use, threatened to kill an owner, if he found him on the land, etc., *held* insufficient to entitle plaintiffs to injunction.

2. Pleading §8(6)—Allegation entry on land was unlawful and wrongful a conclusion.

Allegation of petition of fence owners for injunction against defendant's interfering with their possession by tearing the fence down, etc., that defendant's entry on the land was unlawful and wrongful, *held* a mere conclusion of the pleader, and not entitled to force in construing the legal effect of the averments.

3. Injunction §172—Dissolution of temporary writ discretionary, where allegations denied by answer.

The truth of the allegations of the petition for injunction, so far as material to the matter before the trial court, having been denied in the answer, the court, under Vernon's Sayles' Ann. Civ. St. 1914, art. 4663, acted within his discretion when he dissolved the temporary writ.

Appeal from District Court, Bowle County; H. F. O'Neal, Judge.

Suit by T. N. Graham and others against M. H. Knight. From a judgment dissolving a temporary injunction, plaintiffs appeal. Affirmed.

This appeal is by appellants, T. N. Graham, W. T. Williams, S. A. Raffaelli, W. W. Whitfield, and Susie Whitfield from a judgment rendered March 8, 1920, dissolving a temporary injunction theretofore granted restraining appellee, M. H. Knight, from disturbing them in their possession of certain land.

The hearing in the court below was on the pleadings of the parties, which were sworn to, and the affidavits of certain other persons, made a part of appellee's answer. In their petition appellants alleged that on November 17, 1919, and long prior to that time, they had the land fenced, were in actual possession of and using and enjoying it, and had leased it for the year 1920. They further alleged that on or about December 15, 1919, appellee unlawfully went upon the land and wrongfully tore down and removed the fence, converting the material therefor to his own use. They further alleged that on or about December 20 appellee threatened to kill appellant W. W. Whitfield if he "caught said Whitfield on said land again," and that the threat was seriously made, "for purpose," quoting, "of

intimidating the said W. W. Whitfield and the other plaintiffs herein." They further alleged that appellee was "preparing to unlawfully construct a fence of his own on and around the land in furtherance," quoting, "of unlawful designs to oust plaintiffs and each of them." And they further alleged that they would suffer "irreparable damage and injury to their property and right to use and enjoy same," unless they were granted the relief by injunction for which they prayed. In addition to such relief, appellants prayed for a money judgment against appellee for \$150 as the value of the fence, and for \$750 as damages. In his answer appellee did not deny that he tore down and removed the fence appellants referred to, nor that they owned same; but he did deny that appellants were ever in actual possession of and using and enjoying the land as they alleged they were, and alleged the fact to be that he was the owner of the land and held actual possession thereof at the time appellants commenced their suit, and that he and those under whom he claimed title had the land fenced, and held actual possession of and used and enjoyed it all the time from February 25, 1901, until the time when his answer was filed, to wit, January 5, 1920. He further alleged that appellants had been trespassing on the land, and prayed for an injunction restraining them from trespassing further thereon. The affidavits attached to the answer supported the allegations therein in regard to appellee's claim of title and in regard to the possession and use he and those under whom he claimed had made of the land since said February 25, 1901.

Todd, Graham & Williams and Rodgers & Rodgers, all of Texarkana, for appellants. Mahaffey, Keeney & Dalby, of Texarkana, for appellee.

WILLSON, C. J. (after stating the facts as above.) The contention presented by the assignments is that the trial court erred when he overruled certain exceptions urged by appellants to appellee's answer. The ground of the exceptions was that there was no denial in the answer of material allegations in appellants' petition. The argument is that the trial court therefore should have treated the allegations as true, and hence that he abused the discretion he had when he dissolved the temporary injunction.

[1] The contention assumes that the allegations in the petition, if taken as true, entitled appellants to relief by injunction. We do not think so, and therefore would not reverse the judgment, if we thought the answer was subject to the objection urged to it. As we view the petition, the allegations did not entitle appellants to such relief, and the trial court, for that reason, if for

no other, should have dissolved the writ. *San Antonio Water Supply Co. v. Green*, 198 S. W. 631.

The fact that appellants owned a fence on the land, and that appellee tore it down and converted the material thereof to his own use, may have entitled appellants to recover damages of appellee, but it certainly did not entitle them to an injunction. The wrong, if it was one, was complete, and such a writ was not a remedy for it. *Whitaker v. Dillard*, 81 Tex. 359, 16 S. W. 1084; *Acme Cement Plaster Co. v. American Cement Plaster Co.*, 167 S. W. 183.

So, the fact, if it was one, that appellee threatened to kill appellant Whitfield if he found him on the land, did not entitle appellants to the writ—certainly not, in the absence, as was the case, of allegations showing a right in Whitfield to go thereon. 14 R. C. L. 376.

Of course the fact that appellants had leased the land for the year 1920 was not a reason why the writ should have been granted.

Nor was the fact that appellee was preparing, if he was, to construct "a fence of his own on and around the land in furtherance of a design he had to oust appellants therefrom," of itself a reason why the writ should have been granted. Unless it appeared from the allegations in the petition that appellants had a right to the possession of the land as against appellee, they were not entitled to have him restrained from going upon and building a fence on it. They did not specifically allege, nor did they state facts showing, they had such a right. They did not allege either that they owned the land or were entitled to possession of it. Indeed, they did not even allege that their possession of the land was lawful. The averments with reference to this phase of the case were merely that—

"On and long prior to November 17, 1919, they had and held the land in their actual physical, open, and notorious possession, holding same under a good, sufficient, and secure fence, peaceably and without molestation, using and enjoying adversely to all others."

They might have had such possession of the land, and yet have been mere naked trespassers thereon.

[2] If it should be said that the defect just suggested was cured by the allegation that appellee's entry on the land was "unlawful and wrongful," the answer is that the allegation is a mere conclusion of the pleader, and not entitled to force in construing the legal effect of the averments in the petition. *Birchfield v. Bourland*, 187 S. W. 422.

"The rule of pleading," said the court (*Weaver v. Emison*, 153 S. W. 923), "that the state-

ments of a party are to be taken most strongly against himself, is reinforced in injunction suits by the further requirement that the material and essential elements which entitle him to relief shall be sufficiently certain to negative every reasonable inference arising from the facts so stated, from which it might be deduced that he might not, under other supposable facts connected with the subject, thus be entitled to relief."

And see *King v. Driver*, 160 S. W. 415, *Ross v. Veltmann*, 161 S. W. 1073, and *Shannon v. Hay*, 153 S. W. 360, where it was said:

"In an application for an injunction, the well-recognized rule is that allegations of fact must be direct, certain, and particular."

The rule stated is applicable to another view of the allegations in appellants' petition. While appellants alleged that they were in actual possession of the land "on and long prior to November 17, 1919," they did not, except inferentially, allege that they had possession thereof on December 15, 1919 (when, they averred, appellee entered thereupon), or ever afterward. Observing the rule, the trial court might very well have concluded that it did not sufficiently appear from the allegations in the petition that appellants were in actual possession of the land after November 17, 1919.

While appellants sought both mandatory and preventive relief, the trial court granted their prayer only so far as it was for a writ restraining appellee from interfering with them in their possession and use of the land. The predicate for the relief the court granted was, of course, the allegations in the petition that appellants had actual possession of the land and that appellee was threatening to resort to unlawful means to deprive them of such possession. As we construe the answer, appellee not only denied that appellants had such possession of the land, but also denied that they were entitled to possession thereof, and alleged that he (appellee) owned it, that he was actually in possession of it from February 25, 1901, to the date of the filing of the answer.

[3] If, therefore, we doubted the correctness of the conclusion reached, that it did not appear from the petition that appellants were entitled to the relief they obtained, we nevertheless would affirm the judgment; for the truth of the allegations of the petition, so far as they were material to the matter before the trial court, having been denied in the answer, the court acted within his discretion when he dissolved the writ. Article 4663, *Vernon's Statutes*; *Harris v. Thomas*, 217 S. W. 1068; *K. & L. of Honor v. Cole*, 62 Tex. Civ. App. 500, 131 S. W. 1180.

The judgment will be affirmed.

KIRTLEY et al. v. SPENCER et al.
(No. 1659.)

(Court of Civil Appeals of Texas. Amarillo.
April 28, 1920. Rehearing Denied
June 2, 1920.)

1. Charities ☞21(4)—Beneficiaries sufficiently described.

Testamentary gift to trustees, invested with discretionary powers as to manner of expenditure, to aid a school founded by testator, at which white children between the ages of 6 and 21, shall be admitted free of tuition, preference to be given those who have been in attendance before and those who reside in the district, *held* to sufficiently describe the beneficiaries, and to be good as a gift to a public charity.

2. Wills ☞62—Survivor under joint will estopped to renounce.

A will of husband and wife, whereby they give their property to trustees for a charity, the trustees to pay half of the income to the survivor for life, *held* a joint and mutual will, estopping the survivor, after the death of the other and the probate of the will and acceptance of benefits under it, from renouncing it.

3. Judgment ☞747(1)—Judgment on disclaimer in action to remove cloud held conclusive of rights.

Where, after death of husband and probate of will of himself and wife, giving their property to trustees for a charity, subject to payment of half the income to the survivor, she conveyed a half interest therein to a university, and at her request suit was brought by the trustees to remove cloud caused thereby, judgment in their favor, on disclaimer by her, was sufficient to foreclose any right asserted by her contrary to the will.

4. Judgment ☞686—Heirs of party barred.

Persons claiming interest in land as heirs are barred by judgment foreclosing any interest of the person through whom they claim; they being in privity with her.

5. Trusts ☞173—Suit by trustee held not breach of fiduciary relation.

Trustees, to whom husband and wife by their joint and mutual will devised property for a charity, subject to the payment of half the income to the survivor, did not abandon their fiduciary relation to the survivor by bringing suit to remove cloud placed on the title by her deed of an interest in the property, executed after death of the husband and probate of the will.

6. Judgment ☞456(2)—Suit to set aside barred in 4 years.

A suit, in so far as it is one to set aside a judgment, is barred in 4 years after the judgment was obtained.

Appeal from District Court, Collin County;
F. E. Wilcox, Judge.

Action in the form of trespass to try title by Rachael E. Kirtley and others against

Cora D. Spencer and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

George P. Brown, of McKinney, and Allen G. Fisher and William P. Rooney, both of Chadron, Neb. (John B. Barnes, of Lincoln, Neb., of counsel), for appellants.

Head, Dillard, Smith, Maxey & Head, of Sherman, and Abernathy & Smith, of McKinney, for appellees.

HUFF, C. J. Moses Hubbard and Mary Jane Hubbard resided in Collin county, Tex., and owned the land in controversy in this suit. The property involved in this suit was all community property of Moses Hubbard and Mary Jane Hubbard. On the 5th day of January, 1897, Moses Hubbard and Mary Jane Hubbard, having no children then living or descendants of any children living, after discussion of the disposition to be made of their property, by agreement made a joint and mutual will, by the terms of which all of their property was willed to certain trustees named, which was a perpetual body in trust for the benefit of the school known as "Alla," which Moses Hubbard and Mary Jane Hubbard had established on the land and partly maintained for many years prior to the death of Moses Hubbard. Moses Hubbard departed this life about the 26th day of May, 1906, and the said joint and mutual will of the said Moses Hubbard and Mary Jane Hubbard was duly probated in Collin county, Tex., on the 31st day of July, 1906, and the probate of said will has never been at any time reversed or in any manner modified. Upon the death of Moses Hubbard, in pursuance of said will, the trustees named in the will went into possession of all of the property, and continued in possession of the same from that date until the present time, administering the trust under the terms of said will. On the 20th day of June, 1912, Mary Jane Hubbard, by deed, attempted to convey to the Texas Christian University an undivided one-half interest in all of the lands involved in this suit, being the same land that Moses Hubbard and Mary Jane Hubbard, under their joint and mutual will, had bequeathed to the trustees hereinabove mentioned. On January 11, 1913, the trustees named in the joint and mutual will of said Moses Hubbard and Mary Jane Hubbard instituted a suit in the district court of Collin county, Tex., against the Texas Christian University and Mary Jane Hubbard, in an action to remove cloud from title to the undivided half interest Mary Jane Hubbard had attempted to convey to the Texas Christian University. In said cause both defendants, Mary Jane Hubbard and the Texas Christian University, filed a disclaimer, and on February 22, 1913, judgment was rendered for plaintiffs, the trustees hereinabove mentioned, against

Mary Jane Hubbard and the Texas Christian University, removing cloud from title, and in which they recovered the undivided half interest which Mary Jane Hubbard attempted to convey to the Texas Christian University. That judgment became final, and it has never been appealed from or in any way set aside. On the 20th day of February, 1913, the Texas Christian University reconveyed to Mary Jane Hubbard pendente lite the undivided half interest that she had theretofore attempted to convey to the Texas Christian University, which deed was filed for record February 24, 1913. Mary Jane Hubbard departed this life on the 7th day of February, 1914. On the 14th day of May, 1914, the will of Mary Jane Hubbard was duly probated, which, after making numerous bequests, contained a residuary clause, under which residuary clause Cora D. Spencer, one of the defendants herein, took as a legatee all of the estate of Mary Jane Hubbard, not disposed of by special bequest in the said will, and the said will of Mary Jane Hubbard has never in any way been vacated or set aside. Plaintiffs filed this suit in the district court of Collin county, Tex., on the 31st day of August, 1918, in the form of an action of trespass to try title, in which they pleaded their title and seek to have rendered null and void the judgment of the district court of Collin county, Tex., wherein the trustee in said will recovered a judgment against Mary Jane Hubbard and the Texas Christian University. The property involved in this suit plaintiffs claim as heirs at law of Mary Jane Hubbard. The appellees answered by general demurrer, general denial, and plea of not guilty and the statutes of limitations of 2, 3, 4, 5, and 10 years. Upon a trial of the case without the intervention of a jury the court rendered judgment for the appellee for the property involved in the suit. The above statement is taken from the appellee's brief.

Moses Hubbard and Mary Jane Hubbard had a daughter born to them, named Alla, who died without issue. The evidence is sufficient to show that the school was erected on Dr. Hubbard's land, and the school was named Alla as a memorial to his daughter. They had no other children, and Dr. and Mrs. Hubbard discussed the disposition that should be made of their estate after their death. The doctor was inclined to endow a medical hospital, while Mrs. Hubbard desired to endow an orphans' home, but they finally agreed between them that, as they had lived in that neighborhood and made their fortune among those people, they should devise a means of leaving the property to the use and benefit of their neighbors, among whom they had lived. Dr. Hubbard, previous to his death, contributed considerable money to the support of the Alla school, which is in common school district No. 67 of Collin county, and assisted in the employment of teachers and aided the support of

the school in various ways and expressed his desire that the school should become a high school, and, though his pastor apparently sought to induce him to change his will in that particular, he steadfastly adhered to his purpose of leaving his property in trust for the benefit of the school. The will probated recites:

"We, Moses Hubbard and Mary Jane Hubbard, of Collin county, being of sound mind and disposing memory, mindful of the uncertainty of life and the certainty of death, wishing to dispose of the effects which it has pleased Almighty God to bless us with, while we have the strength of mind and bodies so to do, make, publish and declare this to be the last will and testament of us and each of us, hereby revoking all others by us made; and we each direct that as each of us die this instrument shall be probated as the will of such deceased person."

Item second provides:

"It is our desire and each of us, that as each of us dies all the property then owned by us shall descend and vest in the following named persons and their successors in this trust, to wit: J. H. L. C. English, Dr. B. F. Spencer, Dan P. English, F. S. Finley and the superintendent of public instruction of Collin county, who shall taken and hold all of the property, real, personal and mixed, owned by us, at the death of either of us, for the purposes and trusts as hereinafter directed, and vacancies in whose numbers shall be filled as directed."

Item third:

"Upon the death of either of us the trustees shall receive rents, revenues and profits arising from all of said property and shall lend all money and have same well secured or invest same in interest-bearing bonds, rent the land. One half of the net proceeds shall be paid to any person in any manner for any purpose, the survivor may direct. The other half shall be used and paid out in the same manner and for the same purposes as the rents and revenues of the property are herein directed to be paid and appropriated, after the death of both of us, but the survivor has the right, during lifetime, to determine the manner of expenditures; that is whether it should be used in employment of teachers, erection of buildings, purchase of apparatus or other germane uses," etc.

Item 4th provides generally that the trustees, after the death of both, shall take and hold the property and divide it into four funds, specifying the manner of dividing the same. Item fifth:

"Believing that we have the love of God in our hearts for the manifold blessings he has bestowed upon us, and desiring to add to the happiness and improvement of our neighbor, we have founded an institution for the increase and diffusion of knowledge, which we have named Alla, and which shall remain permanently located on the same survey on which it is located, to wit: Wade H. Rattan. And it is our desire that the trustees herein provided for shall use the available fund that has been pro-

vided for in the employment of teachers, the erection of proper and necessary buildings, the purchase of apparatus and other germane uses; and it is our desire that at this institution of learning all children of white race and whose parents are Caucasian and who are over the age of six and under the age of twenty-one, shall be admitted, free of tuition, but in case more apply than the funds on hand justify, then the trustees, in determining who shall be admitted, are requested to give preference to worthy students, who have been in attendance before and those residing in the school district or adjacent thereto. The term 'germane uses' is intended to receive a liberal construction, and to authorize the use of all means proper by the trustees for diffusion of knowledge, but we do not desire a sectarian school taught. The Holy Bible may be used and we pray may be the guide of both instructor and pupils."

Item 6 provides that the trustees shall not have power to sell or alienate the real estate, but that it shall be preserved, and its rents and revenues be applied for the charitable uses, but provides that, if in the judgment of a court of competent jurisdiction, after bona fide trial, it shall determine the land cannot so be held, the trustees upon order of court could sell the land and hold the proceeds as a permanent fund. It is their wish, however, that the land, if it could be done legally, should not be sold.

Item 7 stipulates:

"Confiding in the honor and integrity of J. H. L. C. English, Dr. B. F. Spencer, F. S. Finley, and the person who may be superintendent of public instruction, in Collin county, Texas, we appoint trustees of this fund, and executors of each of our wills."

Item 8 provides for filling vacancies in the trustees, in the case of death, resignation, or otherwise, and that the trustees should be residents of Collin county, reciting that—

"It being our intention to create a perpetual body and to this end the trustees may, if advised it would be better to advance the purposes herein intended, incorporate under the name of Alla. No stock shall be issued."

After Dr. Hubbard's death the trustees took charge of the property, collected the rents, paid the taxes, and looked after the property, turning over to Mrs. Hubbard the portion provided for under the will, leaving to her the direction of the investment or application of the rest of the fund. This situation continued until about the 20th day of June, 1912, when she made a deed to the Texas Christian University. She afterwards addressed a letter to Abernathy & Smith, in which she said:

"I desire the joint and mutual will, executed by me and my deceased husband, which has been duly probated, be carried out in all of its terms."

She authorized them to use her name as a party to a suit either as defendant or in-

tervenor, or in any way they might think necessary to carry out the terms of the will, and to vest title in the trustees of Alla school, as recorded in the will. They were requested to endeavor to procure judgment vesting all of the property absolutely in the trustees, subject, however, to the interest and right given her under the will; that is vest absolutely in fee simple in the trustees of said Alla school, subject to her right to receive one-half the rents during her lifetime. This letter was signed by her and properly witnessed, and in the suit instituted Mrs. Hubbard filed a disclaimer:

"I, Mrs. Mary Jane Hubbard, one of the defendants in the above styled and numbered cause, come now and disclaim in favor of the plaintiff any and all right, title and interest in and to any of the lands set out and described in plaintiff's petition, except as herein specified, and agree that the judgment may be rendered in favor of plaintiff, as prayed for in their petition, subject to my rights, in the rents, revenues and profits arising from said land."

Judgment was rendered in that case as heretofore stated, recognizing Mrs. Hubbard's right to one-half the rents during her lifetime under the terms of the will. Before her death Mrs. Hubbard made a will, disposing of certain specific property to certain named devisees, having a residuary clause giving all of the remainder of the property, after satisfying the special bequests, to Cora D. Spencer, her niece. The property disposed of by that will specifically appears to be different property to that disposed of by the joint will of herself and husband, and the evidence indicates that it was property accumulated by her after her husband's death.

[1] The first assignment in effect assails the judgment of the trial court on the ground that the will was void and insufficient to vest title in the trustees because the beneficiaries, under the terms of the will, were not specifically designated, and so general that the beneficiaries may include any white child 6 years and under 21 years of age in the world; that the bequest is to an unincorporated institution, and not for a corporation.

The appellants and Cora D. Spencer are heirs at law of Mrs. Hubbard, and would be entitled to recover but for the will. It is our view that the bequest under the will was to a public charity, and may be sustained. We quote from *Paschal v. Acklin*, 27 Tex. at page 200:

"It cannot be said that the bequest in favor of the poor of Sumner county is too vague and uncertain a description of the beneficiaries to be sustained as a charity in our courts, where the English doctrine of cy pres has never been recognized. Though this point may, at one time, have been a ground of much debate, it is now too firmly settled to admit of question [citing authorities]. It is, also, said that the bequest is void because it was intended to operate in favor of an unincorporated institution; in fact, one that had, at the testator's

death, only an imaginary and ideal existence in his brain. And to sustain this position, the case of *Baptist Association v. Hart*, 4 Wheat. 1, has been referred to; but this case has, in subsequent decisions in the same high tribunal, been much questioned. But whatever may be its weight as an authority, it is not applicable to the case now before the court. The bequest in that case was directly to the unincorporated association; here it is to trustees, who are capable of taking the estate. In such cases, it has been frequently held that the subsequent incorporation of the beneficiary of the trust, within a reasonable time, is sufficient to support and maintain the bequest [citing authorities]. But without the aid of the subsequent incorporation of the 'Franklin Institute,' the trust was effectual in favor of the beneficiaries pointed out in the will. It was supported by the bequest to trustees, and their execution of it could have been enforced by the beneficiaries in a court of equity [citing authorities]. In *Moggridge v. Thackwell*, 7 Ves., Jr., 36, it is said: 'When an ascertainable object is designated by the donor, in general or collective terms, as the poor of a given county or parish, or when a person is appointed by him to select a described portion, or kind, or number from a designated class, the chancellor, sitting as judge in equity, will interpose upon the ground of trust.' And in *Moore v. Moore*, 4 Dana, 354, it is said, 'Whenever the only objection to a bequest is that it is for the benefit of the persons described collectively by some characteristic trait, by which they may be identified, if the bequest is a charity within the statute, and therefore valid, it is as good and available as it would have been at common law, had it been to one competent person in trust for another, identified by the will.' *Bell County v. Alexander*, 22 Tex. 351, 73 Am. Dec. 268; *Laird v. Bass*, 50 Tex. 412; *O. J.*, vol. 11, "Charities," § 58 et seq. p. 338.

"Gifts, for the purpose of advancing the cause of education are universally admitted to be valid as public charitable gifts, both under the statute of Elizabeth and also in the United States, in those states where that statute is expressly or by implication not in force. Hence gifts, in general terms, for education, not specifying in what particular mode they are to be applied, are valid where trustees are also appointed, for in such cases courts of equity will contrive a plan for carrying the gift into practical effect. So a fortiori a gift to found public schools or colleges or for the particular purpose of founding schools, seminaries and colleges, or contributing to the maintenance of those already in operation, to pay salaries of teachers in the public schools, to aid in the education of poor children, to educate colored children, to establish public libraries, to increase the amount of public school funds for the education of young persons in the useful and economic arts, for the education of poor students of the Protestant ministry, or for the Catholic priesthood, or to establish a parish school under the supervision of the authorities of the church, is valid as a charitable gift." *Underhill on the Law of Wills*, vol. 2, § 814.

The record in this case abundantly shows that Dr. Hubbard founded, or built, the

school on his land for the benefit of the children of his neighbors and friends. While the schoolhouse is in a common school district and under the control of the laws of Texas, he and his wife, by their will, evidenced a purpose to aid that school and create a fund to maintain it. In appointing the superintendent of public instruction of the county they manifested a purpose to co-operate with the school authorities of the district and the state. He evidently intended it, in part at least, for the use and aid of pupils under and over the scholastic age, prescribed by law. It was his purpose, manifestly, to give his neighbors a high school at their doors, without the necessity of going from home for better school facilities, and to relieve them in a measure from heavy taxation. Though there was no railroad near the school and it was then in a rural district, it seems to have been his purpose inasmuch as the estate would contribute, to overcome those disadvantages. The trustees were invested with discretionary powers; they could pay teachers, erect or improve buildings, etc., to further its progress. We believe that the beneficiaries were sufficiently pointed out and designated. The trustees appointed were capable of receiving and being vested with the title in trust for the uses specified. The will, therefore, we think valid, and vested Dr. Hubbard's interest in the trustees.

[2] We also believe this will to have been the joint and mutual will of Dr. Hubbard and his wife, and entered into upon their mutual agreement and understanding. After Dr. Hubbard's death and the probate of the will, his wife was estopped from thereafter renouncing the will. The trustees took charge of the estate at the death of Dr. Hubbard, dividing the income, giving the wife her proportional part under the will, and the remainder they held and used as directed by her during her life. She received and accepted the services of the trustees in handling the entire estate. We think she is shown to have elected after the death of her husband to accept under the will, at least there is sufficient evidence to sustain a finding to that effect. On the question of estoppel under a mutual and joint will, and the effect of the death of one without revoking or renouncing the will, by the survivor, before the death of such other party, we cite the case of *Larabee v. Porter*, 166 S. W. 395, where the question is ably discussed and many authorities cited and discussed.

[3-6] We think the request by Mrs. Hubbard made of attorneys to institute suit for the land in order to carry out the will of her husband, and the judgment therein, is sufficient to foreclose any right she may have asserted during her life, and the appellants herein, being in privity with her, are barred by the judgment. Neither do we think the trustees abandoned their fiduciary relation

to her in bringing the suit. She had by her deed placed a cloud on the title. They held the title in trust for the named beneficiaries under the will, and if by her act Mrs. Hubbard placed in jeopardy the trust, it was their duty to sue her if necessary. It is asserted the trustees and the attorneys did not explain to her she had a half interest in the property when she filed a disclaimer in the suit. She had undertaken to convey a half interest by her deed to the Texas Christian University. She needed no explanation on that point as to what interest she would take if the will was invalid as to her. If it had not been for the will, upon the death of Dr. Hubbard all the property would have vested in her. If the trustees had informed her she could retain all the estate, they would have violated the trust reposed in them by the will. We find no such abuse of the fiduciary relation or of fraud as would have authorized the trial court to set aside the judgment in favor of the trustees against the Texas Christian University and Mrs. Hubbard. In so far as this was an action to set aside the judgment so rendered, it was barred by the 4-year statute of limitation. *Watson v. Railway Co.*, 73 S. W. 830; *Warren v. Foust*, 36 Tex. Civ. App. 59, 81 S. W. 323; *Wolf v. Sahm*, 55 Tex. Civ. App. 564, 120 S. W. 1114, 121 S. W. 561. The second, third, fourth, fifth, and sixth assignments of error are overruled. We think them without merit.

The judgment will be affirmed.

KIRBY LUMBER CO. v. LEWIS. (No. 579.)

(Court of Civil Appeals of Texas. Beaumont. May 5, 1920.)

1. Trial \S 240—Argumentative instruction refused.

Argumentative instruction was properly refused.

2. Trial \S 350(3)—Refusal of issue raised by evidence cannot be justified by showing of facts making the issue immaterial, where such other facts are not pleaded.

Refusal to submit to the jury the issue, which was raised by the evidence, whether defendant's alleged agent was authorized by defendant to make the contract sued on, could not be justified by the claim that all the evidence showed that defendant ratified the acts and conduct of such agent in making the contract, where ratification was not pleaded.

3. Judgment \S 248—Evidence to form basis of judgment must have support in the pleadings.

Evidence cannot form the basis of a judgment, without a pleading to which the evidence relates.

4. Damages \S 57—Submission of issue as to whether breach of contract by defendant was

fraudulent or willful held error; question being immaterial.

In action for breach of contract to deliver "cull" oxen to plaintiff in exchange for work oxen, court erred in submitting issue of whether contract had been fraudulently or willfully breached; plaintiff being entitled, as damages, to the highest market value of cull oxen between the time they should have been delivered and the date of the trial, regardless of whether breach was willful or fraudulent.

Appeal from Jasper County Court; C. C. Brown, Judge.

Action by J. L. Lewis against the Kirby Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

G. E. Richardson, of Jasper, and Andrews, Streetman, Logue & Mobley, of Houston, for appellant.

Chas. C. Ingraham, of Jasper, for appellee.

HIGHTOWER, C. J. The appellee, J. L. Lewis, sued appellant, Kirby Lumber Company, in the county court of Jasper county, and upon a trial with a jury appellee recovered judgment for \$425, with interest at the legal rate until paid. After its motion for new trial was overruled, appellant perfected its appeal to this court.

Very briefly stated, the contention of appellee was that about the 1st of November, 1914, he entered into a verbal contract with appellant, acting through its duly authorized agent, whereby appellee sold and delivered to appellant five work oxen, for which appellant promised and agreed to deliver to appellee five oxen known as or called "cull" oxen; such oxen to be delivered to appellee not later than the latter part of spring of 1915.

Appellant was engaged in the sawmill business at Brown del, in Jasper county, at the time the claimed contract was made, and appellee was engaged in the meat market business at the same place. As work oxen would become unfit for use in appellant's sawmill business, they were called "cull" oxen, and would be disposed of for butchering, and their places supplied by other oxen fit to do the work.

Appellee alleged that under the claimed contract, he delivered to appellant, at Brown del, five good work oxen, but that appellant never did comply with its contract by delivering to him the "cull" oxen, and never paid appellee anything for the work oxen delivered by him. Appellee prayed recovery for the highest market value of the "cull" oxen obtaining between the date they should have been delivered to him and the date of the trial, but, in the alternative, if it should be found that the claimed contract was not made, for the value of the work oxen delivered to appellant.

Appellant answered by general and special exceptions, all of which were properly overruled, and also by general denial and plea of limitation. The jury found that the contract, as claimed by appellee, was made, and found the aggregate value of the "cull" oxen to be \$425.

We overrule the first assignment of error, for we think that the cause of action set up in appellee's second amended petition was not, in legal contemplation, a new or different cause of action from that contained in the original petition filed more than two years before. The claimed contract and its breach was clearly alleged in all of appellee's pleadings.

[1] The second and third assignments are overruled, for we do not agree with appellant that there was a variance between the contract as alleged and that proved by appellee; and the fourth assignment is overruled, for the reason that the requested instruction, which was refused as there complained of, was argumentative.

[2, 3] The fifth assignment of error must be sustained. Whether R. B. Cochran was authorized by appellant to make the contract relied upon by appellee was clearly made an issue of fact by the evidence, and the trial court should have granted appellant's request to submit that issue to the jury. Appellee's reply to this assignment is that all the evidence showed that appellant ratified the acts and conduct of Cochran in making the contract, and that therefore it was not error to refuse the issue. We are inclined to agree with appellee that the evidence was sufficient, if not conclusive, to the effect that appellant ratified Cochran's act in making the contract, or at least held Cochran out as having such authority; but the trouble is there was no such pleading by appellee. Evidence cannot form the basis of a judgment without a pleading to which the evidence relates.

[4] The sixth assignment is overruled. Upon the record now before us, we are also of the opinion that there was no necessity for submitting to the jury an issue as to whether the contract claimed by appellee to have been made was fraudulently or willfully breached by appellant, which action of the trial court is made the basis of the seventh, eighth, and ninth assignments, and we would suggest that no such issue be submitted upon another trial. If the contract, as claimed by appellee, was made and breached, then, upon the evidence as reflected by the record at this time, appellee would be entitled to recover the highest market value of the "cull" oxen obtaining between the time they should have been delivered to appellee and the date of the trial; and this would be so regardless of willful breach or fraud on the part of appellant.

Because, however, of the error of the trial

court in refusing to submit the special issue as to whether R. B. Cochran was authorized by appellant to enter into the contract declared upon by appellee, the judgment will be reversed, and the cause remanded; and it is so ordered.

WESTERN UNION TELEGRAPH CO. v. CARVER et al. (No. 6380.)

(Court of Civil Appeals of Texas. San Antonio. May 12, 1920. Rehearing Denied June 2, 1920.)

1. Telegraphs and telephones \S 37(8)—Diligence in delivery required, though addressee is not at address given.

Where death message was directed to address where telegraph company's agent was informed the addressee did not live, being resident, however, in the vicinity, it was duty of company, not only to seek to deliver telegram at address, but, when it ascertained addressee was not there, to make at least some effort to ascertain her whereabouts by making due inquiry, failing of which a finding of negligence would be justified.

2. Telegraphs and telephones \S 66(4)—Evidence held to show delivery of message to telegraph company's agent.

In an action against a telegraph company for failure to deliver a death message, evidence held to show message was delivered to the company's agent, and not merely to agent of a railroad.

3. Telegraphs and telephones \S 68(3)—Damages for physical pain and mental anguish recoverable for failure to deliver death message.

In action against telegraph company for failure to deliver a death message, plaintiff addressee could recover damages arising both from physical pain and mental anguish, which were in contemplation of parties when message announcing dying condition of addressee's mother was sent.

4. Appeal and error \S 1050(1)—Admission of conclusion of witnesses harmless to defendant.

In action against telegraph company for failure to deliver death message, in absence of any evidence to show person to whose address message was sent was agent of addressee for any purpose, if it was a conclusion for both him and addresser to swear he was not her agent, such conclusion was harmless to defendant company.

5. Telegraphs and telephones \S 71 — \$1,500 for nondelivery of death message not excessive.

Verdict for \$1,500 recovered by daughter against a telegraph company for failure to deliver message announcing dying condition of her mother, whereby she was prevented from attending funeral, held not excessive.

Appeal from District Court, Bastrop County; R. J. Alexander, Judge.

Suit of Nellie Carver and another against the Western Union Telegraph Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Francis R. Stark, of New York City, and Brooks, Hart & Woodward, of Austin, for appellant.

S. L. Staples, of Smithville, and Maynard & Maynard, of Bastrop, for appellees.

FLY, C. J. This suit was instituted, and prosecuted to a judgment for \$1,500 against appellant by Nellie Carver, joined by her husband, H. A. Carver. The basis of the complaint against appellant was negligence in failing to deliver a telegram, directed to Mrs. Carver at Houston, Tex., from her brother at Temple, Tex., informing her that her mother was dying in Temple. The cause was submitted to a jury on special issues, and on the responses thereto judgment was rendered in favor of appellees for the sum hereinbefore indicated.

The facts show that about 10:30 o'clock on the morning of January 31, 1918, in Temple, Tex., the following message, with the required toll for transmitting the same, was delivered to the agent of appellant:

"Mrs. Nellie Carver, 3711 Engelke Street, Houston, Texas. Come home. Mama is dying. Your bro., Paul Trammell."

At the time that the message was delivered, Paul Trammell, the sender, told the agent of appellant that Mrs. Carver did not live at 3711 Engelke street, but lived near that point, which was the address nearest to where she lived that could be given him. He accepted the message for transmission. The mother of Mrs. Carver died about 1 o'clock p. m. on January 31, 1918, and was buried at 4 p. m. on February 1, 1918. In compliance with a request, contained in a letter which she received on the morning of February 1, Mrs. Carver left on the first train for Temple, where she arrived about 2 o'clock a. m. about 10 hours after the burial of her mother. She did not know that a telegram had been sent to her until she reached Temple. The telegram was placed in the hands of a messenger about 2:55 p. m. of January 31, and was carried by him to 3711 Engelke street, which was a drug store owned by J. R. Clark, who refused the telegram, telling the boy that he did not know Mrs. Carver and did not know where she lived. The messenger boy left, and returned probably on February 1, 1918, and upon his insisting that Clark receive the telegram the latter did so. It was several days afterwards before it was delivered to some one who asked for it. The boy made no inquiries as to where Mrs. Carver lived, nor made any effort to find her, although the agent at Temple had been informed that she lived near the number placed on the telegram, and, in fact, she lived within 2½ blocks of the drug store. If the telegram had been deliver-

ed at any time on the afternoon or evening of January 31, Mrs. Carver could have reached Temple in time to have attended her mother's funeral. She suffered great mental anguish on account of not being present at her mother's funeral, which she would have attended, had the telegram been promptly delivered. The evidence fails to show that Clark had any authority to receive telegrams for Mrs. Carver, and appellant had no information to that effect.

[1] The first, second, third, fourth, and fifth assignments of error question the sufficiency of the evidence to sustain the verdict and are overruled. Although the message was directed to 3711 Engelke street, it was the duty of appellant not only to seek to deliver it there, but when it ascertained that Mrs. Carver was not there, to make at least some effort to ascertain her whereabouts, by making due inquiry, and, failing to do so, a jury would be justified in finding that it was guilty of negligence. The message conveyed information of the gravest and most important character to Mrs. Carver, and yet no effort whatever was made to locate her or ascertain her place of residence, although appellant had been informed that she did not live at the address, but lived near there. As said by the Supreme Court in *Telegraph Co. v. Mitchell*, 91 Tex. 454, 44 S. W. 274, 40 L. R. A. 209, 66 Am. St. Rep. 906:

"The duty which the telegraph company owes to the addressee is personal, and cannot be discharged by making inquiry for the person to whose care the message may be sent, nor by applying to the place of business or residence of the addressee; but inquiry must be made for the person addressed, if the circumstances are such as to show that he may probably be found away from such place of business or residence. The place to which a message is sent is but a guide for the messenger, and does not determine the measure of his diligence."

Clark was not the agent of Mrs. Carver in receiving telegrams, and what others may have done in connection with telegrams could not affect her. Appellant was informed, when the message was delivered to it by Trammell, that she did not live at the address given, but near it. Appellant could not have acted on the custom to deliver messages at the drug store, because there is no testimony indicating that it had any knowledge of such custom. When Clark told appellant that he did not know Mrs. Carver and refused the message, it was put on notice that Mrs. Carver had not instructed Clark to act as her agent, and yet no effort was made to locate her. The number given was a guide for the messenger, and, with the additional information that the addressee lived in the vicinity, was sufficient upon which to base a finding of negligence, if no effort was made to find her. *Klopf v. W. U. Telegraph Co.*, 100 Tex. 540, 101 S. W. 1072; *W. U. Tel. Co. v. Houghton*, 82 Tex. 561, 17 S. W. 846, 15 L. R. A. 129, 27 Am. St. Rep.

918; Postal Telegraph Co. v. Prewitt, 199 S. W. 316.

[2] It is the claim of appellant that there was no testimony that the message was delivered to its agent, but that it was delivered to the agent of the Missouri, Kansas & Texas Railway Company. Trammell not only swore that the person to whom he delivered the message was the agent of the railway company, but also of appellant. It is singular, in view of the admission in the answer, that the message was delivered to it by Trammell and that it transmitted it and sent it to the street number indicated, that such a contention should be made. The contention is utterly without merit.

[3] The sixth, seventh, eighth, and ninth assignments of error complain of charges permitting the recovery of damages arising from both physical pain and mental anguish. The charges were fully authorized by Texas decisions, whatever may be the rule in inferior federal courts and inferior courts of New York and Indiana. Western Union Telegraph Co. v. Cooper, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772, and cases cited; W. U. Telegraph Co. v. Finfrock, 191 S. W. 181. The authorities cited do not sustain the contentions of appellant. Both mental and physical suffering were the natural result from conduct causing a daughter to be absent from the funeral of her mother, and such damages must have been in contemplation of the parties when the message was sent.

The tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, and seventeenth assignments of error are overruled. The message was not delivered to any one until the next day after it was sent, and then was delivered to a person not authorized to receive it, and appellant knew that it had no such authority. So far as the matter contained in the requested issues were raised by the facts, they were clearly submitted by the court and in the special charge requested by appellant and given.

[4] There was not one particle of testimony to show that J. R. Clark was the agent of Mrs. Carver for any purpose, and if it was a conclusion for both Mrs. Carver and Clark to swear that he was not her agent, such conclusion could not have damaged appellant. It would seem reasonable however, that it would be permissible for a witness who did not know a certain person, and never held any communication with him or authorized any one else to do so, to state that he was not her agent. Under the facts the court would have been justified in instructing the jury that Mrs. Carver had never authorized Clark to receive telegrams for her. The eighteenth, nineteenth, twentieth, and twenty-first assignments of error are overruled.

Appellant admitted that the message was delivered to it by Trammell, and objections to Trammell stating that he had delivered the

message to its agent, are trivial and without merit. Appellant not only admitted that the message was delivered to it, but that it had transmitted it with diligence and had sought to deliver it. The twenty-second, twenty-third, twenty-fourth, and twenty-fifth assignments of error are overruled.

The twenty-sixth assignment of error is overruled.

[5] The verdict is not excessive.

The judgment is affirmed.

FT. SMITH COUCH & BEDDING CO. v. GEORGE. (No. 6218.)

(Court of Civil Appeals of Texas. Austin. May 19, 1920.)

1. Appeal and error \S 731(1) — Assignment of error that verdict is contrary to law too general.

Assignment of error, complaining of trial court's refusal to set aside the verdict and judgment and to grant a new trial "because the verdict of the jury is contrary to the law and to the evidence," without specially pointing out the particular ruling complained of, *held* too general to be considered.

2. Contracts \S 10(4)—Contract giving salesman exclusive right to sell goods in certain territory held unilateral.

Contract giving defendant the exclusive right to act as plaintiff's salesman in a certain territory *held* unilateral and unenforceable, in absence of allegation that defendant bound himself to buy any amount of goods from plaintiff, or that contract was for a definite time and could not be abandoned at will by defendant.

3. Principal and agent \S 41—Seller not liable for refusal to sell to buyer with exclusive selling rights, where unable to pay for goods.

Seller, having given buyer the exclusive right to sell its goods in certain territory, would not be liable for damages for refusing to sell its goods to buyer, and for selling to his competitors, if his financial condition was such that he was unable to pay for such goods under the terms of the contract.

4. Justices of the peace \S 45 — Amount in controversy under plea in reconvention determined by considering each claim separately.

In ascertaining whether the justice's court has jurisdiction of a plea of reconvention, the amount in controversy is determined by considering plaintiff's claim and defendant's claim separately, and not by adding one to the other.

5. Set-off and counterclaim \S 35(1)—Plea in reconvention for unliquidated damages as against a claim for liquidated amount held proper.

In seller's action against buyer on a verified account, the court had jurisdiction of buyer's plea in reconvention for unliquidated damages for breach of contract giving buyer ex-

clusive selling rights in certain territory, the amount pleaded and set off in such case being founded on a cause of action arising out of, incident to, or connected with seller's cause of action.

Appeal from Bell County Court; M. B. Blair, Judge.

Suit by the Ft. Smith Couch & Bedding Company against T. B. George, in which the defendant interposed a plea in reconvention. From the judgment rendered, plaintiff appeals. Reversed and remanded.

Clem C. Countess, of Belton, for appellant.

BRADY, J. Appellant brought this suit against appellee in a justice's court, to recover the sum of \$155 upon a verified account. Appellee filed a sworn denial of the account, and by plea in reconvention asked judgment for damages against appellant in the sum of \$175 for breach of contract. The jury in the justice's court returned a verdict for appellant for \$150, and against appellee on his plea in reconvention. Upon appeal to the county court, the jury, without any written charge from the court, returned a verdict for appellant for the full amount of its demand, and for appellee for the full amount of his claim, and from the judgment entered thereon appellant has prosecuted this appeal.

Opinion.

[1] The first assignment of error complains of the refusal of the trial court to set aside the verdict and judgment, and to grant a new trial, "because the verdict of the jury is contrary to the law and to the evidence." This assignment is the first ground in the motion for new trial, and, in effect, is no more than a claim that the trial court erred in not granting a new trial, without specifically pointing out the particular ruling complained of in the court below or here. Under the most liberal interpretation of the rules, we think this assignment must be held bad, because of its generality. Therefore we decline to consider it.

[2] The remaining assignments attack the ruling of the trial court in refusing to sustain certain special exceptions to appellee's plea in reconvention. One of these exceptions raised the point that the contract alleged as the basis of the plea of reconvention was unilateral and void for the want of mutuality. After careful consideration of the question, we have concluded that the assignment presenting this question should be sustained, and the cause reversed for such error.

The contract as pleaded was an agreement that appellee should act as appellant's exclusive salesman in the territory of Temple, Tex., and appellant agreed that no other store or firm should be given the right to handle its goods in the town of Temple. It was not alleged that appellee in any way bound himself to buy any amount of goods from appellant,

nor for any definite time to abide by the terms of the contract, which could be abandoned at will by appellee. The contract seems to have been clearly unilateral and unenforceable. *Railway v. Mitchell*, 38 Tex. 85; *Tyler Ice Co. v. Coupland*, 44 Tex. Civ. App. 383, 99 S. W. 133; *Railway v. Matthews*, 64 Ark. 398, 42 S. W. 902, 39 L. R. A. 467; *Mutual Film Corporation v. Morris*, 184 S. W. 1060.

Since we have decided to remand the case for another trial, it is proper to indicate our views upon the remaining questions presented in the brief.

[3] We are of the opinion that, if an enforceable contract should be alleged, nevertheless appellant would not be liable for damages for refusing to sell appellee its goods, and in selling to his competitors, if the financial condition of appellee was such that he was unable to pay for same. Assuming the validity and binding force of the contract, appellant would not be required to sell and deliver its goods to appellee, if he was unable to pay for the same under the terms of the contract.

We are also of the opinion that the evidence offered to show appellee's damages for breach of the contract was too indefinite, speculative, and uncertain to sustain a verdict. The testimony on this point resolves itself into almost a mere guess or conjecture as to any loss sustained by appellee.

We cannot agree with the contention of appellant that the averments and proof do not show an agreement between appellant and appellee, in that it appears to have been made with the agent of appellant, and without its knowledge or authority. The pleading alleges a contract with appellant, and there is evidence tending to show that it was made in behalf of appellant, and within the actual or apparent authority of the agent.

[4] As to the claim that the plea of reconvention should have been stricken out, because the amount in controversy was not within the jurisdiction of the justice's court, we overrule this contention. The amount claimed by appellant was within the jurisdiction of the justice's court, as was also the amount claimed by appellee in his plea in reconvention. In substance, appellee pleaded a counterclaim, independently of appellant's demand, and the amount in controversy is determined by considering each claim separately, and not by adding the same together, as contended by appellant. Appellee asked for judgment only for the amount of his profits or counterclaim, in the sum of \$175, which was within the jurisdiction of the justice's court. *Crosby v. Crosby*, 92 Tex. 441, 49 S. W. 359; *Tucker v. Williams*, 56 S. W. 585.

[5] We also hold that the court did not err in overruling the special exception to appellee's plea in reconvention, because it was sought to set up and recover on a claim for unliquidated damages against a claim for a liquidated amount. Our statute permits an unliquidated claim to be set up as a counter-

claim to a liquidated demand, where the amount pleaded in set-off is founded on a cause of action arising out of, incident to, or connected with the plaintiff's cause of action. We think the allegations and evidence adduced in support of the counterclaim show such a set-off.

We have not passed upon the question of the validity of the contract as affected by the anti-trust laws. The transactions in this case appear to be interstate in character, and would not seem to fall within the purview of or be controlled by the Texas statute. *Albertype Co. v. Gust Feist Co.*, 102 Tex. 219, 114 S. W. 791. The effect of the federal anti-trust law, or the principles of the common law, upon this contract, have not been determined by us, as the questions have not been raised in the brief, and because of the meager pleadings in the trial courts.

We believe we have sufficiently indicated our views of the law upon the probable issues in another trial, and for the error indicated the judgment will be reversed, and the cause remanded.

Reversed and remanded.

KOHLER et al. v. UNITED IRR. CO. (No. 6394.)

(Court of Civil Appeals of Texas. San Antonio. May 12, 1920.)

1. Waters and water courses \S 257(1)—Remedy for excessive rates by water engineers is by action and not appeal.

Landowners entitled to water rights under contract with irrigation company had no right to appeal from decision of board of water engineers fixing rates, to district court of county in which the irrigation system was located, Acts 35th Leg. (1917) c. 88, § 62 (*Vernon's Ann. Civ. St. Supp.* 1918, art. 5002i) having no application to such an appeal, in view of sections 56 and 59 (sections 5002c, 5002f); their remedy, under section 61a, as added by Acts 35th Leg. 4th Called Sess. (1918) c. 55, being a suit in district court of Travis county to set aside the rates so fixed.

2. Appeal and error \S 170(2)—Parties having invoked act in petition cannot assert unconstitutionality on appeal.

Parties who not only failed to plead the unconstitutionality of an act, but invoked the benefit of act by their petition, cannot complain of unconstitutionality of the act for first time on appeal.

Appeal from District Court, Hidalgo County; V. W. Taylor, Judge.

Proceedings before Board of Water Engineers of the State of Texas by George W. Kohler and others against the United Irrigation Company. From decision of the board, petitioners appealed to district court. Judgment of dismissal, and petitioners appeal.

Affirmed.

Seabury & George, of Brownsville, and George P. Brown, of Edinburg, for appellants.

D. F. Strickland, of Mission, Glasscock, McDaniel & Bounds, of McAllen, and Andrews, Streetman, Logue & Mobley, of Houston, for appellee.

MOURSUND, J. On April 14, 1919, George W. Kohler and many others filed a petition in the district court of Hidalgo county, and that the petitioners owned land, company. They alleged that the said company owned an irrigation system in Hidalgo county, and that the petitioners owned land, contiguous and adjacent to the canals and laterals, and had for several years irrigated with water from said system; that in addition they own and hold rights under certain water contracts, providing for compensation to the company by means of a flat rate, to be collected from all who hold contracts, without regard to whether water is taken or not, and a water rate, to be paid for water used. It was further alleged that these rates were to be fixed by the company for a period of five years or less, subject, to change by the company at the end of any fiscal year; that all rates so fixed were to be just and reasonable, without discrimination, and figured on a basis stated in the contract and set out in the petition; that the contracts further provided that the flat rate for the period of five years from and after October 1, 1916, was never to exceed the sum of \$4 per acre for a fiscal year, and provided a classification of the lands to be irrigated. It was then alleged that the company had from time to time fixed rates, and that prior to October 1, 1918, a flat rate of \$4 and a water rate of \$2 per acre had been in force; that about August 31, 1918, the company promulgated a flat rate of \$5 per annum and a water rate of \$3 per acre for irrigation, and in connection with such changes promulgated a new set of rules and regulations, and proposed to enforce all of the same from and after October 1, 1918, the beginning of a new fiscal year; that afterwards the company fixed the water rate at \$3 per 90 minutes per head of water; that on or about September 30, 1918, the petitioners, with others, acting through a voluntary association formed by them under the name of the "Water Users Association" of Mission and Sharyland presented to the board of water engineers of the state of Texas, their petition, setting up their rights to water and attacking the rates thus promulgated as unjust, unreasonable, and discriminatory, and also attacking the rules and regulations, and praying for a modification and change of such rates and rules. In this connection it was alleged and shown that

all requirements of the statute necessary to vest said board with jurisdiction to hear and determine the matters were complied with. It was then alleged that the cause was set for hearing by said board, and continued to November 7, 1918, and at said time the individual petitioners made themselves parties; that before the completion of the hearing by agreement that part of the complaint relating to the flat rate was withdrawn, this agreement embracing a waiver by the company of any right or claim it might have to an increase of the flat rate at said time; that on February 18, 1919, the board rendered its decision, fixing the water rate at \$4 per acre per irrigation, and providing that the volume of water that could be taken in one irrigation was four inches per acre, and the time limit for each irrigation should be 90 minutes. It was then alleged in detail that in arriving at such decision the board erroneously took into consideration items covered by the flat rate, concerning which there was no controversy, and that the rate fixed was excessive, unjust, and unreasonable for other reasons based upon valuation and income; also that the restrictions relating to delivery of water were unreasonable and impracticable, and their effect was to indirectly grant a further increase of 50 per cent. in the rate. After stating fully the grounds relied on to show the unreasonableness of the rate and rules, the petition recites that the plaintiffs now appeal from said decision, filing the petition as their notice in writing of such appeal, and tendering therewith their appeal bond, and praying that after due notice and proceedings as required by law the court do try *de novo* the case here submitted, and upon final hearing do grant petitioners a judgment "reversing, setting aside, and for naught holding" the said decision and order of the board of water engineers, and fixing and determining a fair, just, and equitable water rate, "based upon the actual and necessary cost of operating said irrigation system and of procuring and delivering the water, as required by the terms of said water contract, without injecting therein any other considerations, and without attaching thereto any new or unreasonable conditions of water service which would in effect increase such rate." They then prayed specifically for a water rate "for the fiscal year commenced October 1, 1918, and thereafter, until set aside in a proper and legal way of \$1.50 per acre per irrigation, for a refund of all moneys in excess of such proper water rate as they may show themselves entitled to upon the trial," for costs and general relief.

The company filed a plea in abatement and motion to dismiss, based on the theory that the appeal must be taken to the district court of Travis county, and that in addition the bond was defective. This plea was sustained, and the cause dismissed.

There can be no doubt that the petition

was drawn upon the theory that an appeal was authorized to be taken from the order or decision of the board to the district court of Hidalgo county. The act of the Thirty-Fifth Legislature, chapter 88, regular session (Vernon's Ann. Civ. St. Supp. 1918, arts. 4991-5011½w), contains provisions authorizing appeals in certain cases. The petitioners rely on section 62 of said act (section 5002i) for the right of appeal, but when that section is considered in connection with sections 59 and 56 (sections 5002f, 5002c) it becomes evident that the decision from which the appeal was permitted was one from a hearing upon a petition by persons who have no contract for water, but by reason of being owners of a possessory right to land adjoining or contiguous to the canals are entitled to water not contracted to others. No such decision by the board is involved in this case.

{1} While the caption of said act of 1917 contains no provision evidencing an intention to authorize the board to fix and determine rates upon such an application, or any other application, it appears that the caption of the act of 1913 (Gammel's Laws, vol. 16, p. 358) shows that at the time the provisions embraced in sections 56 and 59 were originally enacted, the Legislature regarded them as conferring authority, not only to require the delivery of water not contracted to others, but also to establish and regulate the rates to govern in such cases. In the case of *Knight v. Oldham*, 210 S. W. 567, the court so construed the provision contained in the act of 1913 (Laws 1913, c. 171 [Vernon's Sayles' Ann. Civ. St. 1914, art. 5002e]), which was copied into the act of 1917 as section 59. The act of 1917 repealed the act of 1913. The same Legislature which passed the act of 1917 during its fourth called session passed an act amending the said act of 1917, known as chapter 88, by adding certain sections. See chapter 55, Acts 4th Called Sess. 35th Leg. In the emergency clause it was recited that—

"There is now no law authorizing the fixing of rates for furnishing water and permitting furnishers of water to apply for a review and revision of orders, rates and decrees."

This act specifically conferred the power and authority upon the board of water engineers to fix reasonable rates, and provided that any person at interest may file a petition in a district court of Travis county against the board as defendant, setting forth the objections to the decision made or rule or rate promulgated by the board. In drawing the bill the language of Rev. St. 1911, arts. 6657, 6658, relation to attacks upon rates and rules of the Railroad Commission, was used in so far as it could be made applicable to the fixing of water rates, rules, etc. Under the terms of the act the burden is placed upon the plaintiff to show, by clear and satisfactory evidence, that the rates, regulations, or orders complained of are unreason-

able and unjust to him. By inserting in the act of 1917 (chapter 88) the provisions of said act passed at the special session, at the places where by reason of section number they naturally belong, some doubt is created whether the provision for an appeal contained in section 62 was made applicable to a decision establishing rates made under the provision inserted as section 61a. However, it is inconceivable that the Legislature actually intended to make the right of appeal provided for in section 62 apply to a decision under section 61a, for if it did so a peculiar situation would be brought about. By appealing, instead of suing the board in the district court of Travis county, the provision concerning the burden of proof could be evaded. We have arrived at the conclusion, from a consideration of the several statutes, that the Legislature intended to make the rates and rules promulgated by the board of water engineers conclusive unless set aside in an action brought in a district court of Travis county, and that the statutes can, and therefore must, be construed so as to effectuate such intention. It, therefore, follows that we also conclude that the statutes do not bestow any right to appeal to the district court of Hidalgo county from the decision of the board of water engineers, of which complaint was made in the petition.

[2] Appellants, however, as their first assignment of error, present another theory upon which they hope to sustain the jurisdiction of the district court of Hidalgo county, and that is that the petition should be held sufficient as an original suit, and, being brought in the district court of the domicile of the appellee, the court should have tried the case. This theory is presented apparently as an afterthought, for the petition does not purport to present in the alternative an original suit, nor is a request made for relief by injunction against the enforcement of the rates, and it is evident that no cause of action entitling the petitioners to have the rates attacked by them adjudged unreasonable by the district court of Hidalgo county can be stated in a petition except upon the theory that the act of the Legislature, bestowing upon the board of water engineers the power and duty of fixing and establishing rates, is void. The appellants recognize this fact in their brief, and therein attack the act as in violation of the constitutional inhibition against the delegation of legislative power, but are in the embarrassing position, as it appears to us, of not only having failed to plead that said act was unconstitutional, but, on the contrary, of having shown by their petition that they invoked the benefit of said act, and that the situation now complained of was brought about because the board, although entertaining their petition and affording them a trial, failed to render a decision such as was desired by them. Having used

the provision of the statute to procure a decision or order fixing rates, the plaintiffs are precluded from contending that such provision is unconstitutional, if indeed they can be heard to so contend for the first time on appeal. Cooley on Constitutional Limitations (7th Ed.) pp. 251, 252; 12 Corpus Juris, p. 769, § 190, Section 199, p. 773; Wall v. Parrot, etc., 244 U. S. 407, 37 Sup. Ct. 609, 61 L. Ed. 1229; Great Falls Mfg. Co. v. Garland, 124 U. S. 581, 8 Sup. Ct. 631, 31 L. Ed. 527; Daniels v. Tearney, 102 U. S. 415, 26 L. Ed. 187; Lewis v. Chamberlain, 69 Or. 476, 139 Pac. 571; State v. Boston & Maine R. R., 75 N. H. 327, 74 Atl. 542; Regan v. Dickmann, (Mo.) 207 S. W. 792.

In view of this conclusion, it is unnecessary to consider the question of the constitutionality of the statute.

It is also contended in the brief that the decision of the board had the effect of impairing the obligation of plaintiff's contracts, and to deprive them of their property without due process of law. No such grounds of attack were pleaded, but, aside from this, as we have held that the statute authorizing the board to fix rates cannot be attacked by plaintiffs, it follows that the objections now under consideration could only be presented in a suit instituted in the court designated by the statute as the one in which the rates can be reviewed.

We conclude that the judgment dismissing the case should be affirmed.

MEYERS v. ABLES. (No. 6192.)

(Court of Civil Appeals of Texas. Austin.
April 28, 1920.)

Appeal and error \Rightarrow 1056(1)—Exclusion of evidence of cost and value of land held harmless to owner sued by broker.

In realty broker's action for commission, exclusion of evidence that value and cost of property was \$3,125, offered to show that he would not sell at \$2,500, with excess to broker as alleged, was harmless, where jury had before them undisputed evidence that owner was willing to sell at \$2,700.

Appeal from District Court, Falls County; Prentice Oltorf, Judge.

Suit by W. H. Ables against C. W. Meyers. From judgment for plaintiff, defendant appeals. Affirmed.

Spivey, Bartlett & Carter, of Marlin, for appellant.

E. M. Dodson, of Rosebud, for appellee.

BRADY, J. Appellee instituted this suit against appellant to recover commission on a land sale. The only issue involved was the

amount of commission the appellee was to receive for selling the property; it being his contention that he was to receive all that he sold the property for over and above \$2,500. Appellant's contention was that he agreed to pay plaintiff a 10 per cent. commission for effecting the sale. The property sold for \$3,250, and the suit was for \$750, less an indebtedness owing by appellee to appellant of about \$95.

The court submitted the case to a jury upon one special issue, namely, What compensation did the defendant agree to pay the plaintiff for procuring the purchaser or bringing about the sale of the property? The jury answered, "All money above \$2,500," and judgment was rendered accordingly for the plaintiff.

The only question arising upon this appeal is whether the trial court committed reversible error in refusing to allow appellant to prove that at the time he bought the property it had cost him \$3,125, and that it continued to be worth that sum, or more, until the sale in controversy; that he was not embarrassed financially or otherwise, and was not compelled to sell the property, for any reason, at a less sum than he had paid for it. This testimony was offered upon the theory that it was a circumstance tending to show the improbability that appellant ever made the contract as claimed by appellee, and as tending to show that appellant's version of the contract was true and appellee's untrue. The bill of exceptions was qualified by the trial court as follows:

"Defendant testified, without objection, that at the time he purchased the place he held a lien against it for \$1,800, and had to take up another lien against it of \$1,000, and his counsel argued the fact to the jury that the place had cost him \$2,800 for those items alone, which line of argument was not replied to in the closing argument of counsel for plaintiff."

The testimony is of doubtful admissibility, but appellant has cited authorities which tend to sustain the point that it was relevant for the purpose offered, under facts somewhat similar. However, we do not deem it necessary to decide the question. If it should be assumed that the testimony was admissible, and that the matter of its admission or rejection was not within the sound discretion of the trial court, we are

nevertheless of the opinion that his ruling does not present reversible error. We will briefly indicate our reasons for this conclusion.

Not only did appellee receive the benefit of the argument, based on his own testimony, referred to by the trial court in the qualification to the bill of exceptions, which showed that the property had cost appellant at least \$300 more than appellee claimed he had agreed to take for the property, but the undisputed evidence further shows that appellant first agreed to a sale of the property in question for the sum of \$3,000, and that he agreed to pay appellee 10 per cent. of that price for making the sale. This sale was not consummated, but the property was later sold for \$3,250. Thus it appears that the jury had before them evidence, not disputed by appellant, that he was willing to sell the property for \$2,700 net to him, which was at least \$425 less than its value and its cost to him, if he had been permitted to show that its cost and reasonable market value was \$3,125. Therefore, if the rejected testimony had been admitted, it would have been little or no evidence that he would not have made a contract by which he was to receive only \$2,500 net for the property, as contended by appellee. At least the evidence would have been of slight probative value, in view of the facts shown by other proof.

It is admitted in appellant's brief that, even where error has been committed through the exclusion of testimony which is relevant, material, and admissible, whether such error will require the reversal of a judgment depends upon the probable effect of such evidence upon the result of the trial, if it had been admitted. It is conceded that if it appears that the evidence, if admitted, could not properly have influenced the jury to render a different verdict, the exclusion of the evidence would not be material error. Tested by this standard, we are clearly of the opinion that it does appear that the exclusion of the evidence could not properly have had any effect upon the verdict of the jury, did not injure appellant, and that the same result would have been reached had the evidence been admitted.

No reversible error having been shown, the judgment is affirmed.

Affirmed.

GREEN et al. v. CHURCHWELL.
(No. 6129.)(Court of Civil Appeals of Texas. Austin.
April 7, 1920.)**1. Partition ⇨63(3)—Evidence held to make prima facie case in favor of daughter against widow.**

Proof by plaintiff in partition of a deed to her father, that the grantee was her father, that at the time of execution of the deed he was the husband of defendant, his widow, that he was dead, that plaintiff was his only child, and that defendant was his surviving wife, made a prima facie case for plaintiff entitling her to have half the land set aside to her.

2. Partition ⇨62 — Testimony of defendant widow that land was paid for by her inadmissible under general denial.

In suit for partition by a daughter against her father's widow, wherein general denial was pleaded, testimony of defendant widow that the lands in controversy were paid for with her separate means was improperly admitted.

3. Partition ⇨16—Suit based on theory of common title not disputed ownership.

A partition suit is based on the theory of a common title and not of disputed ownership.

4. Trespass to try title ⇨47(1) — Partition may be prayed for.

Partition of land may be prayed for in a suit of trespass to try title where it is alleged plaintiff owns an undivided interest in the land, and that defendant has ejected him and denied his right of possession, but is merely incidental to the main action, which is to try title.

5. Partition ⇨17(2)—Suit may be converted into trespass to try title.

A partition suit in ordinary form may be converted into trespass to try title by defendant's alleging right of possession in himself to all the land.

6. Partition ⇨62 — Allegation of ownership means legal ownership and must be established.

Plaintiff's allegation in a partition suit that he is the owner of the land means that he is the owner of the legal title, and he must introduce evidence to establish the fact.

7. Partition ⇨56—Plea of not guilty without place.

A plea of not guilty has no place in a partition suit.

8. Partition ⇨62—Plea of general denial requires plaintiff to prove only prima facie case.

A plea of general denial in a partition suit only puts plaintiff on proof of facts necessary to make a prima facie case.

9. Partition ⇨62—Proof of equitable title inadmissible for defendant widow under general denial.

A widow sued by a daughter for partition could not, under plea of general denial, show equitable title by proving the deed to her deceased husband offered in evidence by the

daughter was other than what it purported to be, or that it was made to her husband in trust for her own benefit.

10. Trespass to try title ⇨35(2)—Proof of equitable title in widow by deceased husband holding in trust for her inadmissible under general denial.

In trespass to try title by a decedent's daughter against his widow, wherein the latter pleaded a general denial, evidence of equitable title in the widow, showing that the deed to her deceased husband offered in evidence by plaintiff daughter was other than what it purported to be, or was made to the husband in trust for the widow's benefit, would not be admissible for her.

Appeal from District Court, San Saba County; W. M. Allison, Special Judge.

On motion for rehearing. Motion granted, judgment reversed, and cause remanded for new trial.

Walker & Burleson, of San Saba, for appellants.

Rector & Rector, of San Saba, for appellee.

JENKINS, J. [1] Appellant brought suit for partition of two tracts of land. The petition was in the form prescribed by article 6097, Revised Statutes. Appellant, to sustain her cause of action, introduced a deed to J. C. Churchwell, and proved that J. C. Churchwell was her father; that at the time of the execution of said deed he was the husband of defendant, Mrs. Lela Churchwell; that J. C. Churchwell was dead; that she was his only child; and that Mrs. Lela Churchwell was his surviving wife. This made a prima facie case, entitling her to have set aside to her one-half of the land in controversy.

Appellee was permitted, over objection of appellant, to offer evidence to the effect that the lands in controversy were paid for with her separate means.

Appellant objected to this testimony upon the ground that such fact was not pleaded, which objection was overruled. Such testimony was admitted, and upon special issue the jury found that the land in controversy was the separate property of appellee. Appellee pleaded only a general denial and a plea of not guilty.

[2-5] We are of the opinion that the court erred in admitting this testimony. A partition suit is based upon the theory of a common title, and not of disputed ownership. Sedgwick & Wait on Trial of Land Title, § 166. Partition of land may be prayed for in a suit of trespass to try title, where it is alleged that the plaintiff owns an undivided interest in the land, and that the defendant has ejected him therefrom, and denies his right of possession. McLean v. Moore, 145 S. W. 1074. But in such case partition is only an incident of the main action, which is

to try title. A partition suit in the ordinary form may be converted into a suit of trespass to try title by the defendant alleging title and right of possession in himself to the whole of the land in controversy. *De La Vega v. League*, 64 Tex. 205; *Banks v. Blake*, 143 S. W. 1184, 1185.

[8] In the absence of such allegation the part of defendant, a partition suit is not a suit to try title. It is true that the plaintiff must make out a prima facie case. His allegation that he is the owner of the land means that he is the owner of the legal title, and he must introduce evidence to establish this fact.

[7, 8] A plea of not guilty has no place in a partition suit. A plea of general denial only puts the plaintiff on proof of facts necessary to make a prima facie case. *Mims v. Mitchell*, 1 Tex. 447; *Townes on Pleading*, 365, 366, and 370.

[9] The only facts necessary for plaintiff herein to have made a prima facie case—that is, to show that she held the legal title to a one-half undivided interest in the land in controversy—was to prove the facts, which it is hereinbefore stated she did prove, and which were not denied by the defendant. The defendant could not, under a plea of general denial, show an equitable title in herself by proving that the deed offered in evidence was other than what it purported to be, or that it was, as defendant claimed, made to her husband in trust for her benefit. *Wiedner v. Hell*, 26 S. W. 781; *Griffin v. McKinney*, 25 Tex. Civ. App. 432, 62 S. W. 78.

[10] Not only is such evidence not admissible in a partition suit, but it would not be admissible in trespass to try title. In such case, if the defendant desires to prove equities outside of those disclosed by a deed, such equities must be pleaded. *Groesbeeck v. Crow*, 85 Tex. 200, 20 S. W. 49; *Matthews v. Moses*, 21 Tex. Civ. App. 494, 52 S. W. 113; *Rippetoe v. Dwyer*, 49 Tex. 506; *Robbins v. Hubbard*, 108 S. W. 775; *Peak v. Brinson*, 71 Tex. 310, 11 S. W. 269; *Moody v. Rowland*, 100 Tex. 370, 99 S. W. 1112.

The evidence introduced by appellee in this case was in the nature of confession and avoidance; that is to say, that she, in effect, said to the plaintiff, although everything that you have testified to is true, and these facts show a prima facie legal title in you, yet there are other facts which avoid the force of the deed under which you claim, and these other facts show an equitable title in me.

As shown by the authorities above cited, such facts could not be proven unless they were pleaded. The doctrine that defective pleadings may be cured by verdict and judgment, as stated in *Ellis v. Howard*, 35 Tex. Civ. App. 566, 80 S. W. 633, cited by appellee,

has no application to the facts of this case.

For the reason that the court erred in admitting testimony hereinbefore referred to we grant appellant's motion for rehearing, and reverse and remand this cause for a new trial.

KIRBY LUMBER CO. et al. v. CONN et al.
(No. 575.)

(Court of Civil Appeals of Texas. Beaumont.
May 14, 1920. Rehearing Denied
June 9, 1920.)

1. Trial \S 352(1)—Issue as to adverse possession held not erroneous.

An issue, "Do you believe from the evidence that the plaintiff O. has been in peaceful and adverse possession of the land described in plaintiff's petition for a period of 10 years next after the year 1896?" was not erroneous, as limiting the jury in their answer to the 10 years immediately following 1896.

2. Adverse possession \S 44 — Adverse occupancy must be for consecutive period of years.

In order to gain title by adverse possession, occupancy must be for a consecutive period of the required number of years.

3. Adverse possession \S 108—Necessity for designation on ground of land claimed.

As between the record owner and a limitation claimant, the latter cannot claim a specific 160 acres by actual possession for 10 years of less than 160 acres, unless the 160 acres so claimed, has been definitely designated on the ground for 10 years before the institution of the suit, but the limitation claimant can avoid such rule by showing that the specific 160 acres is a fair partition as between him and the record owner.

4. Tenancy in common \S 55(1)—Maintainable by one joint tenant against trespasser.

Since a limitation claimant of an undefined part of the land of another is a joint tenant with the record owner, the limitation claimant can maintain trespass to try title for a specific part of the land against third persons, who showed no title, although he has not occupied all of such land, as there can be no partition, except as between owners.

5. Adverse possession \S 57—Adverse occupancy for 10 years held sustained by evidence.

In an action by one claiming land by adverse possession, evidence held to sustain a finding that plaintiff held the land as described in his petition for a period of 10 years.

Appeal from District Court, Newton County; W. T. Davis, Judge.

Action by Mrs. S. N. Conn and others against the Kirby Lumber Company and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Andrews, Streetman, Logue & Mobley, of Houston, for appellants.

Warren & Conn, of Houston, for appellees.

WALKER, J. This action was brought in the usual form of trespass to try title by Charles Levias and wife, Ella Levias, and Mrs. S. N. Conn, as sole devisee and independent executrix of the estate of her deceased husband, R. C. Conn, against John H. Kirby and the Kirby Lumber Company. Levias and wife alleged that they were owners of 160 acres of land on the James Gray survey, in Newton county, Texas, describing it in their petition by metes and bounds, basing their claim on the statute of limitation of 10 years. Mrs. Conn held under Levias and wife, and claimed the timber on the land. Defendants answered by general demurrer and plea of not guilty, and the 3, 5, and 10 year statutes of limitation.

The case was submitted to the jury on the following issue:

"Do you believe, from the evidence, that the plaintiff Charles Levias has been in peaceful and adverse possession of the land described in plaintiff's petition for a period of 10 years next after the year 1896?"

—to which the jury answered "Yes." In connection with this issue the court submitted the statute of 10 years' limitation, and defined "peaceable possession" and "adverse possession." On this verdict judgment was rendered for the plaintiffs, from which judgment the defendants have appealed.

Under all their assignments of error, appellants raise the issue that there was no evidence that Charles Levias had had peaceable and adverse possession of the specific 160 acres of land described in the petition for 10 years next after the year 1896. The testimony of Levias is that he entered upon the James Gray survey in 1895, and raised a crop on it, and that he was on this survey from that date until this suit was filed in 1917, cultivating, using, and enjoying the same and claiming 160 acres of land; that he built his house on it during the year 1897, and lived on it continuously from that time until this suit was instituted in December, 1917. In 1907 A. L. Shaw surveyed for Levias and wife 160 acres of land out of the James Gray survey, so as to include their improvements. Prior to this time Levias had been claiming an undivided 160 acres of land. After the survey he claimed to his marked boundaries. The land as surveyed by Shaw was the land described in plaintiffs' petition. In 1908 Levias and wife, by their warranty deed, conveyed to the said Shaw the east one-half of the land for a recited consideration of \$125 cash, but in fact no consideration was paid. Shaw was employed by Levias to clear up his title, and agreed to give him one-half of the land for his services. At that time Shaw was not an attorney, and after consulting with competent counsel, he advised Levias that it would be best to take no action to clear up the title, but to wait until suit was brought against him. Shaw took no further steps in

the matter. Afterwards R. C. Conn bought the timber on the entire 160 acres from Levias and wife, and then paid Shaw about \$300 for a quitclaim deed to his interest in the 160 acres. No line was ever run between the east and west halves. The defendants showed no title in themselves.

[1, 2] In construing the issue submitted to the jury, appellants contend that the court limited them in their answer to the 10 years immediately following 1896; that is to say, the years 1897 to 1906, inclusive. We do not so construe the charge. In answering this issue, the jury were required to consider the occupancy of Levias from January 1, 1897, until the institution of this suit in December, 1917, and any consecutive period of occupancy for 10 years during that period will sustain the verdict of the jury. Appellants' assignments require us to examine the evidence to see if this verdict can be sustained. No question is made but what Levias lived on this land from 1897 until 1917, and that he claimed 160 acres during all this time; but appellants contend that the 10 years' occupancy from 1897 to 1907 cannot sustain a verdict to the specific land surveyed in 1907, citing *Bering v. Ashley*, 30 S. W. 838; *L. & T. Lbr. Co. v. Kennedy*, 103 Tex. 297, 126 S. W. 1110; *L. & T. Lbr. Co. v. Stewart*, 61 Tex. Civ. App. 255, 130 S. W. 199; *Wickizer v. Williams*, 173 S. W. 288, 1162; *Patterson v. Bryant*, 191 S. W. 771; *Dowdell v. McCardell*, 193 S. W. 182; *Lockin v. Johnson*, 202 S. W. 168.

[3] By these authorities it is now settled, beyond dispute, that, as between the record owner and a limitation claimant, the latter cannot claim a specific 160 acres of land by actual possession for 10 years of less than 160 acres, unless the 160 acres so claimed, including the improvements, has been definitely designated on the ground for 10 years before the institution of the suit. To avoid this rule, a limitation claimant must show, by pleading and proof, that the specific 160 acres is a fair partition as between him and the record owner. In this case, while the testimony would sustain such a finding, the issue was not raised by plaintiffs' pleadings.

[4] There can be no partition, except as between the owners. In this case the defendants failed to show any title in themselves. As the plaintiffs were joint tenants with the record owners of the balance of the survey, they could maintain this action to this specific 160 acres as against the defendants, who showed no title in themselves. *Hill v. Smith*, 6 Tex. Civ. App. 312, 25 S. W. 1079; *Padgett v. Gullmartin*, 106 Tex. 551, 172 S. W. 1101.

[5] As we construe the evidence in this record, it fully sustains a finding that plaintiffs held the land as described in their petition for a period of 10 years. As shown by the testimony of Levias and his wife, Ella, something like 25 or 30 acres was under fence.

As shown above, no dividing line was ever run between the east and west halves. Ella Levias thus testified as to the location of the improvements on this 160 acres:

"As near as I can come to it, my house and field are somewhere close to the center of this 160 acres."

By this testimony Ella Levias raised the issue as to the location of the improvements on the 160 acres of land. If these improvements were about the center, then a portion of the cleared land must have been on the east half. This being so, the possession of Levias and wife was not disturbed nor broken by the execution of the deed to A. L. Shaw. It is true that Mr. Shaw testified:

"Ella Levias and Charles Levias by that deed (referring to the deed executed to him by Charles and Ella Levias) conveyed to me the east half of that 160 acres that I surveyed out. Their improvements were on the west portion of the 160 acres."

It is not shown by any statement made by appellants that Shaw was ever on this land after he surveyed it in 1907, more than 12 years before his testimony was given in this case. As reflected by this record, it appears that Ella Levias, though a negress, was an intelligent witness, and was thoroughly familiar with the boundaries of her land. We believe that her testimony sustains the verdict of the jury.

We have examined all the assignments raised by appellants, and, as we understand them, what we have said here disposes of all the legal propositions raised.

Finding no error in this record, the judgment of the trial court is in all things affirmed.

SMITH v. COBURN et al. (No. 548.)

(Court of Civil Appeals of Texas. Beaumont. Feb. 18, 1920. On Rehearing, May 25, 1920.)

1. Appeal and error \S 1011(1)—Court finding on competent testimony not disturbed.

A finding by the trial court, sustained by competent testimony, will not be disturbed though there was sufficient evidence to justify a finding to the contrary.

2. Estoppel \S 118—Evidence held to show that claimant did not know property was included in mortgage.

In a suit to foreclose a mortgage lien, where part of the property was claimed by another, evidence by the claimant that he did not know his property was included in the mortgage, when it was executed in his presence, held sufficient to sustain a finding that he did not consent to the mortgage so as to be estopped to claim the property.

3. Estoppel \S 94(1)—Recording chattel mortgage does not estop one not a party and ignorant of its contents.

The filing of a chattel mortgage in county records does not estop one who had no knowledge of its contents and was not a party to it from claiming the property as his own.

4. Chattel mortgages \S 48 — Description of crop held too indefinite.

A description in chattel mortgage of a crop which does not mention the year in which it was to be raised, nor specify the land on which it was to be grown, is too indefinite to cover the particular crop without proof of intention of the parties to specify the crop.

5. Appeal and error \S 877(2)—Plaintiff cannot complain of judgment for one defendant against another.

Where plaintiff appellant has no interest in a judgment rendered by one defendant against another, and neither defendant complains of that judgment, plaintiff's assignments of error attacking it will be overruled.

6. Chattel mortgages \S 275—Chattel mortgagor not necessary party to issue between mortgagee and adverse claimant.

Where the evidence showed that a chattel mortgagor had no interest in the crop covered by the mortgage, he is not a necessary party in foreclosure suit to issues raised by claimants of the crop as against the mortgagee who had seized it.

7. New trial \S 102(1)—Lack of diligence to procure evidence warrants denial.

A new trial for newly discovered evidence was properly denied where the suit had been pending nearly three years, the witnesses were personally acquainted with plaintiff and his attorney, and plaintiff wholly failed to show diligence in procuring their attendance.

On Rehearing.

8. Evidence \S 601(4)—Proof that tort-feasor bought crop as a certain grade held to warrant finding of grade.

Proof that one who converted a crop of cotton to his own use by seizing it under a chattel mortgage executed by one not the owner, bought it on the basis of middling lint cotton, and resold it so that the owner had no opportunity to establish the grade, is sufficient to warrant a finding that the cotton was of that grade where the tort-feasor made no proof that it was of a lesser grade.

9. Evidence \S 18—Court judicially knows value of cotton depends on its grade.

The Court of Civil Appeals, as a matter of common knowledge, knows that cotton marketed in Texas in any year differs in grade, and that its value materially depends upon its grade.

10. Appeal and error \S 740(2)—Assignment as to finding held multifarious.

An assignment that the court erred in finding that the cotton replevied was middling lint cotton, and in fixing the value thereof at stated price at the time of the trial without de-

ducting the expenses of marketing, is multifarious, under Courts of Civil Appeals rules 24, 25 (142 S. W. xii), apparently stating three different errors in one assignment.

11. Appeal and error \S 742(6)—Assignment not supported by proposition will not be considered.

An assignment of error to the fixing the value of replevied cotton without deducting the expenses of marketing is not in itself a proposition, and where it is not supported by a proposition of law it cannot be considered.

Appeal from Montgomery County Court;
A. W. Morris, Jr., Judge.

Action by C. T. Smith against T. H. Coburn and others. Judgment for plaintiff against defendant Coburn, but in favor of the other defendants, for property claimed by them, and plaintiff appeals. Affirmed.

McCall & Crawford, of Conroe, for appellant.

F. McDonald, of Montgomery, for appellees.

WALKER, J. This suit was instituted in the county court of Montgomery county by appellant, C. T. Smith, against T. H. Coburn, on two promissory notes of \$50 each, with interest and attorney's fees, and to foreclose a chattel mortgage lien on a mule, horse, wagon and cows, and on the corn and cotton raised by Coburn and his help on a farm in Montgomery county, Tex. He also made Charley Johnson and G. M. Scott defendants, alleging that they were asserting some sort of claim to this property. Plaintiff sued out a writ of sequestration, and seized the corn and cotton claimed under the mortgage. Coburn was served by publication, and the trial judge appointed counsel to represent him. Defendants Scott and Johnson answered to the effect, first, that they had no interest in any of the property claimed under the mortgage, except the cotton and corn and cotton seed; second, that the corn, cotton, and cotton seed belonged to Johnson, and that Coburn had no interest in it; third, that, in the beginning of the year 1916, Coburn and Johnson agreed to cultivate the crop together, and that Coburn executed a rent note to Scott, who owned the land, and that Johnson agreed that his part of the crop should also be liable for the rent; that Coburn left the country, did nothing towards cultivating the crop, and did not carry out his part of the contract, and that Johnson cultivated the crop by himself, and therefore Coburn had no interest in it. Johnson also prayed for the possession of his crops seized under the writ of sequestration, or the value of same, and for damages for the wrongful levy of the writ. Scott further pleaded a landlord's lien against Johnson's crop, asking for foreclosure of same, and for judgment against Johnson on his rent note, and for the advances made him.

Plaintiff filed a supplemental petition, alleging that Johnson knew that Coburn had executed the mortgage on the crops, was present when the mortgage was executed, claimed no interest in the crops, held himself out as being a hired hand to Coburn, and that Johnson was now estopped to assert any personal interest in the crops; that, if he did not know of the existence of the mortgage as a fact, plaintiff duly filed the mortgage in the proper records of Montgomery county, and that Johnson was given constructive notice of the mortgage and of its contents, and was therefore estopped.

The case was tried by the court without a jury, and judgment was rendered for plaintiff against Coburn for the amount of his debt, with a foreclosure of his lien on all of the property except the crops, and on this issue judgment was against plaintiff. Judgment was for Scott for the amount of his debt against Johnson, and for a foreclosure of landlord's lien on the Johnson crop, and for Johnson for the title and possession of the cotton and corn and cotton seed seized under the writ of sequestration, or their value. To this judgment plaintiff duly excepted, and has brought the case here for revision.

Appellant has filed a very able brief in this case, advancing 25 assignments of error, and as abstract legal questions most of these propositions are sound, but, as we view this case, it is determined by the trial court's conclusions of fact. By proper assignments the correctness of these are questioned by appellant. We will discuss the vital issues without special reference to the assignments.

[1] First. The court found that this crop belonged to Johnson, and that Coburn had no interest in it. There is abundant evidence in the record to sustain this finding. It is true the court could have found contrary to this, but being sustained by competent testimony, we will not disturb this finding.

Coburn and Johnson agreed to work this crop together, Coburn to make ties to pay expenses, and Johnson to work the crop; but Coburn left the county, and in no way complied with his part of the contract. Some of the witnesses testified that he worked on the crop just one-half day.

[2] Second. The court found that Johnson was not estopped to assert a claim to this property. Plaintiff and his witnesses testified that Johnson and his wife were present when Coburn executed the mortgage given to secure the first note, and represented himself as being Coburn's hired hand; made no claim to any interest in the crop. This was denied by Johnson. He said he knew that the plaintiff and Coburn were fixing up some kind of papers, but he thought it was a mortgage on Coburn's ties, and that he had no intimation that it was a mortgage on the crops, and did not learn this fact until long afterwards.

This testimony raises an issue of fact. The trial court heard the witnesses, saw their manner of testifying, and we cannot say that he was wrong in making this finding.

[3] The fact that this mortgage was duly filed in the chattel mortgage records of Montgomery county, in view of the fact that Johnson had no actual knowledge of its contents, could not work an estoppel against him.

Third. By proper assignments appellees raise the question that plaintiff's mortgages did not include this crop. The first mortgage is as follows:

"* * * And for such sums — hereby bargain, sell, and convey, and by these presents do bargain, sell, and convey, unto the said C. T. Smith, his heirs and assigns, the following described property, to wit: [Here follows description of the cows]; and on cotton, corn, and other products raised by — on my own place or other places in Montgomery county, Texas, or cultivated by me or my help during the year 191—, and all rental interest that may be due — from renters on said place or places above mentioned, and on my claims, interest, and liens as landlord for advances made to my tenants or otherwise."

The second mortgage, after describing the cattle, says:

"All the cotton, corn, and other products raised by — on the — place or other places in Montgomery county, Texas, and cultivated by — during the year 191—, and all rental interest that may be due — from renters on said place or places above mentioned, and all my claims, interest, and liens as landlord for advances made to my tenants or otherwise."

[4] Nowhere is mentioned, in either of these mortgages, the year in which the crop was to be raised, and the second mortgage is entirely too indefinite to include any particular place in Montgomery county. This cross-assignment is well taken.

As we have sustained the trial court in finding that Coburn had no interest in this property, and that Johnson was not estopped, and having found that these mortgages did not include the crops for 1916, it must follow that the trial court was correct in holding that appellant was not entitled to a foreclosure of the mortgage lien on the cotton and corn seized under the sequestration.

The trial court was not in error in fixing the grade of this cotton at middling. The plaintiff bought the cotton, after it was seized under the writ of sequestration, and testified that he bought it as middling. The same line of testimony sustains the court in finding the market value of the cotton seed.

[5] As appellant has no interest in the judgment entered by the court in favor of Scott against Johnson, and as neither of them complains of the judgment, it being entered on their respective pleas, we overrule appellant's assignments attacking the same.

[6] As Coburn had no interest in the crop raised by Johnson, he was not a necessary party to the issues raised by Johnson and Scott and their answer to plaintiff's petition. Plaintiff had seized this crop, alleging that Johnson and Scott were asserting some claim to it. They answered that they were the owners of the crop, thus making an issue between them and Smith, to which Coburn was not a necessary party.

[7] Appellant was not entitled to a new trial because of the newly discovered testimony. This suit had been pending in the county court of Montgomery county nearly three years. These witnesses were personally acquainted with the plaintiff and plaintiff's attorney, and appellant has wholly failed to show proper diligence in securing their attendance.

In view of the disposition made by us of the assignments above discussed, appellant's other assignments become immaterial, and are overruled.

Finding no error in this record, the judgment of the trial court is in all things affirmed.

On Rehearing.

On rehearing, appellant insists that we are in error in holding that the mortgages introduced by him were void. We did not intend to so hold. All we said was that these mortgages were too indefinite to cover the crops raised by Coburn on the Scott place during the year 1916. By proper pleading and proof, under the rule announced in *Perkins v. Alexander*, 209 S. W. 789, and *Clark-Boyce Lbr. Co. v. Commercial National Bank*, 200 S. W. 199, appellant could have shown that it was the intention of the parties to subject to these mortgages the crops to be raised on the Scott place during the year 1916. However, inasmuch as we have sustained the trial court's finding that Coburn had no interest in such crops, a further discussion of this question is immaterial, because appellant could not subject the cotton involved in this suit to these mortgages.

[8] In stating in our original opinion that "the plaintiff testified that he bought it [the cotton] as middling," we misconstrued his testimony. His testimony was that he bought it on the basis of middling lint cotton, and paid the highest price that was offered for it at that time. The record does not show that either of the appellees ever saw this cotton after it was picked. Appellant took charge of it, shipped it out, sold it on the Houston market, and appropriated the proceeds. Also it does not appear that any one except the appellant knew the true grade of this cotton. It affirmatively appears that he had placed it beyond the ability of appellees to show the true grade.

[9] As a matter of common knowledge, we know "that cotton marketed in Texas in any year differs in grade, and its value materially

depends upon its grade." *Brass v. Railway Co.*, 218 S. W. 1040. When appellees traced this cotton into the hands of appellant, and showed that he had wrongfully converted it to his own use, and had placed it beyond their power to show its correct grade, and when they further showed that he had bought the cotton on the basis of middling, and that middling cotton was of the market value of 30¼c per pound, it then became the duty of appellant to show the correct grade of the cotton, and on his failure so to do it will be presumed that affirmative testimony as to such grade would have been against his interests, and that it was to his interest to conceal the correct grade and value of the cotton. At least, when appellant remained silent and failed to show the correct grade, an issue of fact was thus raised against him, and the court's finding on that issue is conclusive on us. *Beaumont, Sour Lake & Western Ry. Co. v. Myrick*, 208 S. W. 935; *Railway Co. v. Day*, 104 Tex. 237, 136 S. W. 438, 34 L. R. A. (N. S.) 111; *Pullman Co. v. Cox*, 56 Tex. Civ. App. 327, 120 S. W. 1060; *Pullman Co. v. Nelson*, 22 Tex. Civ. App. 223, 54 S. W. 626; *Insurance Co. v. Tillman*, 84 Tex. 31, 19 S. W. 294.

In *Brass v. Railway Co.*, supra, the Supreme Court held that it was the duty of the plaintiff to show the correct grade and value of the cotton; but in that case it is not shown that the defendant knew the correct grade, or had concealed the grade from the court. Appellant relies upon that case as being in point, and has cited it to us on his proposition of reversible error. We think there is a clear distinction between the two cases.

The court did not err in fixing the value of the cotton seed at \$28. This is the sum appellant received for the cotton seed when he sold it. When the cotton was seized under the writ of sequestration, the officer executing the writ employed the defendant Johnson to pick the cotton and paid him for the picking. Under the direction of appellant, the cotton was hauled to the gin, ginned, wrapped, and sold. This expense is taxed as court costs against appellant. The trial court rendered judgment against him for the market value of the cotton as ginned and wrapped, and did not allow any credit for the picking and other expenses incurred. On rehearing appellant insists that we were in error in not sustaining his assignment complaining of this ruling of

the court; citing *Brown v. Leath*, 17 Tex. Civ. App. 264, 42 S. W. 655, 44 S. W. 42.

[10] The sixth is the only assignment we find in his brief raising this issue, which is as follows:

"Because the court erred in finding that the two bales of lint cotton replevied by plaintiff was middling lint cotton, and fixing the value thereof at 30¼ cents per pound at the time of the trial, without deducting the expenses of marketing therefrom."

This assignment is clearly multifarious. It would seem that three different errors are stated in this one assignment. Rules 24 and 25 for Courts of Civil Appeals (142 S. W. xii). *Russell v. Old River Co.*, 210 S. W. 705.

[11] However, waiving this objection to this assignment, we have considered the only proposition advanced under it, which is as follows:

"There is no evidence in this record showing that the two bales of cotton sued for herein, and for which recovery is had in favor of Chas. Johnson against plaintiff and the sureties on his replevy bond, was middling grade cotton of any particular grade."

Though appellant in his assignment of error complains of the refusal of the court to deduct the expenses of marketing the cotton, he does not advance a proposition of law under this assignment showing in what manner the ruling of the court on this issue was error, nor does he advance the assignment itself as a proposition. In view of this fact, we are without authority to consider this question as raised on motion for rehearing. The rule is thus announced in *Vernon's Sayles' Civil Statutes*, under article 1612, vol. 1, p. 843, where a long list of authorities is collated:

"Assignments of error which are not propositions in themselves, and are not followed by propositions as required by rule 30 (67 S. W. xvi), will not be considered."

As stated in our original opinion, in view of the finding of the court that Coburn had no interest in the cotton in controversy, appellant's assignments, except those discussed by us, become immaterial, and it would serve no useful purpose to discuss them further. The motion for rehearing is in all things overruled.

SCHEPS v. GILES. (No. 588.)

(Court of Civil Appeals of Texas. Beaumont.
May 19, 1920. Rehearing Denied
June 9, 1920.)

1. Appeal and error ⇐1040(10)—Overruling of exceptions on ground of misjoinder of actions held harmless.

Though one paragraph of plaintiff's petition for damages for breach of a contract of employment alleged damages not properly included within exemplary damages growing out of breach of the contract, the overruling of an exception to the petition on the ground of misjoinder of actions was harmless, where the prayer and fourth paragraph limited recovery to exemplary damages based on the breach of the contract, and such issues alone were submitted to the jury.

2. Damages ⇐89(2) — Malicious breach of contract subjects wrongdoer to exemplary damages.

While ordinarily exemplary damages are not allowed for breach of contract, the breach may be accompanied by such malicious and oppressive conduct as to subject the wrongdoer not only to actual but also to exemplary damages.

3. Master and servant ⇐41(5)—Exemplary damages for breach of contract of employment held warranted.

In an action for damages for breach of contract of employment, held, that employer's conduct in asserting before others that plaintiff, a woman, was a liar, etc., was so wanton and malicious as to warrant the allowance of exemplary damages.

4. Trial ⇐143 — Conflicting evidence is for jury.

It is for the jury to determine conflicts in the evidence.

5. Master and servant ⇐41(5)—\$500 exemplary damages for discharge held not excessive.

An award of \$500 exemplary damages for breach of contract of employment held not so excessive or unreasonable as to show passion or prejudice; it appearing, according to plaintiff's testimony, that her employer accused her of being a liar.

6. Exceptions, bill of ⇐54—Bystanders' bills filed after term and unverified cannot be considered.

Bystanders' bills filed in April after trial had in November, which were not verified by bystanders or any one else, and which were filed after adjournment of the term at which cause was tried, cannot be considered.

Appeal from Harris County Court; R. M. Love, Judge.

Action by Anna Giles against Adolph Scheps. From a judgment for plaintiff, defendant appeals. Affirmed.

Heidingsfelders and Norman C. Kittrell, all of Houston, for appellant.

Rowe & Kay, of Houston, for appellee.

WALKER, J. This suit was brought by the appellee against the appellant for damages, actual and exemplary, for breach of the following contract:

"I, Adolph Scheps, hereby agree to pay in salary to Anna Giles for eight months within one year, \$25.00 for services per week as trimmer and two months between seasons at \$18.00 per week, two months vacation—no pay one month in summer and one in winter. I, Adolph Scheps, also agree to pay Miss Giles' transportation from New York to Houston, Texas, only.

"[Signed]

A. Scheps.
"Anna Giles."

The case was submitted to the jury on the following issues:

(1) "Was plaintiff discharged by the defendant substantially as alleged in plaintiff's petition?" To which the jury answered, "Yes."

(2) "Was the discharge of plaintiff by defendant without lawful cause therefor?" To which the jury answered, "Yes."

(3) "If you find the answer to foregoing question No. 1 in the affirmative, and only in such event, then what amount do you find to be due the plaintiff under said contract?" To which the jury answered, "\$280.27."

(4) "Was the discharge of plaintiff by defendant without lawful cause and done in a malicious and humiliating manner, and did the same pain and humiliate the plaintiff?" To which the jury answered, "Yes."

(5) "If you answer the question in special issue No. 4 in the affirmative, and only in such event, then say by your answer to said issue what amount you find as exemplary damages?" To which the jury answered, "\$500."

On this verdict, judgment was rendered for plaintiff. Defendant has appealed to this court and has assigned errors.

[1] Appellant's first assignment of error is that the court erred in overruling defendant's special exception to plaintiff's petition on the ground of misjoinder of causes of action.

In the first paragraph of her petition, plaintiff states the contract. In the second paragraph she alleges the breach thereof by defendant, and states her actual damages in the sum of \$318.50. The balance of her petition is as follows:

"III. Plaintiff alleges that at the time of the tortious breach of the contract by said defendant, as aforesaid, the said defendant was insulting, oppressive, and threatening in his manner and publicly and in the presence of one Mrs. Glasgow called the plaintiff a liar several times, and without any excuse or justification therefor, discharged the plaintiff. That the words spoken and pronounced in public against and concerning this plaintiff were violently abusive, and were false and untrue and were willfully, maliciously, and falsely spoken and pronounced in public by the said defendant for the purpose, and with the intention not only to injure this plaintiff, but to humiliate her and cause her to lose the esteem and re-

spect of her friends, and the same did injure her in her business and profession; and such language did injure and humiliate her and cause her much mental pain and distress to her damage in the sum of \$500, for which sum this plaintiff sues as and for exemplary damages.

"IV. That by reason of the premises plaintiff has sustained actual damages in the sum of \$318.50.

"That by reason of the malicious, willful, wrongful, and fraudulent breach of his said contract with the plaintiff, she is entitled to recover exemplary damages in the sum of \$500.

"Wherefore, premises considered, plaintiff prays the court that the defendant be cited to appear and answer this petition, and that on final hearing hereof she have judgment against the defendant for the sum of \$318.50, actual damages, and for the sum of \$500 as exemplary damages; for costs of suit in this behalf expended, and for such other and further relief, in law or in equity, to which she may be entitled; and as in duty bound the plaintiff will ever pray."

If by her third paragraph she has stated damages not properly included within exemplary damages, growing out of the breach of contract, she has waived such relief by the fourth paragraph of her petition and by her prayer. It clearly appears that plaintiff was suing for \$318.50, the balance due her under the contract, and for \$500 exemplary damages "by reason of malicious, willful, wrongful, and fraudulent breach of said contract with the plaintiff." She prays:

"That on final hearing hereof she have judgment against the defendant for the sum of \$318.50, actual damages, and for the sum of \$500 as exemplary damages."

Such exemplary damages are merely based on the breach of the contract. These were the only issues submitted to the jury.

[2-4] Ordinarily, exemplary damages are not allowed for breach of a contract, but the breach may be accompanied by such malicious and oppressive conduct as to subject the wrongdoer not only to actual damages, but also to exemplary damages. *G. C. & S. F. Ry. Co. v. Levy*, 59 Tex. 543, 46 Am. Rep. 269; *Tignor v. Toney*, 13 Tex. Civ. App. 518, 35 S. W. 881; *Hooks v. Fitzenrieter*, 76 Tex. 277, 13 S. W. 230; *Burnett v. Edling*, 19 Tex. Civ. App. 711, 48 S. W. 775; *Southwestern Tel. & Tel. Co. v. Luckett*, 60 Tex. Civ. App. 117, 127 S. W. 856; *Oklahoma Fire Ins. Co. v. Ross*, 170 S. W. 1064. As shown by the testimony of appellee, in which she was fully corroborated by Mrs. Glasgow, appellant was very insulting to her at the time he discharged her. She said:

"I went to work on Thursday morning, and Mr. Scheps had three hats laying aside, and he asked if that was all the work I had done the day before, and I said, 'No,' and he said, 'Where is it?' and I said, 'You came up here yesterday and carried it down,' and he said: 'You are a liar. I didn't do anything of the kind.' And I said: 'You are mistaken, when I came in

from lunch I met you coming down with a lot of hats, and in the afternoon you came and got some more.' And he said, 'You are a liar. I didn't do anything of the kind.' And I then said to Mrs. Glasgow, 'Don't you remember all the hats I trimmed in the morning with the flowers on them?' and she said, 'Sure I remember,' and he said: 'I don't need you to prove anything by either one of you. You are both one. Take your hat and coat and get out. I wouldn't tolerate you another minute.' He told me three times to take my hat and coat and get out. He did not make any motion, or move, or anything; just stood there and talked with me in a very abusive manner. He walked around the table toward me, but that is not the time I left. I waited until he went downstairs. No, sir; I was not afraid of him, but his language humiliated me, surely it did, because I never had anything like that happen to me before in my life. Mrs. Glasgow was present at the time this took place. It made me feel badly and hurt my feelings, too, to think that I had tried to do my duty, and then to be talked to like that."

Appellant's version, in which he is corroborated by one of his witnesses, is as follows:

"When I went up there in the morning, I noticed a hat that had been laying there five or six days and had not been fixed, and I told her, 'This buckle needs tacking,' and I looked around, and I said, 'Miss Giles, have you had any orders yesterday?' and she said, 'No,' and said, 'Why?' and I said, 'Have you trimmed any more than these hats?' and she said, 'Yes,' and I said, 'Where are they? Here are the hats, the three hats.' And she said, 'I did trim more than three hats,' and I said, 'Where are they?' and she snapped me up and said, 'Do you mean to call me a liar?' and I said, 'No.' So I said: 'I didn't call you a liar. Here are the three hats that speak for themselves. Here is the proof of the pudding.' And she said, 'Mrs. Glasgow, didn't I trim more than three hats?' and in reply, she said: 'Yes, I think so, I think you trimmed some with flowers.' And I said, 'What is the use of taking her into the conversation, she is tending to her work?' and she said, 'Do you mean to call us both a liar?' She was sore and angry, and she had a hat in her lap, and she got hold of the hat and was about to swing it, and I saw that, and I said: 'I think you and I are through. You better get your hat and coat and leave.' She told me, 'You are one,' and got hold of the hat as if to throw it at me, and I immediately left the workroom and went downstairs, and Miss Giles sat up there about 20 minutes, and I got busy at my desk, and she picked herself up and left."

Cam Kay, attorney for plaintiff, testified as follows in regard to the statement by Mr. Scheps:

"I drove down to his place after I wrote him this letter, and I asked if he wanted to make a settlement of this thing, or did he want to go to court, as Miss Giles had told me she was going to sue him and have him prosecuted, and he asked what we would be satisfied with, and I told him we would be satisfied with the

payment of her money up to the end of her contract, and he said: 'I cannot give you an answer now; I will have to see my lawyer, and will tell you to-morrow.' And the next day he didn't come up, and I telephoned him and asked him if he had seen his lawyer, and he said yes, and that he would come up, and he came up and said he did not tell me he wanted Miss Giles to go back to work. He did say, 'My lawyer has written her a letter and registered it,' and I said: 'I have nothing to do with that. You pay her according to her contract up to the 18th day of January, and she will be satisfied.' And he said, 'I will not do that,' and I said, 'There is nothing open but to go into court.' I was looking out for Miss Giles' case, and I did ask him if her work was satisfactory, and he said, 'Absolutely, no disagreement at all about her work,' and I said, 'Did she fulfill her contract?' and he said, 'Yes, but she disputed my word, and I would allow no woman to work for me and dispute my word,' and I said, 'She says you called her a liar,' and he said, 'That will be settled in court,' and I said, 'All right.'"

We believe the testimony of plaintiff and her witnesses. Mrs. Glasgow, and Mr. Kay, bring this case within the rule announced by the decisions cited above. The issue being properly submitted, it was for the jury to decide who was telling the truth. As this issue was resolved in favor of the plaintiff, we will not disturb it.

[5] The third assignment of error complains of the judgment as being excessive and unreasonable, and that it was rendered through passion and prejudice. This assignment is overruled. If the defendant used toward Miss Giles the language testified to by her (and the jury were the proper judges of this issue), the verdict was in no sense excessive and unreasonable.

[6] The second assignment complains of the admission of certain testimony. Appellant has attempted to present this question in six bystanders' bills of exception, which are not approved by the trial judge; each of them having this statement:

"The above bill of exception No. — (this being filled by the number of the bill of exception), which reflects the true facts was presented to the judge of the court and to counsel for appellee, and same could not be agreed to, as between counsel for appellant and ap-

pellee and the court, the trial judge refused to sign the same or order same filed. Therefore this bill is presented and the undersigned witnesses thereto state that they and each of them were present at the trial of the above cause and were present in court at the time the facts in dispute occurred, and that same as set out above is true and correct. We further state that we are citizens of the City of Houston, Harris County, Texas.

"[Signed] N. L. Jacobs.

"Ed Carr.

"P. G. Houchins."

These bills of exception were filed April 4, 1919. This case was tried November 29, 1918. None of these bills were verified by the bystanders, nor by any one else. The term of the court during which the case was tried adjourned on January 4, 1919. As presented by these bills of exception, we cannot review the action of the court in admitting the testimony complained of.

Justice Carl, in *Kenedy Mercantile Co. v. Western Union Telegraph Co.*, 167 S. W. 1094, states the rule:

"Appellant has one bill of exceptions, which is not approved by the trial court, but which is signed by three persons who are called bystanders. The parties so signing do not swear to the matters set out in the bill. The judgment was November 25, 1913, and the bill of exceptions is dated January 6, 1914. It has been held that, to meet the requirements of article 2067, the bill must be prepared and sworn to and filed at the time of the occurrence of the matters to which it relates (*Dehougne v. Western Union Tel. Co.*, 84 S. W. 1068; *Shook v. Shook*, 145 S. W. 699), and when it is not verified it will not be considered. (*G. & S. F. Ry. Co. v. Holt*, 30 Tex. Civ. App. 330, 70 S. W. 591.) The affidavit of one bystander is not sufficient since the statute requires three. *Taylor v. State*, 87 S. W. 1039."

The fourth assignment is that the court erred in not entering judgment for defendant, as per prayer therefor made by defendant; and the fifth is that the court erred in overruling defendant's motion for new trial for the reasons set forth therein. These assignments are in all things overruled.

Finding no error in this record, the judgment of the trial court is in all things affirmed.

LUDTKE et ux. v. WILSON. (No. 586.)

(Court of Civil Appeals of Texas. Beaumont.
May 17, 1920. Rehearing Denied
June 9, 1920.)

1. Adverse possession §114(2)—Description of land by party claiming adversely sufficient to sustain verdict.

In trespass to try title, evidence for defendant describing land occupied adversely held sufficiently definite to sustain a verdict in his favor.

2. Adverse possession §98—Naked possession not extended by construction beyond actual occupancy.

When naked possession alone is relied on as constituting title to land, there must be an actual occupancy of the land, and the possession cannot be extended by construction beyond the actual occupancy.

3. Witnesses §37(6)—Witness competent to testify as to boundary line.

Where a witness testified that he had known the location of the boundary line between several lots all his life, that there were marked trees there recognized as being on the dividing line, and that he was present when a survey of certain property was made and the line between the lots was marked, the court erred in not permitting him to testify as to the location of such line in regard to certain improvements.

Error from District Court, Harris County; J. D. Harvey, Judge.

Action by H. T. D. Wilson against W. F. Ludtke and wife. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

Pritchett Harvey and F. L. Jones, both of Houston, for plaintiffs in error.

Harry Holmes and Louis, Campbell & Nicholson, all of Houston, for defendant in error.

WALKER, J. In our discussion of this case, we will speak of plaintiffs in error as appellants and the defendant in error as appellee. This action was in trespass to try title, brought by the appellee, H. T. D. Wilson, against the appellants, W. F. Ludtke and wife, and involves the south half of block 12 of the Royal addition to the city of Houston, Harris county, Tex. Block 12 is in the southwest corner of the Royal addition and is a part of lot 8, and on the south boundary line of lot 8 of the original subdivision of the Harris and Wilson two-league grant. The case was tried to a jury, and on conclusion of the evidence a verdict was instructed for the appellee.

[1] Many years ago this Harris and Wilson grant was subdivided into several lots, the

upper tier including lots 7 and 8 and the lower tier including lots 14, 15, 16, and 17. Lot 8 contained about 250 acres, and lots 15 and 16, as shown by a pencil sketch made a part of this record, lie immediately south of lot 8 and contain about 40 or 50 acres each. The north boundary line of lots 15 and 16 is the south boundary line of lot 8, the northeast corner of 15 being the southeast corner of 8 and the northwest corner of 16 being the southwest corner of 8. About 1854 August Ludtke, the father of appellant, acquired a claim to a portion of lot 15. In a partition he was awarded about 26 acres off the west side of this lot, extending from the Buffalo bayou, which was the south boundary line, to the north boundary line, which was the south boundary line of lot 8. Old man Ludtke built his improvements on the south end of his tract and raised his family there. The appellant was born on lot 15 and has lived practically all his life on this lot. About 1887 or 1888 old man Ludtke promised to give his two boys, the appellant and Pete, 30 acres of land off the north end of lot 15. The land was not surveyed, but the father and the boys stepped it off, marking one corner. The boys improved this land, thinking they were on lot 15, built houses and stockpens, and cleared up about 5 acres. Years afterwards appellant bought the north half of block 12, as described in appellee's petition, from a man named Bettis, and moved from his 5-acre improvements to the north half of block 12. According to the testimony of appellant, his 5-acre improvements extended beyond lot 15 and onto the southeast corner of the land in controversy. Appellant described his inclosure on lot 12 as being about the size of three city lots, 50 feet wide and 100 feet long, lying on the south boundary line and extending north. On cross-examination he said, emphatically, that he did not know where the dividing line between lot 8 and lot 15 was; that he did not know the exact location of the south boundary line of lot 12, nor the exact location of the east line of lot 12, but, taking his testimony as a whole, we believe that this issue was fairly raised. He had lived there all his life. He had bought the north half from Bettis, and was living on it. Bettis had the lot under fence at one time. Appellee had had trouble with Bettis in establishing the line between his claim to the south half and Bettis' claim to the north half. Appellee introduced a blueprint map of lots 15 and 16, and this map shows that Ludtke's fence on lot 15 extended into lot 8. Appellant further testified that he had had this corner of lot 12 under fence for about 30 years, and that his fence was still there. If appellant's improvements extended on to the southeast corner of lot 12, his description is sufficiently definite to sustain a verdict of

the jury. The issue raised by his testimony as to this encroachment should have gone to the jury.

By their third assignment, appellants complain of the refusal of the court to submit to the jury the following charge:

"Gentlemen of the Jury: If you believe from a preponderance of the evidence that the defendants and those under whom they claim had ten years' peaceable and adverse possession (as those terms are hereinbefore defined) prior to August 18, 1910, of any part of the south end of lot No. 8 of subdivision of Harris and Wilson two-league grant of land in Harris county, Tex., cultivating, using, or enjoying the same, then the defendants would be entitled to hold not to exceed 160 acres of land, including their improvements, and if you so find, you will find for the defendants," etc.

[2] This assignment is overruled. Appellants cannot recover beyond their actual inclosures on lot 8. The testimony of appellant brings his claim clearly within the rule announced in *Bracken v. Jones*, 63 Tex. 184, he said:

"At the time my father gave us this land, he was claiming it as his, as a part of the property which he owned in that vicinity. He was claiming it under the deed he had from old man Haley, and he claimed it to be a part of lot 15, I think, and we thought it was a part of lot 15 when we went out there. Our father thought he was giving us a part of the land he bought from Haley. My father bought from

Haley the south half of lot 15. He left the north half out. Later on Wilson sued my father for a partition of lot 15, in which suit we were supposed to get the west half, and that was because in the deed from Haley to my father he conveyed him an undivided one-half interest in lot 15, and at the time our father conveyed the land to us he was living on the west half of it. He was living on the 26-acre tract known as the Ludtke homestead tract. My father did not assert claim to any part of the land until he bought it from Haley. When he bought from Haley he moved over on to that and half of 82 acres is what he claimed, but in the suit 26 acres was awarded to him."

[3] The court erred in excluding the testimony of J. M. Ludtke as to the location of the dividing line between lots 15 and 16 and lot 8. He testified that he had known the location of this line all his life; that there were marked trees there recognized as being on the dividing line. He further testified that he was present when his father's west half of lot 15 was surveyed out, and the line between 15 and 8 was marked. The record shows lot 12 was on the south boundary line of lot 8. If permitted by the court, the witness would have testified that the improvements of W. F. Ludtke extended from lot 15 on to lot 8, and that W. F. Ludtke lived on block 12 of the Royal addition on the south end of lot 8.

For the errors discussed, this cause is reversed and remanded for a new trial.

WILLIAMS LUMBER CO. et al. v. DUDLEY & HEALAN. (No. 34.)

(Supreme Court of Arkansas. June 7, 1920.)

1. Logs and logging — Evidence held to warrant finding that contract for cutting and manufacturing timber was modified.

In an action for a balance claimed due on a contract for the cutting of timber and the manufacturing of the same into lumber, evidence held to warrant a finding that the provision as to stacking the lumber for measurement was modified.

2. Appeal and error — Verdict on conflicting evidence not disturbed.

A verdict on conflicting evidence will not be disturbed by the appellate court.

3. Logs and logging — Evidence as to amount of lumber from logs held admissible, in view of modification of contract.

Where a contract for the cutting of timber and manufacture of the same into lumber, which provided for the stacking of the lumber for measurement, was modified, and defendants were allowed to move the lumber as it came from the mill, evidence as to the measurement of the logs cut and as to the amount of lumber which would be produced therefrom is admissible over objection that proof of the amount of lumber was made in a fashion different from that fixed by the contract.

Appeal from Circuit Court, Van Buren County; J. M. Shinn, Judge.

Action by Dudley & Healan against the Williams Lumber Company and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

S. W. Woods, of Marshall, for appellants.
Appellees, pro se.

MCCULLOCH, C. J. Appellees entered into a written contract on June 18, 1918, with B. J. Powell, one of the appellants, whereby it was agreed that appellant should cut the standing timber on a large body of land owned by appellant, and manufacture the same into lumber for the price of \$7.50 per thousand feet, board measure, and an additional sum of 50 cents per thousand feet for stacking the lumber on the millyard. The contract provided that appellees should manufacture the lumber according to certain specifications, and to stack it on the millyard and Powell should "check up and accurately measure all lumber cut and stacked under this contract and according to the specifications under the contract."

Appellees instituted this action against Powell and his coappellant Williams Lumber Company, alleging that the latter was a partner with Powell in the transaction, and that Powell acted as the agent of said corporation, that appellees had manufactured 1,007,508 feet of lumber under the contract,

and that appellants had paid thereon the sum of \$5,462.01, leaving a balance of \$1,640.92, and had refused to pay said sum. Judgment is prayed for the amount of the balance due under the contract. Appellants filed answer, denying that Williams Lumber Company was a party to said contract or was interested therein, and denied that Powell was indebted to appellees in any sum for lumber manufactured under the contract. The answer sets forth the amount of lumber manufactured under the contract by appellees according to the contention of appellants, and also alleges that appellants had paid to appellees the sum of \$145.74 in excess of the amount due, for which judgment over against appellees is prayed for. There was a trial of the issues before a jury, and the judgment was in favor of appellees for the recovery of \$1,250.

[1] It is contended here that the evidence was not sufficient to sustain the verdict, and that the court erred in permitting appellees to make proof of the amount of lumber manufactured according to a different basis than that specified in the contract. The contract provides that payment be made at the specified price per thousand feet according to the measurement designated as "board measure," that appellees should stack the lumber on the yard, and that Powell should measure it after it was cut and stacked and pay for it according to the prices mentioned. The contention, however, of appellees is that the contract was changed by mutual agreement concerning the requirement that appellant should stack the lumber on the yard, and that it was agreed instead that appellants should accept the lumber as it came from the saw and haul it away to the lumber yard of the Williams Lumber Company at Shirley. It is earnestly insisted by counsel for appellants that there is no proof in support of this contention, but we are of the opinion that there was sufficient testimony justifying the submission to the jury.

The testimony of one of the appellees, who gave personal attention to the transaction with appellants, is rather vague as to what was actually said between the parties, but there is testimony to the effect that appellants hauled the lumber away as taken from the saw without requiring it to be stacked, and that there was an agreement between the parties that appellants could have the lumber sticks used in stacking lumber for the purpose of stacking it in piles on the millyard at Shirley. If, as contended by appellees, the lumber was accepted by appellants as it came from the saw and was hauled away by them, that constituted a waiver of the express stipulation of the contract with respect to the stacking on the millyard, even though there was no express agreement that the contract should change in any regard.

[2, 3] Appellees introduced proof showing the measurement of the logs cut from the

land and hauled into the mill, and the amount of merchantable lumber contained in each log. They also introduced proof tending to show that board measure, which means the grading and measurement of each board after being manufactured, exceeds the log measure about 20 per centum on average logs—in other words, that the output of logs properly manufactured into lumber will, according to board measure, be on an average 20 per centum in excess of log measurement. There is scarcely any dispute about that, and the testimony in this case shows that most of the logs would run about 30 or 33½ per centum according to board measure over log measure. This proof was adduced by appellees, not for the purpose, as we understand it, of changing the rule of measurement specified in the contract, but to show what amount of the lumber was manufactured under the contract according to the kind of measurement specified in the contract. In other words, the amount to be recovered was sought to be established by proof of the quantity of lumber according to board measure, but in order to arrive at it appellees proved what the actual measurement was according to the rules for log measure, and then added the percentage of gain.

If, as contended by appellees, the lumber was taken from the saw and hauled away before being stacked, this was the only available method of proof to establish what the amount of lumber was according to board measure. Powell was, according to the terms of the contract, to check and measure the lumber after it was stacked on the yard, but this was not done because that feature of the contract was changed, and appellants hauled the lumber away before it was stacked. We think that the court was correct in allowing appellees to make out their case by the only kind of testimony that was available, that is, by proving the amount of lumber in each log according to accepted standards of measurement, and then by adding the amount of difference between log measure and board measure. There was a conflict in the testimony as to the character of the logs, whether the appellees measured in rotten logs which did not produce merchantable lumber, but we think that there was enough testimony to show that after reasonable deductions were made for rotten logs and lumber not properly manufactured there was an average gain of 20 per centum over the log measurement. Appellants presented before the jury what they claimed to be an accurate account of the amount of lumber according to board measure, and it was much less in quantity than the amount that appellees contended they had manufactured. This conflict, however, was settled by the verdict of the jury, and we are of the opinion that there was sufficient testimony to support the verdict. There was also testimony tending to show that Williams Lumber Company was a party in interest

under the contract, and that Powell acted as the agent of that company in making the contract. The contention of appellants is that Williams Lumber Company was not interested in the contract, but was merely a purchaser from Powell of the lumber manufactured under the contract. There are many circumstances proved by the evidence which, standing alone, would not be sufficient to establish the interest of Williams Lumber Company in this contract, but when all were considered together they warranted the inference by the jury that the Williams Lumber Company was a party to the contract, and not merely a purchaser of the lumber from Powell. It is unnecessary to undertake to detail those circumstances.

There were objections to the ruling of the court with respect to instructions to the jury, but the objections are based mainly on the ground of insufficiency of the evidence to support the issues; and, since we have reached the conclusion that the evidence was legally sufficient on each of the issues presented, it becomes unnecessary to discuss the court's charge.

Judgment affirmed.

GOOD et al. v. STATE LINE OIL & GAS CO. et al. (No. 31.)

(Supreme Court of Arkansas. May 31, 1920.
Rehearing Denied June 25, 1920.)

1. Garnishment §107—Creditor first serving acquires prior lien.

As between general creditors and a particular debtor, the one obtaining and first serving a writ of garnishment upon a third party owing the debtor will acquire a prior and paramount lien thereon to the extent of his claim.

2. Stipulations §14(10)—Findings held not supported by agreed facts.

In a garnishment proceeding where other creditors intervened, a finding by the chancellor that funds garnished were trust funds belonging to all the creditors was not supported by an agreed statement of facts, "It is agreed that the creditors set out herein are due the amounts set opposite their respective names as individuals; * * * that no creditor is in a position to identify the funds garnished."

Appeal from Craighead Chancery Court; Archer Wheatley, Chancellor.

Suit by J. R. Good and others against the State Line Oil & Gas Company and others, in which H. J. Spencer and others intervened. From an adverse decree, the plaintiffs appeal. Reversed and remanded, with instructions.

Appellants pro se.

E. L. Westbrooke, of Jonesboro, for appellees.

HUMPHREYS, J. Appellants instituted suit in the Craghead chancery court, western district, against appellees, State Line Oil & Gas Company, P. C. Ford, manager, and P. C. Ford, to recover amounts set opposite their respective names, as creditors of P. C. Ford. Said appellees being nonresidents, a writ of garnishment was issued and duly served against the Bank of Jonesboro to impound money deposited in said bank by the said P. C. Ford. A warning order was issued against the appellees aforesaid in the manner, form, and for the time prescribed by law. Subsequently interventions were filed by appellees H. J. Spencer et al., claiming amounts set opposite their respective names, as creditors of the said P. C. Ford, under the same conditions as amounts due appellants by the said P. C. Ford, and praying that they be permitted to share in the funds deposited to the credit of P. C. Ford in the Bank of Jonesboro and theretofore garnished by appellants. Thereupon appellants filed a motion to strike said interventions from the files, alleging priority as creditors of the said P. C. Ford by reason of the writ of garnishment they had caused to be issued and served upon the Bank of Jonesboro, impounding funds deposited therein by the said P. C. Ford, and alleging further that the interveners had no equitable rights in the fund.

The cause was submitted to the court upon an agreed statement of facts embodying the substance of the pleadings and evidence, from which the court found that \$1,888.81 was on deposit in the Bank of Jonesboro in the name of P. C. Ford, but that neither P. C. Ford nor the State Line Oil & Gas Company had any ownership therein, but were trust funds belonging to appellants and interveners in proportion to their respective claims. In accordance with the findings the court decreed that the Bank of Jonesboro should pay to the clerk of the court, who had theretofore been appointed receiver on the application of the interveners, the trust fund aforesaid, and that the receiver, Ben Eddins, should apportion said amount between all claimants who had filed their claims prior to the 15th day of October, 1918, pursuant to an order theretofore made, in proportion to their respective claims, as designated by the amounts set opposite the name of each. From the findings and decree of the chancery court, an appeal has been duly prosecuted to this court.

[1, 2] Appellants insist that the court erred in decreeing interveners' participation in the funds before appellants' lien thereon, by reason of the garnishment, had been discharged.

"The lien of garnishment dates from the time the garnishment writ is served upon the garnishee." *Bergman v. Sells & Co.*, 39 Ark. 97.

"Service of process on a garnishee creates a lien in favor of the plaintiff on the money due from the garnishee to the defendant, and upon constructive service the court may ascertain the amount due from the garnishee to the defendant, and subject such money to the satisfaction of the plaintiff's claim." *St. L. S. W. Ry. Co. v. Vanderberg*, 91 Ark. 252, 120 S. W. 993.

It follows therefore that, as between general creditors and a particular debtor, the one obtaining and first serving a writ of garnishment upon a third party owing the debtor will acquire a prior and paramount lien thereon to the extent of his claim. Interveners' contention, however, is that the garnished fund was a trust fund held for the benefit equally of appellants and interveners, and that appellants could not acquire a paramount lien thereon by virtue of garnishment proceedings. Interveners' contention would be correct if the facts in the case supported the finding and decree of the chancellor. The agreed statement of facts in this particular is as follows:

"It is agreed that the creditors set out herein are due the amounts set opposite their respective names as individuals, and that the said P. C. Ford is due the parties set out herein the sums set opposite their names; that no creditor is in a position to identify the funds garnished; that the sum of \$1,888.81 is deposited in the Bank of Jonesboro to the credit of P. C. Ford and the Bank of Jonesboro is indebted to the said P. C. Ford in the sum of \$1,888.81."

The agreed statement of facts does not support the finding and decree of the court, nor the contention of interveners that the garnished fund was a trust fund in which all of the creditors were equally interested in proportion to their respective claims. The court therefore erred in ordering the receiver, Ben Eddins, to distribute the fund equally between all creditors who filed their claims prior to October 15, 1918, in proportion to the amount claimed by each. The order should have been to pay appellants' claims in full with any balance over to the interveners equally in proportion to their respective claims.

The decree is therefore reversed and the cause remanded, with instructions to enter a decree distributing the fund in accordance with this opinion.

HESTER v. CHICAGO, R. I. & P. RY. CO.
et al. (No. 35.)

(Supreme Court of Arkansas. June 7, 1920.)

1. Railroads ⇨103(1) — Notice of defective stock guards essential to recovery for damage to crops.

An owner of a crop cannot recover damages for injuries to the crop by hogs by reason of the fact that defendant railroad's stock guard was in a defective condition, where written notice of the defective condition of the stock guard was not served upon the railroad or its agent, under Kirby's Dig. §§ 6644, 6645, as amended by Acts 1909, No. 53.

2. Railroads ⇨103(1)—Fence law penal and strictly construed.

Sp. & Priv. Acts 1911, No. 447, as amended by Acts 1913, No. 53, requiring railroads to build and maintain fences along their right of way, etc., is a penal statute and must be strictly construed.

3. Railroads ⇨113(4)—Civil action for damages to crops not maintainable against company violating penal statute requiring fencing.

No civil action for damage to crops will lie against a railroad for a violation of Sp. & Priv. Acts 1911, No. 447, as amended by Acts 1913, No. 53, requiring a railroad to build and maintain certain fences and stock guards.

Appeal from Circuit Court, Saline County;
W. H. Evans, Judge.

Action by Joe Hester against the Chicago, Rock Island & Pacific Railway Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Arthur C. Thomas and J. S. Utley, both of Benton, for appellant.

Thos. S. Buzbee, H. T. Harrison, and C. L. Johnson, all of Little Rock, for appellees.

WOOD, J. This action was brought by the appellant against the appellee. The appellant alleged, in substance, that the appellee operated a railroad over 100 miles long in the state of Arkansas and over certain lands in Saline county, Ark., describing them; that in the year 1918 appellant cultivated a crop of corn consisting of 30 acres on the land described; that prior to 1918 the appellee had constructed stock guards on both the east and west sides of the inclosure of the lands at the points where the railroad enters the inclosure, but had negligently failed and refused to maintain said stock guards in a suitable and safe condition; that appellee prior to the year 1918 had erected a fence along each side of its right of way over said lands, but had negligently permitted them to become so out of repair as to not be substantially and sufficiently in condition to keep live stock from passing through and under said fence and into the

adjoining lands of the appellant as described in the complaint; that as a result of the negligence of appellee in failing and refusing to keep and maintain said stock guards in a suitable and safe condition, and in negligently permitting said fence to become out of repair as aforesaid, that hogs passed over said stock guards onto appellee's right of way and thence through said right of way fences onto said lands of appellant, destroying his crop and damaging him in the sum of \$1,120, for which damages he prayed judgment. The appellee demurred to the complaint on the grounds: First, that the complaint does not allege that written notice had been given the appellee or its agent that the stock guards were in a defective condition. Second, because the allegations of the complaint are not sufficient to constitute a cause of action against the appellee. The court sustained the demurrer and entered judgment dismissing appellant's complaint. From that judgment is this appeal.

[1] First. The complaint does not state a cause of action under sections 6644 and 6645 of Kirby's Digest, as amended by Act 53 of the Acts of 1909, p. 135, for the reason that the complaint does not allege that the written notice required by the statute had been given. The giving of this notice is a condition precedent to the right of recovery in an action based on that statute. *C. R. I. & P. Ry. Co. v. Adams*, 84 Ark. 14, 106 S. W. 200.

[2, 3] Second. The complaint does not state a cause of action under Act 447 of the Acts of 1911, as amended by Act 53 of the Acts of 1913. The statute is as follows:

"Section 1. Every firm, person or corporation owning or operating any railroad over one hundred miles in length, which extends into or through Grant, Hot Spring, or Saline counties, Arkansas, shall be required to build and maintain a fence along each side of their rights of way therein substantially and sufficiently to keep all mules, horses, hogs, sheep, cattle, goats, and stock of all kinds off said rights of way.

"Sec. 2. Said persons, firms or corporations shall provide and maintain gates, with good latches or openings, at least eight feet wide, at all private road crossings, and stock guards at all public road-crossings; and shall also be required to provide open crossings with stock guards every two miles, if there should be no opening or crossing within four miles of each other. No right of way shall be fenced through towns and municipal corporations, and a space of not less than three hundred feet shall be left open at all flag stations thereon.

"Sec. 3. If said railroad right of way fence should contain any gates as herein provided, any persons using same in crossing or entering the said right of way shall be required to close and fasten the gates behind them, and any said person failing to comply with the provisions of this section shall be guilty of a misdemeanor,

and upon conviction therefor, shall be fined in any sum not less than one dollar and not more than ten dollars for each separate offense."

"Section 4. Any said person, firm or corporation, violating the provisions of this act, shall be fined any sum not less than fifty dollars and not more than five hundred dollars for each offense, and each day shall constitute a separate offense."

This statute is penal. Its violation is a misdemeanor and subjects the offender to a fine. It does not provide any remedy by way of civil action to those who may be damaged by reason of its violation, nor that the penalty may be recovered by any individual nor by the state for the benefit of any individual. Penal statutes are strictly construed; therefore no civil action will lie for damages against the appellee railroad for the violation of the above statute. *State v. International Harvester Co.*, 79 Ark. 517, 96 S. W. 119; *Choctaw & Memphis Ry. Co. v. Vosburg*, 71 Ark. 232, 72 S. W. 574; *St. L., M. & S. E. Ry. Co. v. Busick*, 74 Ark. 589, 86 S. W. 674, and other cases in 4 Crawford's Digest, "Statute," § 71, pp. 4694, 4695.

In the cases from Missouri cited and relied upon by counsel for appellant to sustain their contention, the causes of action in those cases were founded upon a statute which expressly made the corporation liable "in double the amount of all damages which shall be done," etc., by reason of its failure to comply with the provisions of the statute. Of course, cases based upon such a statute can have no application here.

The judgment is correct, and it is therefore affirmed.

MYERS v. WHEATLEY et al. (No. 391.)

(Supreme Court of Arkansas. May 10, 1920.
Rehearing Denied June 25, 1920.)

1. Guardian and ward \S 163—Findings on exceptions to account of guardian res judicata in suit to falsify final account.

Findings of the probate court on exceptions by ward to account of her guardian on final settlement are res judicata as to items involved in a suit in equity by the ward against the guardian to surcharge and falsify the guardian's account, the testimony concerning the items being practically the same in both cases, the approval of a final settlement being an adjudication of all matters involved in it.

2. Guardian and ward \S 163 — Finding that ward ratified expenditures res judicata.

Where a ward, after reaching majority, on trial of exceptions to guardian's account, testified that she was willing to pay for anything that she had received from her guardian, and that he should receive credit for whatever he had furnished her, the probate court was justified in finding that she ratified expenditures of all matters in the final settlement to which

she made no objection, and she cannot claim, in a suit in equity against the guardian to surcharge and falsify his final account, that allowance of certain credits was erroneous by reason of the ward's minority at the time the expenditures were made.

Appeal from Randolph Chancery Court; Lyman F. Reeder, Chancellor.

Suit by Ethel Alton Myers against J. A. Wheatley and the United States Fidelity & Guaranty Company. From a decree for plaintiff for only part of the relief demanded, plaintiff appeals. Affirmed.

Ethel Alton Myers brought this suit in equity against J. A. Wheatley and United States Fidelity & Guaranty Company to surcharge and falsify the final account current of J. A. Wheatley as her guardian.

It appears from the record that J. A. Wheatley, as guardian of Ethel and Jesse Alton, minors, filed two annual accounts current with the probate court, showing the state of his accounts as guardian of said minors. On January 15, 1919, he filed his third and final settlement in the probate court. Ethel Alton had married a man by the name of Myers, and had become of age at the time the final settlement was filed in the probate court. She filed exceptions to the account of her guardian, and these exceptions were heard upon her testimony, the testimony of her guardian, and his first and second annual accounts.

Ethel Alton Myers testified in the probate court that after she had married she purchased two mules from her guardian for \$300, a wagon for \$50, and some feed and other things; that she had disposed of all the articles purchased from her guardian before she became of age. These items were embraced in her guardian's second annual account.

Ethel Alton Myers gave her testimony in the present suit and again testified that she had bought these articles from her guardian while she was yet a minor, and had disposed of them before she became of age. She testified that the team was not worth what she paid for it.

On the other hand, her guardian, J. A. Wheatley, testified that after she married she bought the team, wagon, and other things from him to be used by her husband in farming, and that they were worth what she paid for them.

Other testimony will be referred to in the opinion.

The chancellor surcharged the guardian's account as to certain items, and dismissed the complaint of the plaintiff as to the others. The plaintiff has appealed.

J. L. Taylor, of Corning, for appellant.

Jerry Mulloy and E. G. Schoonover, both of Pochontas, for appellees.

HART, J. (after stating the facts as above). It appears from the record that the item of \$300 for the purchase of the mules and the item of \$50 for the purchase of the wagon were embraced in the exceptions to the third and final account current of the guardian. The plaintiff, Ethel Alton Myers, was then of age, and filed exceptions to her guardian's account. The guardian and the ward both testified in that proceeding about the same items, and their testimony was practically the same as it is in the present case.

[1] The court found against the ward in favor of the guardian upon the exceptions to his third and final account current. This was a judgment of the court which was conclusive as to these items, and the matter is now *res adjudicata*. All questions relating to these items were necessarily involved in the exceptions to the final settlement of the guardian in the probate court. The approval of the final settlement was an adjudication of all matters involved in it, and if the ward thought the judgment confirming her guardian's account was erroneous, she should have appealed. *Nelson v. Cowling*, 77 Ark. 351, 91 S. W. 773, 113 Am. St. Rep. 155; *Nelson v. Cowling*, 89 Ark. 334, 116 S. W. 890; *Beakley v. Cunningham*, 112 Ark. 71, 165 S. W. 259; *Moore v. Allen*, 121 Ark. 335, 181 S. W. 908.

[2] It is also claimed by counsel for the plaintiff that the accounts should be surcharged and falsified because they show that the guardian expended for the maintenance of the ward more than the clear income of the estate, without having previously obtained an order of the probate court therefor, and that the case comes within the rule announced in *Campbell v. Clark*, 63 Ark. 450, 39 S. W. 262. Therefore counsel claims that the accounts should be restated by giving such credits only as the probate court should have allowed in the first instance, and that the court erred in holding that the guardian might obtain credits exceeding the income of his ward's estate.

As we have already seen, the ward was of age at the time the guardian filed his third and final settlement. She filed exceptions to his account, and strenuously opposed his getting credit for certain items. The record shows that the first and second annual accounts of the guardian were thoroughly gone over in that proceeding. The ward stated in plain terms in that proceeding what items of her guardian's account she objected to. No objection was urged to the account that

she was not of age at the time certain items were furnished to her, and that these items exceeded the income of her estate. The items in question were necessities, and she does not complain that she did not receive them.

On the trial of the exceptions she testified that she was willing to pay for anything that she had received from her guardian, and that he should receive credit for whatever he had furnished her.

Under the circumstances, the probate court was justified in finding that she ratified the expenditure of all matters in the final settlement to which she made no objection. It is true that judgments of this sort are not to be extended by mere intendment to matters not necessarily involved in the determination, but it is equally clear that all questions necessarily involved in the inquiry then before the court must be regarded as finally and conclusively settled by the adjudication in that proceeding. In that proceeding the whole state of the accounts between the guardian and the ward was gone into, and the court, after restating the account in certain particulars, confirmed it. The ward being then of age and having filed exceptions as to all items of the first and second annual settlement, the court was justified in finding against him on the point now under consideration. *Hudson v. Newton*, 83 Ark. 223, 103 S. W. 170.

Counsel for plaintiff places much reliance in the case of *Stubblefield v. Stubblefield*, 105 Ark. 594, 151 S. W. 994. We do not think that case has any application to the facts in the present case. There the judgment was reversed and the lower court was simply directed to take as a basis for settlement the sum shown to have been due in the guardian's last settlement, unless an affirmative showing should be made that there were notes or other property in his hands not included in that settlement. The very basis of the exceptions to the guardian's final settlement in the probate court as shown by the record in the present case was that the court had erred in allowing certain credits to the guardian.

As we have already seen, testimony was taken as to these items, and they were adjudicated in that proceeding. If the ward thought the judgment of the court was erroneous, she should have taken an appeal.

Therefore the decree will be affirmed.

YAZOO & M. V. R. CO. v. HELENA WHOLESALE GROCERY CO. (No. 38.)

(Supreme Court of Arkansas. June 7, 1920.)

1. Pleading \S 248(3)—Change in exhibit to complaint for damage to shipment did not change cause of action.

In an action against railroad for damage to a shipment, where plaintiff was allowed to strike out the word "to" from the exhibit in the nature of an account of the damaged shipment sold, and to insert the word "for," so that the exhibit read "Sold for" the railroad, instead of "Sold to," there was no amendment changing the cause of action and permitting recovery on one different from that pleaded.

2. Principal and agent \S 111(3)—Telegram held to have defined authority of agent relative to damaged shipment.

Telegram to railroad's agent at station from its claim department relative to handling of a damaged shipment of potatoes held to have defined the agent's authority in regard to such shipment.

3. Principal and agent \S 111(3)—Telegram to agent, where damaged shipment refused, assumed liability and agreed to pay.

Telegram of railroad's claim department to its agent at a station relative to a damaged shipment refused by the consignee held to have assumed liability and agreed to pay it, leaving it open to the agent to determine the extent of liability to the best advantage.

Appeal from Circuit Court, Phillips County; J. M. Jackson, Judge.

Action by the Helena Wholesale Grocery Company against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Fink & Dinning, of Helena, for appellant.

R. B. Campbell, of Helena, and Sam Latkin, of Little Rock, for appellee.

SMITH, J. The complaint in this case consists of two counts, in each of which damages to a car of potatoes were claimed. The Helena Wholesale Grocery Company, appellee here, was plaintiff below and was the consignee in both shipments. There was an exhibit to each count of the complaint, and they are identical in form, except as to dates and amounts. Exhibit A reads as follows:

"Helena, Ark., 5/25/16.
"Sold (to) for Y. & M. V. Railroad:
Articles. Weight. Price.
65 bags potatoes hauled to dump. 162½ 1.09 177.13
To labor overhauling 175 bags.....175 .10 17.50
194.62

"Car No. 23812. Initial Soo."

[1] Over the objection of appellant, appellee was allowed to strike out the word "to" and insert the word "for," so that, as a re-

sult of that amendment, the exhibit was made to read "Sold for" the railroad, instead of "Sold to" the railroad. Appellant insists that this amendment changed the nature of the cause of action, and permitted a recovery upon a cause of action that was entirely different from the one stated in the complaint. We think, however, that the change was, in fact, an unimportant one, as it is apparent that, without reference to the amendment, the sum sought to be recovered is the damage to a shipment of two cars of potatoes.

The testimony is chiefly directed to the second car, although, according to the testimony offered on appellee's behalf, the two cars were handled under the same direction from a Mr. Howell, who was appellant's agent at Helena, the place of delivery of the two shipments. The amount of damages appears to be undisputed, and the jury returned a verdict on each count for the sum sued for.

As to the first car, it may be said that, according to the testimony on appellee's behalf, Mr. Howell directed appellee to take charge of that car and dispose of the potatoes to the best advantage, and to present a claim for the damage, and that this was done. The instructions to the jury authorized a finding for appellee for both cars, provided there was a finding that the agent of the railroad company had authorized appellee to dispose of the potatoes and that the railroad company's agent was authorized to make that settlement. The railroad company asked no instruction, except one directing a verdict in its favor, and, while the testimony is conflicting, both as to the agent's authority and as to his directions to appellee concerning the shipments, the testimony is legally sufficient to show that the agent possessed the necessary authority and that he exercised it.

It is insisted, however, that as to the second car the jury was not warranted in finding that the agent had made a settlement in regard thereto, for the reason that the undisputed testimony shows that this settlement was made pursuant to a telegram from the general claims department at Chicago. It appears that Mr. White, the president of the grocery company, refused to receive this second shipment, whereupon Mr. Howell wired the claims department in Chicago for instructions, and in response received the following telegram:

"Exchange wires date, ART 10763, potatoes, consignee can't legally abandon shipment, have him take, handle best advantage, submit a claim, wire delivery."

When shown this telegram, White stated that he would handle the car of potatoes, but that he would do so for the railroad company.

[2] We agree with appellant that, whatever may have been the authority of Howell in regard to other shipments, this telegram defined his authority in regard to this second shipment. White admits that he saw this telegram, and he must therefore be held to have known that it measured and defined Howell's authority so far as that shipment was concerned; but it does not follow, on that account, that the judgment as to the second car must be reversed.

[3] The telegram set out above was sent in response to one advising the claims department of the damaged condition of the shipment and of the consignee's refusal to receive it. The purpose of the telegram from the claims department was to insist that appellee could not legally abandon the shipment, but it did not deny liability for the damage then existing. Upon the contrary, the telegram, fairly interpreted, concedes liability and expresses a purpose to discharge it. The consignee was directed to handle the shipment to the best advantage and to submit a claim for such damages as could not be avoided.

This direction to submit a claim would appear to indicate that the railroad company was not questioning its liability for the damages, but desired to investigate only the extent of that liability, and, as we have said, the testimony is undisputed as to the amount of damage. So that if, as we have concluded, the telegram, set out above, assumed liability and agreed to pay it, and the extent of this liability is undisputed, it is unimportant to determine whether the instructions given were applicable to the second car, as well as to the first one.

We conclude, therefore, that there is no error in the record, and the judgment is affirmed.

SKINNER v. STONE. (No. 37.)

(Supreme Court of Arkansas. June 7, 1920.)

1. Frauds, statute of §110(1)—Offer to sell land in county held sufficiently definite.

Where an owner, in reply to an inquiry as to his price on a described 80-acre tract of land in a named county, offered to sell his 120 acres in that county, and it was shown that he owned only one 40-acre tract in addition to the 80-acre tract, the offer sufficiently described the land to comply with the statute.

2. Specific performance §28(2)—Conveyance of fee by warranty deed implied where contract did not specify.

Where the contract provided for the sale of the land without specifying the kind of conveyance, it will be implied that a conveyance of the fee by deed with general warranty was intended.

3. Specific performance §13—Existence of easement known to both, but not mentioned, does not prevent specific performance.

The existence of a railroad right of way on land agreed to be sold, which was known to both parties, does not prevent specific performance of the contract because it failed to mention the easement, since its exception from the conveyance will be implied.

4. Specific performance §94—Request to send deed to bank held not condition which prevented enforcement of contract.

Where purchaser accepted vendor's offer to sell the land for cash, later request in the letter of acceptance that the vendor execute the deed and forward it to a designated bank for delivery on payment of the price was not a condition of acceptance which prevented specific performance of the contract, but was merely a suggestion as to the method of performance.

5. Specific performance §97(3)—If vendor for cash desires money instead of check he must give purchaser opportunity to pay.

Since in ordinary transactions a check or draft is regarded as the equivalent of money, a vendor cannot avoid specific performance of his contract to sell for cash on the ground that the purchaser did not tender payment in money, without giving the purchaser a chance to pay in money after the offer was accepted.

Appeal from Clark Chancery Court; Jas. D. Shaver, Chancellor.

Suit by Will W. Stone against Lewis Skinner. Decree for plaintiff, and defendant appeals. Affirmed.

J. E. Callaway, of Arkadelphia, for appellant.

J. H. & D. H. Crawford, of Arkadelphia, for appellee.

SMITH, J. This is a suit to enforce the specific performance of a contract for the sale of certain lands in Clark county owned by appellant, Lewis Skinner. The suit is based upon the following correspondence:

"Gurdon, Ark., June 8, 1919.

"Mr. Lewis Skinner, Perryville, Ind.—Dear Sir: I am in the land business here, and will buy either your timber on the east half of the northeast quarter of section 21, township 9 south, range 20 west, Clark county, Arkansas, or I will buy land and timber if you will make me a fair price on it. What do you want for it?

"Very truly yours, Will W. Stone."

"Perryville, Ind., June 28, 1919.

"Mr. Will W. Stone, Gurdon, Ark.—Dear Sir: Your letter received asking for prices on land owned by me in Clark county, Arkansas. I will sell land and timber, 120 acres, for \$2,500 cash.

"Yours truly, Lewis Skinner."

"Gurdon, Ark., July 5, 1919.

"Lewis Skinner, R. F. D. No. 1, Perryville, Ind.—Dear Mr. Skinner: Your price for your 120 acres of land near Smithton, Clark county,

Arkansas, is rather high, but I am accepting your offer to take \$2,500 cash for this land, and am inclosing your deed Arkansas form for you to make deed to Will W. Stone and have acknowledged before a notary public, attach draft to deed and send to the Merchants' & Farmers' Bank, Gurdon, Arkansas, and I will take care of same.

"Very truly yours, Will W. Stone."

It will be observed that the first letter was a proposal to buy the timber on the east half, northeast quarter, section 21, township 9 south, range 20 west, or to buy both the land and the timber, and in response appellant proposed to sell 120 acres of land and timber for \$2,500 cash. The testimony taken at the trial showed that appellant owned, in addition to the 80 acres above described, a 40-acre tract, making 120 acres, and that he owned no other land in that county, and that the two tracts constituted the land referred to by appellant in his letter as the "land owned by me in Clark county, Arkansas."

It also appears from the testimony that appellant made no response to the letter of July 5th, but, instead, came down to Clark county, and went over his land and made inquiry about its then market value without letting appellee know of his presence in the neighborhood. Finally, when pressed to close the deal in accordance with the correspondence set out above, appellant declined to do so upon the ground that the minds of the parties had not met upon certain essential details. First, as to the kind of deed which should be made, whether quitclaim or warranty. Second, that appellant had previously granted a right of way over a portion of the land to a sawmill company for a railroad, and the parties had not reached an agreement in regard to this easement. It is also urged that appellant knew nothing about the responsibility or solvency of the Merchants' & Farmers' Bank, of Gurdon, Ark., and could not therefore be compelled to accept this bank as his agent in closing the transaction, and that no tender of the purchase money had been made, and that appellee's offer to "take care" of a draft to be attached to the deed could not be treated as a tender. It is also said that the letters set out above do not meet the requirements of the statute of frauds, in that the property to be conveyed is not sufficiently described.

[1] Answering this last insistence first, it may be said that appellant's letter, fairly construed, proposed to sell all the land owned by him in that county, and the testimony shows that to have been 120 acres. Appellee's first letter describes particularly and exactly 80 acres of the land, and the testimony makes the remaining 40 acres equally as certain. *Miller v. Dargan*, 136 Ark. 237, 206 S. W. 319; *Fordyce Lumber Co. v. Wallace*, 85 Ark. 1, 107 S. W. 160; *Hirschman v. Forehand*, 114 Ark. 436, 170 S. W. 98.

[2] Upon the question of the kind of deed contemplated by the parties, this court has held that—

"Where a party agrees to convey land, and there is nothing said as to the nature and extent of the title to be conveyed, nor anything connected with the transaction, going to indicate the particular species of conveyance intended; the law implies a deed in fee simple, and with covenants of general warranty." *Holland v. Rogers*, 33 Ark. 255; *Witter v. Biscoe*, 13 Ark. 422.

[3] Upon the question of the prior incumbrance it may be said that in decreeing the specific performance of the contract the court expressly excepted the right of way previously conveyed the lumber company for its railroad. Moreover, the testimony shows that appellee knew of this easement, and it will therefore be presumed that he proposed to purchase subject to it. Appellee did not prepare the deed, but sent to appellant a blank to be used, and appellant had both the right and the opportunity to prepare and return to appellee a deed specifically exempting this easement if he thought it essential so to do.

[4] It is true, of course, that appellant could not have been required to close the deal through the Merchants' & Farmers' Bank at Gurdon; he not having agreed to do so. But appellee did not impose this as a condition. The letter of July 5th must be treated as a suggestion whereby the deal could be closed without delay, and, as the appellant did not ask that the deal be closed in some other manner, he is no position to say that appellee imposed a condition which was not satisfactory.

[5] So, too, in regard to the tender. Appellant did not exact cash, but the reference to cash must be treated as referring to the time of payment rather than to the manner of payment, as in ordinary transactions a check or draft is regarded as the equivalent of money. Appellant would have been within his legal rights in demanding money, but common fairness demanded that after his offer had been accepted he give appellee a chance to pay in money if that condition was to be imposed. We think a binding contract was made when appellee, by his letter of July 5th, accepted appellant's proposition, contained in the letter of June 28th, and that the statement about sending the draft to the Merchants' & Farmers' Bank was not an additional and unagreed upon condition, but was a mere suggestion to expedite the consummation of a contract which the letter itself closed by accepting unconditionally appellant's offer to sell.

We conclude, therefore, that the court correctly decreed the specific performance of the contract, and that decree is affirmed.

ANDERSON-TULLY CO. v. GILLETT LUMBER CO. (No. 279.)

(Supreme Court of Arkansas. March 22, 1920.
Rehearing Denied April 12, 1920.)

1. Specific performance §116¾ — Bill not rendered demurrable by exhibits.

In a suit for specific performance, a complaint alleging a contract by defendant for the sale of standing timber was not rendered demurrable by letters and telegrams constituting the alleged contract and filed as exhibits in response to defendant's motion, though they showed a contract with B. without showing who he was or what authority he had to bind defendant.

2. Specific performance §64—Conveyance of standing timber is conveyance of "interest in land."

As respects specific performance, a contract to convey standing timber is a contract to convey an "interest in the land" itself, notwithstanding Acts 1905, p. 361, making timber in certain cases personal property for the purposes of taxation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interest.]

3. Specific performance §116¾—Complaint alleging insolvency and inadequacy of remedy is good.

In a suit for specific performance, a complaint alleging defendant's insolvency and a consequent inadequacy of remedy is good as against demurrer.

4. Specific performance §65 — Contract to convey standing timber may be enforced.

Specific performance of a contract to convey standing timber may be granted.

5. Specific performance §29(1)—Contract to convey merchantable timber may be enforced if proof shows definiteness.

A contract for the conveyance of merchantable timber on described land may be specifically enforced if the proof shows the term "merchantable timber" to be one of such definite signification as to be a sufficient designation of the timber sold.

Appeal from Arkansas Chancery Court; John M. Elliott, Chancellor.

Suit by the Anderson-Tully Company against the Gillett Lumber Company. From a decree for defendant, plaintiff appeals. Reversed and remanded, with directions.

T. J. Moher, of Gillett, and John L. Ingram, of Stuttgart, for appellant.

W. N. Carpenter, of De Witt, for appellee.

SMITH, J. Appellant, hereafter referred to as plaintiff, filed a complaint against appellee, hereafter referred to as defendant, containing the following allegations: That both plaintiff and defendant are corporations. That on or about August 13, 1919,

defendant was the owner of Spanish grants 2358 and 2406, in Arkansas county, Ark., and that on or about that date defendant, by letters and telegrams, sold plaintiff all the merchantable timber standing on said lands, except the pecan and hackberry, for the price and sum of \$6,000. That defendant had refused to perform said contract, and was attempting to sell the timber to other parties, and would do so unless restrained. That plaintiff "had purchased this particular tract of timber for its kind, character, and quality of timber thereon, for a particular use and purpose, and that they cannot obtain any other of like kind, character, and quality that will suit and fulfill the purposes for which they purchased this particular tract." Plaintiff alleges its willingness and readiness to purchase the timber, and tenders into court \$6,000 for that purpose.

The insolvency of the defendant was alleged, and there was a prayer for a temporary restraining order to prevent defendant from selling the timber, and for a decree for the specific performance of the contract to sell.

A motion was filed by defendant to require plaintiff to file the letters and telegrams constituting the contract, and in response to this motion plaintiff filed the letters and telegrams passing between plaintiff, Anderson-Tully Company, and one Cal Balmer, which make a complete and valid contract, except that it does not appear from this correspondence who Cal Balmer was, nor what authority, if any, he had to act for the defendant.

[1] The point is made that this is a case in equity, and that the exhibits above referred to are the foundation of the action and will control the averments of the complaint, and that these exhibits show no authority for Balmer to act for defendant, and that therefore defendant is not bound.

It is also insisted that under Act No. 146, Acts 1905, p. 361, timber which has been sold apart from the land on which it stands becomes personalty, and that specific performance should be denied on that account.

It is true the exhibits to the complaint do not disclose who Balmer is, nor what authority he had to act for and bind the defendant. But that is a matter of proof. The complaint alleges a valid contract for the sale of the timber, and the exhibits do not conflict with that allegation. When the case has been developed, these exhibits may or may not prove sufficient to bind the defendant. That will depend on Balmer's authority to act for it. But the exhibits do not, on their face, show Balmer to have been without authority, and we must therefore, in testing the sufficiency of the complaint on demurrer, say that, by intendment, the contrary is alleged.

[2] We think the act of 1905 is of no im-

portance here. The title to the act is "An act to make timber in certain cases in this state personal property for the purposes of taxation." In a number of cases prior to the passage of this act, we recognized timber as a part of the realty and held that a conveyance of it as such conveyed an interest in the land itself; and we think there was no legislative intent to overturn those decisions. And in a number of cases since that act we have reiterated the doctrine that a conveyance of the timber on a certain tract of land is a conveyance of an interest in the land itself, and that the timber is real estate until it is severed from the soil. *Griffith v. Ayer-Lord Tie Co.*, 109 Ark. 223, 159 S. W. 218; *Graysonia-Nashville Lbr. Co. v. Saline Development Co.*, 118 Ark. 192, 176 S. W. 129, and cases there cited. The act is intended to make timber sold separately and apart from the land on which it stands personally for the purposes of taxation, so that the land and the timber may be separately assessed and the owner of the land be not required to pay the taxes on the timber, which would otherwise be charged to him as a part of the land.

[3] The demurrer should not have been sustained because there is an allegation of insolvency and a consequent inadequacy of remedy, and it may be that testimony can be adduced showing a special and peculiar value in the timber which gives it a value to the plaintiff which a judgment for damages could not adequately compensate. But we do not decide the point, as it is not especially insisted upon in the briefs and is evidently not the question which will be decisive of the case when the cause is tried out on its merits, upon the remand of the cause for that purpose.

[4] The point to which counsel have chiefly directed attention, and the difficult question in the case, is whether specific performance will lie to compel a conveyance of timber. It appears from the exhibits that the parties contemplated a deed from defendant to plaintiff. This deed would have evidenced, not only the timber conveyed, but that reserved, and would likewise have evidenced the time given for the removal of the timber, which was five years.

In the article on Specific Performance in 25 R. C. L. p. 238, it is said that—

"In similar manner an option to sell standing timber, after being unconditionally accepted by the vendee, may be specifically enforced against the vendor."

In support of that text the case of *Bryant Timber Co. v. Wilson*, 151 N. C. 154, 65 S. E. 932, 134 Am. St. Rep. 982, is cited. The contract there ordered specifically performed is not essentially different from the one here under review, and in that case the Supreme Court of North Carolina said:

"The contract is definite and certain as to its subject-matter, its stipulations, its purposes, its parties, and the circumstances under which it was made. Its meaning is plain and its various provisions carefully and clearly stated. There is a valuable consideration. The agreement is mutual. Specific performance is not only entirely practicable, but is necessary in order to give the plaintiff the full benefit of the contract, and there is nothing inequitable in its enforcement. In short, the contract has every requisite which is usually regarded as necessary to authorize a court of equity to compel specific performance. *Pomeroy, Eq. Jurisprudence*, §§ 1400, 1505. Then, again, the contract does not deal with personal property. It plainly savors of the realty. Growing trees are often, especially in the older cases, regarded as a part of the land, and the sale thereof as a sale of an interest in land. 28 Am. & Eng. Enc. of Law, 537, and cases cited. In this state growing trees have ever been regarded as part of the realty, and deeds and contracts concerning them are governed by the laws applicable to land. [Cases cited.]"

In the case of *Omaha Lbr. Co. v. Co-operative Inv. Co.*, 55 Colo. 271, 133 Pac. 1112, a contract for the sale of timber provided that the title to the timber was to remain in the grantor until removed, and it was therefore contended that this was a contract for the sale of chattels, and not for an interest in real estate, and that, for that reason, it could not be specifically enforced. The Supreme Court of Colorado said this contention could not be sustained, and in the opinion in that case it was said:

"It seems to be quite well settled that a contract for the sale of timber such as we are now considering may be specifically enforced. The English rule was stated to be: 'Thus a contract for a sale of timber can be specifically executed, although the timber is to be cut down at a future time or at intervals, and the money to be paid by installments. It is a certain contract, and the manner of dealing with the thing sold, by future cuttings, is no objection to a specific performance. The one man sells the timber, and the other pays for it the price contracted for. Here part of this contract is at once capable of a specific execution. This admits of no doubt.' *Gervais v. Edwards*, 2 Drury & Warren, 83."

See, also, other cases there cited, and *Gilfallan v. Gilfallan*, Ann. Cas. 1915D, 784, 789; *Davis v. Martin Stave Co.*, 113 Ark. 331, 168 S. W. 553.

[5] It is finally insisted that the contract was not sufficiently definite to support this action, for the reason that it does not define the term "merchantable timber." In reply, it may be said that the proof may show this to be a term of such definite signification as to be a sufficient designation of the timber sold without explanatory words accompanying it in the contract. *Liston v. Chapman & Dewey Land Co.*, 77 Ark. 120, 91 S. W. 27.

The decree of the court below is therefore reversed, and the cause remanded, with directions to overrule the demurrer.

HOME PROTECTIVE ASS'N v. MORSE.
(No. 298.)

(Supreme Court of Arkansas. March 29, 1920.)

1. Insurance §815(3)—Reply to answer not counterclaim or set-off not necessary.

In an action against a fraternal insurance order on a life policy, it was not necessary to file a reply to put in issue allegations in the answer alleging that the constitution and by-laws of the fraternal order expressly provided that no person over 60 years of age was eligible for membership and that the application provided that an answer to the query therein as to age of the applicant was a warranty, in view of Kirby's Dig. § 6108.

2. Insurance §817(2)—Insurance order must introduce constitution, by-laws, and application containing provisions relied on as defense.

In an action against a fraternal insurance order on a life policy, it was incumbent upon the defendant to introduce in evidence the constitution, by-laws, and applications containing provisions to the effect that persons over 60 years of age were ineligible for membership and that answers to queries in application as to age constituted warranties, relied upon as a defense.

Appeal from Circuit Court, Crawford County; James Cochran, Judge.

Suit by Cassie Morse against the Home Protective Association. Judgment for plaintiff, and defendant appeals. Affirmed.

John Mayes, of Fayetteville, for appellant.
E. D. Chastain, of Van Buren, for appellee.

HUMPHREYS, J. Appellee instituted suit against appellant, a fraternal insurance order, in the Crawford circuit court, to recover \$637.50, a 12 per cent. penalty, and an attorney's fee, on a certificate of insurance No. 662, roll No. 2 on the life of her husband, in which she was named as beneficiary. It was alleged in the complaint that, during the life of the policy, her husband, the insured, died, and that, although all requirements of the policy had been complied with and proof of death made, appellant had failed to pay the amount due her on the policy.

Appellant answered, admitting the execution of the policy, the payment by the insured of all assessments thereon, the death and proof of death of the insured, and the demand for and refusal of payment of the amount claimed under the terms of the policy; but interposed, as defenses to the claim,

first, fraud of the insured in the procurement of the policy by representing his age to be 58 when in fact he was 68 years old, and, second, the warranty of the insured in his application for insurance that he was not over 60 years old, and eligible for membership under the constitution and by-laws of the association which prohibited persons over that age from joining the order.

The cause was submitted to a jury upon the pleadings, evidence, and instructions of the court, which resulted in a verdict and judgment against appellee for \$637.50. From that judgment, an appeal has been duly prosecuted to this court.

[1, 2] Appellant insists that the court submitted the case upon the sole issue of whether or not the policy was obtained by the insured through a misrepresentation of his age and committed reversible error in withdrawing the other issue—that of warranty of age—from the consideration of the jury. It was alleged as a matter of defense in the answer that the constitution and by-laws of the fraternal order expressly provided that no person over 60 years of age was eligible for membership therein, and that the application signed by the insured to obtain the certificate of insurance, made the basis of this action, provided that the answer to the query therein as to the age of the applicant was a warranty. The evidence abstracted revealed that the insured was more than 60 years of age at the time he applied for the certificate of insurance. The constitution and by-laws of the order and the application for insurance, signed by the insured, were not introduced in evidence and do not appear in the abstract of the bill of exceptions. Learned counsel for appellant asserts that appellee admits that a party over 60 years of age is not eligible to membership in said insurance company, and that the statements as to the application were made warranties by the contract. We find no such admission in the record. We presume the admission grows out of the inference that it was necessary for appellee to file a reply denying these allegations in the answer. It was not necessary to file a reply to the answer in order to put the allegations thereof in issue. A reply is only necessary under our Code where the allegations in the answer are in the nature of a counterclaim or set-off. Kirby's Digest, § 6108. In addition to tendering the issue in the answer, appellant should have and it was incumbent upon him to introduce in evidence the constitution, by-laws, and application containing the provisions relied upon as a defense. Not having done so, there was no evidence upon which to send the issue to the jury as to whether the answer to the query as to the age constituted a warranty. This court said, in the case of National Annuity Association v. McCall, 103 Ark. 201

(quoting syllabus 1), 146 S. W. 125, 48 L. R. A. (N. S.) 418, that—

"Where an insurance company, being sued on a policy of insurance, relied on the falsity of certain answers in the application for insurance, the burden is upon it to prove the execution of the application by the insured, and that he had made the answers as alleged, as well as their falsity."

No error appearing, the judgment is affirmed.

MITCHELL v. SCHULTE. (No. 221.)

(Supreme Court of Arkansas. March 1, 1920.)

1. Mechanics' liens §132(1) — Void unless filed within ninety days.

A materialman's lien not filed within 90 days from the time the last item of material was furnished is void.

2. Contracts §71(3) — Promise to pay doubtful obligation in consideration of forbearance binding.

If a doubtful or void claim is in good faith believed to be well founded, a forbearance to prosecute it until a certain time is a sufficient consideration to support an agreement to pay it.

3. Contracts §193 — Letter not promise to pay void mechanic's lien.

A letter, "I write you in regard to lien filed by L., formerly known as B. L. Company, on my house for unpaid lumber bill. Please do not file suit but give me more time, say until December 1, 1917, and I will pay same," was a promise only to pay the lien and not to pay any debt which the contractors owed the materialman, and, the lien being void, the writer was not liable for any amount by reason of such promise.

McCulloch, C. J., and Smith, J., dissenting.

Appeal from Sebastian Chancery Court; J. V. Bourland, Chancellor.

Suit by L. D. Mitchell against Ella Schulte and others. From a judgment in favor of plaintiff for part of the relief demanded, the plaintiff appeals, and the named defendant prosecutes a cross-appeal. Affirmed on direct appeal, and reversed and remanded on cross-appeal, with instructions.

Dally & Woods, of Ft. Smith, for appellant.
T. P. Winchester, of Ft. Smith, for appellee.

HUMPHREYS, J. Appellant instituted suit in the chancery court of Sebastian county, Ft. Smith district, against appellee, the owner of a lot in Ft. Smith, and Foster & Paget, contractors, to recover a balance of \$268.26 and to enforce a materialman's lien against the lot, on account of material alleged to have been sold to, and used by, the contractors in the construction of a dwelling thereon.

The material averments in the complaint were that appellee owned the lot; that appellant's predecessor in business, H. B. Boyer, sold Foster & Paget, contractors, the material for the construction of a dwelling thereon; that they owed a balance of \$268.26 on the account; that he gave the required notice to appellee and filed a materialman's lien against the property within the time fixed by law; that appellee agreed in writing to pay the amount of the lien in consideration of an extension of time for the enforcement of the lien by suit. The prayer was for a personal judgment against the contractors and appellant, the declaration of a lien against the property, and an order of sale to satisfy same.

Appellee filed an answer, denying each material allegation in the complaint, and, in addition, alleged, in substance, that she had paid the contractors the contract price for the dwelling erected by them on said lot in the spring of 1917, except \$137 which she paid to appellant after the lien was filed; that the lien was filed more than 90 days after the last item of material was furnished for the construction of the dwelling; that the written promise only bound her to pay any valid and enforceable lien against her property; that the amount for which the lien was claimed had been paid to appellant and improperly credited by him to the Traylor job, for whom the contractors were building a house at the same time they were constructing her dwelling.

The cause was submitted to the chancellor upon the pleadings, the statutory notice to appellee, and the lien filed on October 22, 1917, pursuant thereto, the assignment of the lien by H. B. Boyer to appellant, the letter of date October 24, 1917, written by appellee to appellant's attorney, the attorney's reply thereto, and the evidence, which resulted in a decree in favor of appellant against O. B. Foster for \$268.26, against appellee for \$67.56, and a denial of the lien.

From the refusal of the court to adjudge the full amount of the claim against appellee and to fix and enforce a lien therefor against the property, appellant has prosecuted an appeal; and, from the decree against appellee for \$67.56, appellee has prosecuted a cross-appeal and the cause is before this court for trial de novo.

[1] Appellant's predecessor in business, H. B. Boyer, furnished O. B. Foster and his partner, Paget, the material used by them in constructing the residence for appellee on the lot in question. Appellee paid Foster the contract price, except \$137 retained by her to force the contractors to finish the house, which they never did. During the construction of the residence, the contractors were also building a house for ——— Traylor. According to a preponderance of the evidence, a payment of \$200 by O. B. Foster on appellee's

job was improperly credited to Traylor's job, and an item for screen material, of date July 26, 1917, was improperly charged against appellee's job. These findings of fact, after a careful consideration of the evidence, dispose of appellant's contention that the findings by the chancellor in these particulars were contrary to the preponderance of the evidence. After notice to appellee of appellant's intention to file a lien, she paid appellant the amount of \$137 withheld by her to force a completion of the house. This payment, together with a deduction of \$200 item paid by Boyer on appellee's job and improperly credited to the Traylor job, and the item of \$1.40 for screening improperly charged against appellee's job, reduced appellant's claim against appellee to \$67.56, which formed the basis for the judgment rendered against her by the chancellor, from which she has prosecuted a cross-appeal. Eliminating the item improperly charged for screening, the last item of material furnished to the contractors by appellant for the construction of appellee's house was furnished July 10, 1917. The lien was filed October 22, 1917, more than 90 days after the last item was furnished and, in consequence of the failure to file it within the statutory period, was a void lien. This finding of fact also disposes of appellant's contention that the chancellor's finding that no lien existed against the property was contrary to the weight of the evidence.

[2, 3] Appellant contends that notwithstanding the invalidity of the lien appellee is bound to pay the debt in consideration of a forbearance by appellant to institute proceedings immediately to enforce the claim. It is suggested that if the claim be regarded as doubtful, or void and in good faith believed to be well founded, a forbearance to prosecute it until December 1, 1917, was a sufficient consideration to support an agreement to pay it. A number of decisions are cited in support of that doctrine. *Matthews v. Morris*, 31 Ark. 222; *Lay v. Brown*, 106 Ark. 1, 151 S. W. 1001; *Brinkley Car Works & Mfg. Co. v. Cook*, 110 Ark. 325, 161 S. W. 1065. While the rule thus announced is sound, it does not reach the real point for determination in this case. The real point involved here is whether by the writing appellee bound herself to pay appellant's claim. This must be determined by a proper interpretation of the letter written by appellee to appellant's attorney and his reply thereto. The letters are as follows:

"Mr. Harry E. Daily, City—Dear Sir: I write you in regard to lien filed by L. D. Mitchell, formerly known as Boyer Lumber Company, on my house, 2308 Tilles avenue, for unpaid lumber bill. Please do not file suit but give me more time, say until December 1, 1917, and I will pay same.

"Yours truly, Ella Schulte,
"2308 Tilles Ave."

"Miss Ella Schulte, 2308 Tilles Avenue, Ft. Smith, Arkansas—Dear Miss Schulte: We are in receipt of your letter of the 24th inst, with

respect to the L. D. Mitchell lien, in which you agree to pay same on December 1, 1917, and in reply thereto beg to state that this meets with the approval of our clients, and no action will be taken by us before that time.

"Very truly yours, Kimpel & Daily."

Appellant's contention is that the writing is broad enough to obligate appellee to pay the entire claim or indebtedness. We do not think the contention sound. The language of the letter written by appellee to appellant's attorney indicates appellee's intention to liquidate a valid and subsisting lien against her property, if given time. The promise was to pay the lien, not to pay any debt which the contractors owed appellant for material furnished for the construction of the house. That it was the lien to which appellee was addressing herself is more clearly evidenced by the reply of the attorney, which, in part, is as follows:

"We are in receipt of your letter of the 24th inst. with respect to the L. D. Mitchell lien, in which you agree to pay same on December 1, 1917."

We are unable to construe the language of the letter into an obligation to pay a void lien which did not imperil her property or to pay the debt of another which did not hazard her property. Under this interpretation of her obligation, it was improper to render the personal judgment against her for \$67.56.

The decree on the direct appeal is therefore affirmed, but reversed and remanded on the cross-appeal, with instructions to dismiss the bill against appellee for the want of equity.

McCULLOCH, O. J. (dissenting). The decision of the majority totally disregards the contract between the parties as evidenced by the two letters set forth in the opinion. They say that the correspondence refers to the lien, but not to the payment of the debt, and refers to a lien filed in apt time, not to one which, for any reason, is invalid. In this view of the matter the contract had no binding force whatever; for, if the lien was valid, it needed no new promise to make it effective, and if the promise did not amount to an obligation to pay the debt for which the lien was asserted, it did not rise to the dignity of a contract at all.

There was a conflict in the testimony as to the payments on the account of appellant, as well as to the time of completion of appellee's house by Foster, the contractor; but it may be conceded that the finding of the chancellor on these disputed questions of fact were not against the preponderance of the evidence. There is, however, no dispute as to the correspondence between appellant and appellee, nor as to the circumstances under which it arose. Appellant had, after giving notice to appellee, filed a lien in accordance with the statute (Kirby's Digest, § 4981), which provides that persons asserting such liens must file—

"with the clerk of the circuit court of the county in which the building, erection or other improvement to be charged with the lien is situated, and within ninety days after the things aforesaid shall have been furnished or the work or labor done or performed, a just and true account of the demand due or owing to him, after allowing all credits, and containing a correct description of the property to be charged with said lien, verified by affidavit."

It is well settled by numerous decisions of this court that forbearance to institute legal proceedings for a time on an asserted claim, or to refrain therefrom altogether, is sufficient consideration to support a new obligation, and that the agreement for compromise of a disputed claim, even one which is in fact without merit, also constitutes a sufficient consideration for a new promise. Those principles are distinctly recognized in the opinion of the majority and authorities are cited in support of them. Other cases not mentioned in the opinion may be cited. *Buckner v. McIlroy*, 31 Ark. 631; *Willingham v. Jordan*, 75 Ark. 268, 87 S. W. 424; *Fender v. Helterbrandt*, 101 Ark. 335, 142 S. W. 184; *Nothwang v. Harrison*, 126 Ark. 552, 191 S. W. 2; *Jonesboro Hardware Co. v. Western Tie & Timber Co.*, 134 Ark. 543, 204 S. W. 418; *Simonson v. Patterson*, 213 S. W. 23; *First National Bank v. Allen*, 216 S. W. 1039.

But the majority hold that these authorities have no application, for the reason that, under proper interpretation of the correspondence, appellee did not promise to pay the debt, nor to discharge any lien, except a valid one filed in apt time. This is a narrow view to take of the language of the letters. The lien had been filed, stating the amount of the debt claimed, and notice thereof to appellee had been given. The letter referred to the filing of the lien "for unpaid lumber bill," and promised, in consideration of forbearance, to "pay same." Pay what? The debt for which the lien was asserted. There was nothing else to pay, and that is what the letter meant, if any meaning at all is to be attributed to it. And, even if the lien was filed too late, the promise to discharge it in consideration of forbearance for a time to sue constituted a waiver of the failure to file within the time prescribed by statute, or at least an agreement not to plead it.

SMITH, J., shares these views.

BLACKFORD et al. v. GIBSON et al. (No. 10.)

(Supreme Court of Arkansas. May 24, 1920.)

1. Exceptions, bill of \S 56(1)—Bill must be presented to chancellor for approval.

It was duty of parties to suit in equity to present their bill of exceptions to the chancel-

lor for his approval, or to have had the testimony brought into the record by some of the familiar methods to bring testimony before the Supreme Court; mere certificate of a stenographer that testimony which he had transcribed contained all the oral evidence introduced in the suit, which, as recited by the bill of exceptions, was heard on the complaint, affidavits, demurrer, and answer of defendants, and oral evidence, being insufficient.

2. Appeal and error \S 907(4)—Presumption that missing evidence sustained decree.

In the absence of oral evidence heard by the chancellor, the presumption on appeal is that the missing evidence sustains his decree.

3. Highways \S 90—Road district void for insufficiency of description.

Ozark Trail road district No. 2, sought to be created by Acts 1920, No. 104, held void for insufficiency of the description of the road, section 3, describing the proposed road according to government survey, being totally at variance with the description according to courses and distances.

Appeal from Craighead Chancery Court; E. L. Westbrooke, Special Chancellor.

Suit by B. G. Gibson and others against John Blackford and others. From decree for plaintiffs, defendants appeal. Affirmed.

Appellees brought this suit in equity against appellants to enjoin them from proceeding further in the construction of a road under Act No. 104 of the General Assembly of the state of Arkansas, approved February 7, 1920, entitled An act to create the Ozark Trail road improvement district No. 2.

The court granted the prayer of the plaintiffs, and enjoined the commissioners from taking any further steps tending to carry out the provisions of said act, and from incurring any obligations as commissioners of the district, or from attempting to fix any charge upon the land of the district either by assessment, levy, or for preliminary expenses. The case is here on appeal.

Rose, Hemingway, Cantrell & Loughborough, of Little Rock, and T. A. Turner, of Jonesboro, for appellants.

Lamb & Frierson, of Jonesboro, for appellees.

HART, J. (after stating the facts as above). [1, 2] It is first insisted that the decree must be affirmed because there is no bill of exceptions in the record. The bill recites that the case was heard before the chancellor upon the complaint, the affidavits of certain designated persons, the demurrer and answer of the defendants, and the oral evidence of certain persons named in the decree. There is no bill of exceptions contained in the record.

It is true there is a certificate of a stenographer that certain testimony which he has

transcribed contains all the oral evidence introduced in the cause, but there is nothing to indicate that the parties agreed that the oral testimony should be reduced to writing and filed as evidence in the case, or that the court ordered it so filed. The certificate of the stenographer that his transcribed notes contained all the oral testimony that was introduced in the cause avails nothing. It was the duty of the parties to present their bill of exceptions to the chancellor for his approval, or to have had the testimony brought into the record by some of the familiar methods of bringing such testimony before this court. While chancery causes are heard de novo in this court, they are tried upon the same record as was made in the chancery court. The presumption in cases like this is that the missing evidence sustains the decree of the chancellor. We must assume that every question of fact essential under the pleadings to sustain the decree is established by the oral testimony which is not properly brought into the record. *State, Use, etc., v. Leatherwood*, 127 Ark. 274, 192 S. W. 218, and cases cited. Neither was section 19 of the Practice Act of 1915 complied with. Acts of 1915, p. 1081.

[3] Again it is insisted that the decree should be upheld because the road described in the act creating the district is not an established public road and a part of it lies without the proposed district. On the other hand, counsel for the defendants base their right to a reversal of the decree on the ground that the Legislature committed a clerical error in describing the road. Counsel concede that, when tested by the description of the road according to the government survey, the district is void, but they claim that the road is sufficiently described by known monuments, and that these should control over the government survey. It is contended that the testimony omitted from the record would have shown that the description according to the government survey would have fitted another public road, as well as the one in question, and that it would have also shown that there were no known monuments that would have established the road attempted to be improved. Section 3 of the act contains the description of the road. It is very lengthy, and need not be set out herein. According to the description as there set out, the district is void. It is the duty of courts to ascertain the meaning of an act from the language used by the Legislature. The description of the proposed road according to the government survey is totally at variance with that according to the courses and distances described in the act. There is nothing to indicate which one the Legislature intended to adopt, and the chancery court was correct in holding that the act was void because of the legislative mistake

in describing the road to be improved. *Jones v. Lawson*, 220 S. W. 311.

It follows that the decree will be affirmed.

ANCIENT ORDER OF UNITED WORKMEN et al. v. PARAGOULD SPECIAL SCHOOL DIST. NO. 1 et al. (No. 356.)

(Supreme Court of Arkansas. April 26, 1920.
On Rehearing, May 24, 1920.)

1. Schools and school districts §154—Act allowing transfer of children to another district applies to transfer to or from a single school district.

Kirby's Dig. §§ 7639, 7640, providing for transfer of children of any person residing in a particular school district to an adjoining school district, and that when such transfer is ordered the school tax of such person shall be added to the revenues of the district to which he has been transferred, applies to the transfer of children for educational purposes to or from a single school district.

2. Schools and school districts §110—Complainant insufficient to show complainant district entitled to school taxes of enumerated persons.

A complaint by a school district and a creditor thereof, alleging that taxes collected from the lands owned by three residents of the district had been by the county officers credited to another school district, and praying decree restraining the crediting of such taxes to the other district, is not, in view of Kirby's Dig. §§ 7639, 7640, allowing the transfer of persons from one school district to another, and providing that the school tax of such person shall be added to the revenues of the district to which he has been transferred, sufficient to state cause of action at least for an injunction, not showing that the enumerated residents had not been transferred.

3. Schools and school districts §110—Creditor of school district cannot object to transfer of residents to another district without any showing of injury.

A creditor of a school district cannot object to the transfer of residents to another district and the crediting of their revenues to the second district, where there is no showing that such transfer will diminish the revenues of the district to the extent that they will be insufficient to pay the debt.

On Rehearing.

4. Schools and school districts §110—Complainant seeking to restrain crediting of taxes to another district defective in failing to show complainant's right to taxes.

A complaint seeking to enjoin county officers from crediting taxes from lands of residents of the complainant district to another school district is defective, in failing to allege that complainant was entitled to such taxes, and such defect can be reached by demurrer.

5. Constitutional law §143—Transfers from one district to another do not impair obligation of contract because of debt of district.

The power of the Legislature to transfer children of a resident of one school district to another, and to provide for the transfer of the taxes, is plenary, and cannot be questioned on the ground that it would work an impairment of the obligation of a contract, merely because the district from which the transfer was made was at the time indebted; there being nothing to show that its financial ability would be impaired to the extent of endangering security of bondholders.

6. Schools and school districts §110—Transfers of children and taxes from one district to another cannot be denied, on the ground that those remaining would incur added burdens.

The right of a resident of one school district to have his children transferred to another, and his taxes paid to the second district, cannot be denied, on the ground that the first district was indebted, on the theory that a greater burden would be thrown on those remaining within the district, and, if there are special circumstances, they must be pleaded in a suit to enjoin the transfer.

Appeal from Greene Chancery Court; Archer Wheatley, Chancellor.

Suit by the Mt. Carmel Rural Special School District No. 18 of Greene County and the Ancient Order of United Workmen against the Paragould Special School District No. 1. From a decree dismissing the complaint for want of equity, complainants appeal. Affirmed.

W. W. Bandy, of Paragould, for appellants.

MCCULLOCH, C. J. This is an action instituted in the chancery court of Greene county by the Mt. Carmel rural special school district No. 18 of Greene county and the Ancient Order of United Workmen, a fraternal insurance society, against Paragould special school district No. 1 and the county judge, the county clerk, and the collector of said county, to restrain the county officers from crediting to the Paragould special school district the school taxes levied and collected on certain lands situated in Mt. Carmel school district.

[1, 2] It is alleged in the complaint that said districts were organized by orders of the county court of Greene county as single school districts, pursuant to the general statutes of the state on that subject; that Mt. Carmel special school district was, in the year 1912, authorized to borrow money for building purposes, and did borrow from its coplaintiff, the Ancient Order of United Workmen, the sum of \$2,500, and had from year to year voted a special tax to raise funds to pay said indebtedness, but that the taxes collected from the lands owned by O. B. Justice, Dick Buchanan, and J. E. Purcell,

who are residents of Mt. Carmel special school district, had been by the county officers credited to Paragould special school district No. 1. The amount of taxes alleged to have been so credited is charged to be the sum of \$63.80. The prayer of the complaint was for judgment against Paragould Special School District No. 1 in said sum and for a decree restraining the county judge, county clerk, and collector from, in the future, crediting the taxes collected on said lands to the account of the Paragould special school district. The court sustained the demurrer to the complaint and dismissed it for want of equity; the plaintiffs declining to amend.

The defendant has not appeared in this court, nor does counsel for plaintiff in his brief indicate the specific ground on which the court sustained the demurrer, and we are left to search for ourselves to discover the defects in the complaint. It is alleged that the taxes which have been, or are about to be improperly credited, were levied and collected on the property of Justice, Buchanan, and Purcell, and that they are residents and landowners in the Mt. Carmel special school district; but it is not alleged that the lands of those persons were subject to taxation for school purposes in that district. The statutes of this state provide that the county courts shall have power, upon the petition of any person residing in a particular school district, to transfer the children of such persons for educational purposes to an adjoining district, and that when such transfer is ordered the school tax of such person "shall be added to the school revenues of the district to which he has been transferred, and shall not be included in the school revenues of the district where he resides." Kirby's Digest, §§ 7639, 7640.

We have held that this statute applies to the transfer of children for educational purposes to or from a single school district. Special School District No. 33 v. Eubanks, 119 Ark. 117, 177 S. W. 900. For aught that appears from the allegations of the complaint in this case the children of the three landowners mentioned in the complaint may have been transferred from one of the districts to the other, and consequently the lands of those parties were not subject to taxation for school purposes in the district where they are located. In other words, the allegations in the complaint are not sufficient to show that Mt. Carmel special school district is entitled to the school taxes on the lands of the persons mentioned in the complaint, and that district is therefore not entitled to maintain this action. At least, the complaint does not allege facts which call for the extraordinary relief by injunction.

[3] The other plaintiff, Ancient Order of United Workmen, fails to state a cause of action, in that it is not shown that injury will result if the amount of taxes mentioned

in the complaint is improperly credited to another school district. In order to make out a cause of action in favor of a creditor of the district, it must be shown that injury will result from the alleged wrongful act, or that the transfer of children and property by order of the county court, if there was in fact such a transfer, diminished the revenue of the district to the extent that the revenues pledged to the payment of the debt will be insufficient for that purpose.

The chancery court was therefore correct in sustaining the demurrer to the complaint. Decree affirmed.

On Rehearing.

[4] It is contended by learned counsel for appellant that the fact that there has been a transfer from Mt. Carmel rural special school district to Paragould special school district No. 1, if it constituted a defense to this action, should have been pleaded by answer, and could not have been reached by a demurrer. Appellant is invoking an extraordinary remedy, and, if the transfer constituted a defense, his failure to negative the transfer in the allegations of the complaint constituted an omission which could have been reached by demurrer. In other words, the failure to allege that these three taxpayers, who are named in the complaint, were subject to taxation in Mt. Carmel school district, is an omission which goes to the equity of the complaint.

[5] Again it is very earnestly insisted that under the statute creating the Mt. Carmel district the building fund authorized to be levied was pledged to the payment of the bonds issued by the district, and that it is beyond the power of the Legislature to provide for transfers to another district of the taxes pledged for that purpose, and the attempt to do so would constitute an impairment of the obligations of the contract evidenced by the bonds. We have decided that the power of the Legislature over that subject is supreme, and that the failure to provide by statute for the adjustment of equities does not defeat the legislative action. *Special School District No. 2 v. Special School District*, 111 Ark. 379, 163 S. W. 1164. That principle controls in the present controversy, and leads to the conclusion, announced in the original opinion, that neither of the appellants show facts sufficient to constitute a right of action, in that they did not allege that the transfer of the taxes of the particular parties named was sufficient to deplete the funds of the district to the extent that it endangered the securities held by the bondholders, or that it placed an additional burden on the other taxpayers.

[6] It is now contended that the other taxpayers in the district might complain because the transfer of a part of the taxable property from the district creates a heavier

burden on the main taxpayers. If this were true, the statute authorizing the transfer of children from one district to another would not be effective at all in any case where there was an indebtedness of the district. But the theory upon which it is allowed to be done is that those that remain in the district get the benefit of any improvements in the way of buildings in which the borrowed money was invested. If, however, there are peculiar circumstances which create an additional burden on the remaining property owners by reason of the transfer of the children and taxes of some of them, this must be especially pleaded and proved, in order to call for extraordinary equitable relief. The same can be said with respect to the claim of bondholders, for unless the revenues of the district are depleted to such an extent as to impair the securities of the bondholders they are not entitled to ask for extraordinary relief. This is the idea we intended to express in the original opinion in, stating the reasons why the decree should be affirmed.

We must adhere to those conclusions, and the petition for rehearing is overruled.

BRUNDIDGE et al. v. CRUTCHFIELD. (No. 27.)

(Supreme Court of Arkansas. May 31, 1920.)

Municipal corporations §—459—Special act authorizing improvement district to exceed limit of expenditures held unconstitutional.

Where the laws existing at the time of the organization of a street improvement district limited expenses of improvements to 20 per cent. of the assessed value of the real property in the district, a special act authorizing the district to expend 95 per cent. of the assessed value is unconstitutional.

Appeal from Hempstead Chancery Court; James D. Shaver, Chancellor.

Suit by C. H. Crutchfield against J. P. Brundidge and others, Commissioners of Street Improvement District No. 1 of Hope. Decree for plaintiff, and defendants appeal. Affirmed.

C. H. Crutchfield, an owner of real property within the limits of street improvement district No. 1 of Hope, Ark., brought this suit in equity against the commissioners of the street improvement district to enjoin them from proceeding with the construction of the improvement. The complaint, alleges that, under the laws existing at the time of the organization of the district, it could expend in making the improvements only 20 per centum of the assessed value of the real property of the district. It further alleges that by the provisions of a special act passed

at the extra session of 1920 the district was authorized to expend 35 per cent. of the assessed value of the real property in the district, but that this act is unconstitutional and void. The defendants demurred to the complaint. The chancery court overruled the demurrer, and, the defendants, electing to stand on the demurrer, a final decree enjoining them from proceeding with the work was entered of record. The case is here on appeal.

Rose, Hemingway, Cantrell & Loughborough, of Little Rock, and U. A. Gentry, of Hope, for appellants.

Jas. H. McCollum, of Hope, for appellee.

HART, J. (after stating the facts as above). The decision of the chancellor was right in holding the act to be unconstitutional. The record brings this case squarely within the rule announced in *Skipper v. Street Imp. Dist.* Nos. 1 and 2 of the City of Morrilton et al., 221 S. W. 866, and this case is ruled by the opinion in that case.

It follows that the decree must be affirmed.

MOLINE TIMBER CO. v. TAYLOR.
(No. 29.)

(Supreme Court of Arkansas. May 31, 1920.)

1. Master and servant §291(4)—Instruction held applicable to evidence.

In an employe's action for injuries received while operating a band cut-off saw, an instruction with reference to a broken condition of the guide was not objectionable, as abstract, where there was evidence that the absence of the guide had caused the saw to cut out a place, so that it had a vibration, making its use dangerous.

2. Master and servant §288(15)—Assumption of risk after promise to repair held for jury.

In an employe's action for injuries received while operating a band cut-off saw, whether plaintiff assumed the risk of a defective guide by going to work on Monday morning, after a promise of the foreman on Saturday morning to repair, held for the jury.

3. Master and servant §221(6)—Assumption of risk suspended by promise to repair.

The effect of a promise to repair, and of reliance thereon, is to create a new stipulation, whereby the master assumes the risk impending during the time specified for the repairs to be made; and where no definite period is specified, the suspension of the master's right to avail himself of the defense continues for a reasonable time.

4. Appeal and error §1064(1) — Erroneous instruction as to damages for injuries to minor harmless in view of estoppel of father.

In an action by servant for injuries, an instruction authorizing recovery for loss of time from date of injury, which occurred while he

was still a minor, was not prejudicial, in that plaintiff's father was entitled to the earnings during the remaining period of plaintiff's minority, where the father brought the action as next friend, and thereby estopped himself from claiming anything on account of plaintiff's services.

5. Estoppel §68(2)—Father, suing as next friend, estopped from making claim for child's services.

A father, who sues minor son's master for damages for personal injuries as next friend of his son, is estopped personally from claiming anything on account of loss of plaintiff's services.

6. Appeal and error §231(9)—General objection to instruction not inherently erroneous does not require reversal.

Since an instruction that a servant is entitled to recover for loss of time from date of an injury is not inherently erroneous, a judgment for a servant will not be reversed, although at the time of injury he was a minor and his father was entitled to his earnings, where defendant's objection to the instruction in the court below was only a general one.

7. Damages §132(13)—\$12,500 excessive for loss of two fingers and portion of hand, and reduced to \$8,000.

\$12,500 held excessive for the loss of two fingers and a portion of a left hand of servant 18 years of age, earning \$4.25 per day, and is reduced to \$8,000.

Humphreys, J., dissenting in part.

Appeal from Circuit Court, Hempstead County; James S. Steel, Special Judge.

Action by C. W. Taylor, by next friend, J. W. Taylor, against the Moline Timber Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Gaughan & Sifford, of Camden, and T. D. Wynne, of Fordyce, for appellant.

D. D. Glover, of Malvern, and Pace, Campbell & Davis, of Little Rock, for appellee.

SMITH, J. Appellee sustained an injury while operating a band cut-off saw in appellant's sawmill. The saw ran through a slot in a table having an iron apron. On top of the iron apron was a board 15 or 18 inches wide and 6 or 7 feet long, through which the cut-off saw ran through a slit or groove corresponding with the slit or groove in the iron apron of the table, and appellee claims that his injury was due to the fact that the board on top of the table was defective, in that it had cupped up and had split for a distance of several inches, and that there was a broken guide above the table, which gave the saw too much play, and that on account of the broken condition of this guide the saw had cut out a space, where it went through the table, larger than it had originally been, thereby giving the saw more play and making it more dangerous to operate.

Appellee was only 18 years old at the time of his injury, yet he was an experienced and skillful sawmill man, and had worked in various departments of the mill. He had been engaged at the table at which he sustained his injury only a few days, yet he discovered its dangerous condition, and reported that fact to Anderson, his foreman. Appellee testified that the attention of the foreman was called to the defective and dangerous condition under which the saw was being used on Saturday morning, and the foreman promised to repair the defect as soon as he could, and appellee relied upon this promise and continued in the service. On the following Monday morning appellee reported for duty, and went to work at the table in question, and between 9 and 10 o'clock that morning received the injury to compensate which this suit was brought. The injury resulted in the loss of appellee's little finger, and the one next to it, and the loss of half that hand down to the wrist joint. Appellant saved exceptions to the instructions which were given, and also to the refusal of the court to give other instructions which it requested.

[1] The first instruction given recited the alleged cause of negligence upon which a recovery was asked. It is conceded that the instruction correctly declared the law as an abstract proposition; but it is contended that it was error for the court to instruct with reference to the broken condition of the guide, for the reason that, if the guide was in a defective condition, that fact had nothing to do with the injury. But appellee testified that the absence of the guide had caused the saw itself to cut out a place possibly three-quarters of an inch wide at a place which was properly just a crack, and had cut a hole nearly twice as long as the saw was wide, and that the saw thus had a vibration or play which made its use dangerous. The operator of this saw stood in front of the table and pushed the dimension stuff he was sawing up against the saw, using both hands in doing so, and appellee was thus employed when he was injured. The objection that the instruction was abstract does not, therefore, appear to be well taken.

It is very earnestly insisted that the court should have told the jury that appellee assumed the risk of operating the machine, and should have given a requested instruction to that effect, and that error was committed in so modifying the instruction as to submit that question to the jury. This instruction was based upon the premise that, even though the foreman had promised to repair the defect in the machine, yet if appellee understood these repairs were to be made before he resumed work on Monday morning, and the repairs were not so made, and he knew that the defect of which he had complained still existed when he went to work Monday,

that he assumed the risk of operating the machine in its then existing condition.

[2] The theory of the instruction, as requested, was that the time had expired during which appellee would be relieved of the assumption of risk on account of the promise to repair. It is true that appellee did say that he understood the repair would be made by Monday; but he did not say that the foreman had promised the repair would be made by Monday. His testimony on that point, when amplified, was that the foreman had promised to make the repair as soon as he could, and that he supposed it would be made by Monday morning; but he still expected the repairs would be made, and went to work under that assumption. He also testified that the foreman—

"told me just as soon as he could get to it; that he was in a rush, and he couldn't shut the machine down then; for me to go ahead, and he would do it just as soon as he could."

The modification of the instruction was not improper, because, without the modification, the instruction would have told the jury that there was no suspension of the assumption of risk beyond Monday morning, whereas, if appellee was still relying upon the promise to repair, and had the right to do so, then it could not be said, as a matter of law, that there was a suspension of the assumption of risk, and the modification properly submitted that question of fact to the jury.

[3] We have many cases discussing the effect of the master's promise to repair, but nowhere is the law stated more clearly than in the case of *St. L., I. M. & S. R. Co. v. Holman*, 90 Ark. 565, 120 S. W. 150, where it was said:

"The effect of a promise to repair by the master, and of the continuance in his service by the servant, in reliance upon the promise, is to create a new stipulation whereby the master assumes the risk independent during the time specified for the repairs to be made. Where no definite period is specified in which the given defects are to be remedied, the suspension of the master's right to avail himself of the defense of assumption of the risk by the servant continues for a reasonable time."

Nor can it be said as a matter of law that, if Monday morning was not the definitely specified time within which the promise to repair was to be complied with, appellee would not have a right for a longer period of time to rely on that promise. Only one full day had intervened between the time the promise was made and the occurrence of the injury, and that day was Sunday and was not a working day at the mill.

[4-6] An instruction on the question of the measure of damages permitted appellee to recover for the loss of time from the date of his injury; the objection now urged to the instruction being that appellee, at the time of his injury, was still a minor, and that

appellee's father was entitled to these earnings during the remaining period of appellee's minority. It appears, however, that appellee had been emancipated by his father, and for more than a year had been allowed to collect and to appropriate his earnings to his own use. But, however that may be, the father brought this action as next friend of his son, and the instruction complained of directed the jury to assess compensation for any loss of time or diminished earning capacity from the date of the injury, and the father would be and is thereby estopped from claiming anything on account of appellee's services. *Mo. Pac. Ry. Co. v. Block*, 218 S. W. 682; *Baker v. Flint & Pere Marquette Ry. Co.*, 91 Mich. 298, 51 N. W. 897, 16 L. R. A. 154, 30 Am. St. Rep. 471. Moreover, the objection to the instruction in the court below was a general one, and, as it is not inherently erroneous, the reversal of the judgment would not be required because it was given.

[7] It is finally insisted that the judgment recovered is excessive, and we agree with counsel in this contention. The judgment was for \$12,500. No other error appears in the record, and that error may be cured by the reduction of the judgment. It is always a difficult question for us to determine to what extent a judgment should be reduced which we regard as excessive; but we think the present record presents a case in which that action should be taken. Appellee lost two fingers and a portion of his hand, and for a period of seven weeks was under the constant treatment of a physician, during which time he necessarily suffered much pain and sustained a total loss of earnings. Prior to his injury, which occurred on February 3, 1919, he earned \$4.25 per day, and since his injury he had been able to earn only \$2 per day. Necessarily there is a tenderness, which may for some time yet to come prevent appellee from doing kinds of labor which he may later on be able to perform, and there will always be a diminished capacity to perform labor, and the disfigurement is also permanent. The trial in the court below occurred on October 20, 1919. But the case is not that of a man who has lost a hand. Appellee still has his thumb and his two principal fingers, and he will be able to do many things with that hand which do not require much gripping power or great strength, which he could not do without the three fingers he still has. Appellee was a right-handed man, and the injury occurred to his left hand.

We think, under all the circumstances, a judgment for \$8,000 will fairly compensate the injury sustained, and the judgment will be reduced to that sum, and, as thus modified, will be affirmed.

HUMPHREYS, J. (dissenting). Appellee, C. W. Taylor, began to work for appellant

when a mere schoolboy, working at odd times and on Saturdays. He showed so much aptitude for that character of work, the foreman suggested that he quit school and adopt the mill business as his life's work. He gave up his education and became a regular employé in appellant's company. He became skilled in the use of machines of all kinds in the mill, and was advanced until, at the time of his injury, he was receiving \$4.25 a day, and was in line for promotion. His expectancy was 43½ years. His injury wholly incapacitated him for the character of work he had theretofore been doing. He was re-employed, and made an effort to carry on his old work, but was compelled, on account of the character of the injury, to give it up entirely and take up a different character of labor, from which he was able to earn \$2 per day as a maximum amount. His actual loss, therefore, was \$2.25 per day. Figured upon this basis on an expectancy of 43½ years, the present value of his earning capacity is \$12,275. His injury was a severe one, causing him much pain and anguish of mind. The condition in which his hand is left will necessarily embarrass and humiliate him throughout life. The verdict of the jury is not excessive, based upon the actual pecuniary loss to appellee, and, when the other elements of damage above mentioned are taken into consideration, it is quite clear that the verdict of the jury was not excessive.

For these reasons, I am unable to concur with my Associates in the reduction of the judgment. I therefore dissent from the judgment in this regard.

FROLICH et al. v. HICKS et al. (No. 373.)

(Supreme Court of Arkansas. May 3, 1920.
On Rehearing, June 14, 1920.)

1. Appeal and error \S 1002—Verdict on conflicting evidence conclusive.

Verdict on conflicting evidence on issues properly submitted is conclusive on appeal.

2. Evidence \S 483(1), 519—Capacity of engine not matter calling for expert knowledge.

Capacity of an engine for pumping water is not a matter calling for expert knowledge, but only for such knowledge as a man of ordinary intelligence and judgment, with sufficient observation of the operations of such an engine, would possess.

3. Evidence \S 243(2)—Admissions of agent after transaction inadmissible against principal.

Admissions of an agent after the close of a transaction from which damages, rendering his principal liable, are claimed to have resulted, are not competent to establish liability of the principal.

4. Witnesses \S 388(10)—Inquiry as to conversation as ground for impeachment held too general.

Question to witness, as to prior statements to certain persons contrary to his testimony as foundation for impeachment, is too general; it not mentioning time, place, or circumstances of the conversations.

On Rehearing.

5. Landlord and tenant \S 48(1)—In action for lessor's breach of agreement to furnish water, evidence as to capacity of well held sufficient to go to jury.

Evidence in action by lessee for breach of agreement of lessor to furnish sufficient water to flood a rice crop, conditioned on a third person furnishing a well of 2,000 gallons per minute capacity, held sufficient to go to jury on the question of the well being of that capacity.

Appeal from Circuit Court, Lonoke County; George W. Clark, Judge.

Action by Grover C. Hicks and others against Max Frolich and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Trimble & Trimble and Chas. A. Walls, all of Lonoke, for appellants.

Jas. B. Reed, of Lonoke, and Jno. P. Streepey, of Little Rock, for appellees.

McCULLOCH, C. J. This is an action instituted by appellees against appellants to recover damages alleged to have been sustained by reason of the breach of a contract in regard to the renting of a rice farm for the year 1918 and an undertaking in said contract on the part of appellants to furnish the water to flood the rice crop. Appellant owned a rice farm in Lonoke county and entered into a written contract with appellees, agreeing to rent the farm to appellees for the years 1918 and 1919, for a certain share of the crop, and also agreed to furnish an adequate supply of water with which to flood the rice, conditioned on Lane & Bowler Company furnishing a well on the premises of the capacity of 2,000 gallons per minute, in accordance with the terms of a contract between that company and appellants.

It is alleged in the complaint that Lane & Bowler Company furnished the well, of the capacity mentioned, and installed a pump therein, according to the terms of the contract, but that appellants failed to put in an engine of sufficient capacity to pump enough water to flood the rice crop, and that the crop failed for the lack of water. There was a denial of the allegations of the complaint, and on the trial of the issues before a jury the verdict was in favor of appellees.

[1] It is contended, in the first place, that the testimony is not sufficient to sustain the verdict. The evidence tends to show that the quantity of water pumped from the well was

insufficient to flood the rice crop; that the well furnished by Lane & Bowler Company was up to contract, in that it had a capacity of 2,000 gallons of water per minute, but that the engine used by appellants in pumping water was not of sufficient power to operate the pump to the full capacity of the well or to afford sufficient quantity of water to flood the rice crop. The contract between the parties to the litigation, and also the contract between appellants and Lane & Bowler Company, were both in writing, and there can be no dispute as to their contents. Lane & Bowler Company was only to furnish a well of the capacity mentioned and put in the pump. It therefore became the duty of appellants under their contract with appellees to furnish an engine of sufficient power to pump the necessary quantity of water from the well. If the well furnished by Lane & Bowler Company was not of the capacity mentioned, then, under the contract between the present litigants, appellants were to be absolved from all liability on account of the failure to obtain sufficient quantity of water to flood the crop.

There was conflict in the testimony on the issue as to whether or not the well furnished by the company came up to specifications. Some of the witnesses testified that it furnished much less than 2,000 gallons per minute, and others testified that it had a capacity of more than that quantity of water. That issue was properly submitted to the jury on legally sufficient evidence, and the verdict settles the issue against appellants.

The next issue in the case was whether or not an engine of sufficient power was furnished by appellants. There was a conflict also on this point, and the evidence was sufficient to warrant a verdict either way, according to where the jury found the preponderance to be. We can not say the verdict is unsupported on that issue.

There was also an issue as to the effect upon the rice crop and the amount of damages, if any, which resulted, and these issues were also supported by legally sufficient evidence. All of the issues were submitted to the jury on correct instructions.

Learned counsel complain of the court's instructions, particularly No. 3, which they say ignored the issue as to whether or not Lane & Bowler Company complied with their contract with respect to the well, and particularly as to the pump. There was no controversy in the case, as we understand, as to the sufficiency of the pump itself; but there was an issue as to the capacity of the well which Lane & Bowler Company was to furnish and the capacity of the engine which appellants themselves were to furnish. We think, as before stated, these issues were properly submitted to the jury and there was no error in the instructions.

[2] Error is also assigned in the ruling of the court in permitting appellees themselves and other witnesses to testify with respect to the capacity of the engine furnished by appellants. One of the witnesses is an expert engineer familiar with the operations of such engines, and the other witnesses showed that they had more or less experience in observing the operation of such engines. We are of the opinion that in the first place the matter about which the witnesses testified was not one calling for expert knowledge, but only for such knowledge as a man of ordinary intelligence and judgment with sufficient observation of the operations of such an engine would possess. The witnesses described the engine and its kind, and each stated that they had been about the operation of such engines for many years. We think that the testimony of the witnesses was competent. *Bowen v. State*, 100 Ark. 232, 140 S. W. 28.

[3] Mr. Hollingshead, who was the sales manager for Lane & Bowler Company, was called as a witness by appellees to prove that the well furnished by that company was of the capacity mentioned in the contract, and his testimony tended to establish that fact. Other testimony was adduced by appellees along the same line. After appellees had rested their case and appellants had introduced testimony, they recalled Mr. Hollingshead to the witness stand for further cross-examination, and proposed to ask him the question whether or not he had stated to a Mr. Miller and a Mr. Herron, or either of them, that Lane & Bowler Company had failed to get the well to the capacity they had agreed on. Appellees interposed an objection, which the court sustained, and the ruling of the court in refusing to allow the question to be propounded is assigned as error. It is argued that the testimony was competent as substantive proof to establish the fact that the well was not up to contract, but the answer to that contention is that the admissions of an agent after the close of the transaction from which damages resulted is not competent evidence tending to establish the liability of the principal. *Stecher Cooperage Works v. Steadman*, 78 Ark. 381, 94 S. W. 41.

[4] Again, it is argued that the testimony was competent in order to lay the foundation for the impeachment of Hollingshead as a witness. We are of the opinion that the question was too general in its nature, in that it did not mention the time, place, or circumstances of the conversation sought to be elicited. Before they can complain of the court's ruling in excluding the testimony, they must have offered the question in such form as to elicit an answer which would afford the proper foundation for impeachment. It was not sufficient to merely ask the witness whether or not he had ever made any such statement to the persons named.

We find that there was no error committed

by the court in the progress of the trial, and that the testimony was sufficient to sustain the verdict; and the judgment is therefore affirmed.

On Rehearing.

[5] It is very earnestly insisted by counsel for appellants that we were mistaken in saying that the evidence was legally sufficient to warrant the submission of the issue whether or not the well furnished by Lane & Bowler Company had the capacity to furnish 2,000 gallons of water per minute. It must be conceded that the testimony on this point is not clear and satisfactory, and we have re-examined it with care for the purpose of ascertaining whether or not a mistake was made in the original opinion on that question. Mr. Hollingshead, the sales manager for Lane & Bowler Company, was called as a witness by appellees, and he testified that in his opinion the well was capable of producing 2,000 gallons of water per minute. He was not asked as to his qualifications as an expert on the subject; nor was any objection interposed to his giving his opinion as to the capacity of the well. On cross-examination he made a statement that tended, more or less, to qualify his former statement, or rather to weaken the effect of it; but he did not withdraw the statement, and it was a question for the jury to determine what weight should be given to it. One of the appellees testified that he was familiar with wells of that kind, and that this well furnished 1,800 gallons per minute with the 60 horse power motor that was used.

There was other testimony to the effect that a motor of that capacity was insufficient, and that a larger one would have pumped a greater quantity of water. This witness also testified that, while the pump was bringing up water at the rate of 1,800 gallons per minute, there were no bubbles observable in the water. It appears from the testimony that when a well is pumped full capacity bubbles will appear. Now, there was another witness introduced who testified as an expert, and he gave it as his opinion, if the well was furnishing 1,800 gallons of water per minute with a 60 horse power motor, and no bubbles appeared in the water, that if 75 horse power motor was used the well would have produced 2,000 gallons of water. He testified, on cross-examination, that he would not undertake to say what the capacity of this particular well was; but this did not weaken the force of his testimony as an expert concerning the additional amount of water that would have been furnished under those circumstances. Another witness, T. J. Cullar, testified that he worked for Lane & Bowler Company in driving this well, that he had had experience with such wells, and that a well driven to the stratum reached in this well would furnish 2,000 gallons of water per

minute. We cannot say that there is no testimony of a substantial nature tending to show that the well furnished by Lane & Bowler Company was of the capacity of 2,000 gallons per minute. This being true, the issue was properly submitted to the jury.

We have considered the other questions raised on rehearing, but have reached the conclusion that our judgment on the former hearing was correct.

The petition for rehearing is therefore denied.

ASHCRAFT v. STATE. (No. 83.)

(Supreme Court of Arkansas. Dec. 22, 1919.)

1. District and prosecuting attorneys ~~§ 8~~— Not required to follow up appeals.

Prosecuting attorneys are not required to follow up appeals in criminal cases, and any services performed in that regard are voluntary, since the Attorney General alone is required to represent the state in criminal appeals, under Kirby's Dig. §§ 3462, 3463.

2. Costs ~~§ 317~~—Prosecuting attorney's fee on affirmance where thirty defendants were tried together.

Where 30 defendants were indicted separately for the same offense, were tried together by consent, and there was one judgment of conviction against all defendants, which was affirmed by the Supreme Court, the prosecuting attorney can tax only one fee, under Kirby's Dig. § 2620, providing that upon affirmance of a judgment on defendant's appeal an attorney's fee of \$20 to be paid the prosecuting attorney shall be taxed as part of the costs.

3. Costs ~~§ 292~~—Joint and several liability of defendants tried together.

Where numerous defendants were indicted separately but tried together and a single judgment of conviction entered and affirmed by the Supreme Court, attorney's fee, taxed as part of the costs of appeal, under Kirby's Dig. § 2620, may be collected from either of the defendants or apportioned against all of them, since they are jointly and severally liable.

Lee Ashcraft and others were convicted of falling to dip their cattle and the judgment of conviction affirmed. 215 S. W. 688. On motion of the prosecuting attorney to retax the costs. Motion overruled.

J. H. Bowen, of Perryville, and Reid, Burrow & McDonnell, of Little Rock, for appellants.

Geo. W. Emerson, of Little Rock, and G. B. Colvin, of Perry, for the State.

PER CURIAM. There were 30 defendants indicted separately for the same offense, but by consent they were tried together, and there was one judgment of conviction against all of the defendants. An appeal was prosecuted to this court, and the judgment against all of

the defendants was affirmed. The statute reads as follows:

"Upon the affirmance of a judgment on the appeal of the defendant, an attorney's fee of twenty dollars, to be paid to the prosecuting attorney, shall be taxed as part of the costs of the appeal, and upon the reversal of a judgment upon an appeal by the plaintiff, a fee of five dollars." Kirby's Digest, § 2620.

The clerk of this court taxed as cost one fee of \$20, and the prosecuting attorney moves the court for a retaxation of cost so as to allow a separate fee of \$20 on each of the convictions.

The reliance of the prosecuting officer in his contention for a separate fee for each conviction is on the decision of this court in the case of Hempstead County v. McCollum, 58 Ark. 159, 24 S. W. 9, where the court construed the statute (Kirby's Digest, § 3488) allowing prosecuting attorneys a fee "for each conviction on indictment for any felony," and holding that on joint indictments against several defendants tried together, and on an indictment against a single defendant charging more than one offense, the prosecuting attorney is entitled to a separate fee on each conviction.

The two statutes relate to different subjects and are open to different interpretations.

Section 3488 relates to fee of a prosecuting attorney on each conviction in criminal prosecutions.

Section 2620 relates to fees taxed upon affirmance of judgments in misdemeanor cases in the Supreme Court. One is allowed as compensation for service in procuring each conviction in a criminal case, and the other is allowed as a docket fee on each judgment. The gist of the decision in the McCollum Case, supra, was that, while there was but one judgment, there was more than one conviction within the meaning of the statute, and that the prosecuting officer was allowed, under the statute, a fee on each of the convictions, regardless of the fact that there was only one judgment in the case. In the opinion the court quoted Prof. Wharton as follows:

"In an indictment against two or more the charge is several as well as joint, and the conviction is several." Wharton Cr. Pl. & Pr. § 314.

[1] The case, and the applicable statute, is entirely different where there is only one judgment of affirmance though it embraces several convictions. The prosecuting attorney is not required to follow up appeals in criminal cases, and services performed in that regard are voluntary. The Attorney General alone is required to represent the state in causes pending in the Supreme Court. Kirby's Digest, §§ 3462, 3463. But the statute allows the prosecuting attorneys a docket fee on each judgment of affirmance in misde-

meanor cases in the Supreme Court. This is not for services performed, for, as before stated, none are required of that officer.

[2, 3] It is not material that in the present case the indictments against the defendants were separate. The cases were tried together by consent, and only one judgment was rendered, and there was only one judgment of affirmance. The taxation of a single fee for the judgment of affirmance is against all of the defendants jointly and severally. Only one fee can be imposed, but it may be collected from either of the defendants at the election of the state, or it may be apportioned against all of them, as the state may elect. The fact that each conviction is separate does not affect the question of allowance of a single fee for the affirmance.

Motion overruled

BROWN v. STATE. (No. 363.)

(Supreme Court of Arkansas. April 26, 1920.)

1. Criminal law §510, 511(1) — Accomplice testimony must be corroborated; what not sufficient corroboration.

Under Kirby's Dig. § 2384, a conviction cannot be had on the uncorroborated evidence of an accomplice, and the corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof.

2. Criminal law §511(1)—Evidence corroborating accomplice testimony held sufficient to sustain conviction.

In a prosecution for robbery, where defendant's alleged accomplice confessed and testified for the state, evidence corroborating the accomplice held sufficient to sustain the conviction.

3. Criminal law §942(2)—Denial of new trial because accomplice repudiated testimony not abuse of discretion.

Where, after conviction, defendant's accomplice repudiated his testimony, the denial of a new trial requested on that ground cannot be held an abuse of the trial court's discretion, where such accomplice was corroborated in several important details, and the court heard the witnesses and saw their demeanor.

4. Criminal law §719(1)—Prosecutor cannot state facts not shown by the evidence.

It is error for the prosecutor to state facts not shown by the evidence.

5. Criminal law §719(3) — In a prosecution for robbery, argument by prosecutor held improper.

In a prosecution for robbery, where the proprietress of a hotel at which defendant took his meals gave testimony to establish his alibi, a remark by the prosecutor that he knew all about the woman, but could not tell what he knew, but wished the jury knew, was improper as a statement of fact as to which there

was no evidence, for it was an adroit way of asking the jury to draw an unfavorable inference as to the character of the witness, and as such amounted to a statement of fact.

Appeal from Circuit Court, Nevada County; George R. Haynie, Judge.

George Brown was convicted of robbery, and he appeals. Reversed and remanded for new trial.

George Brown was indicted, tried before a jury, and convicted of the crime of robbery. The facts as shown by the state, briefly stated, are as follows:

Ben Baker lived in Nevada county, Ark., about 11½ miles from Hope, Ark. He is a single man, and his aged mother lives with him, and they lived there on November 23, 1919. On Sunday night, November 23, 1919, two men went into Baker's house and threw their guns on Baker and his mother and then tied them. They told them that they knew Baker had a lot of money and forced him to give them \$400 of his own money. They searched the house and found \$400 additional, part of which belonged to Baker, and the remainder to his mother. One of the men participating in the robbery was a slender man and the other was heavy set. The heavy set man did the talking. Both of the men looked like their faces were blacked, and they had cloths tied over their mouths. One of the men took out his knife and threatened to cut Baker's throat in an effort to make him give up his money. There was smut on Baker's neck where the robber's hands had touched it. Baker's mother was 79 years old, and they tied her with wire. Baker could not recognize the men, because they had smut on their faces and had tied thick cloths on their faces above their mouths. There were tracks on the outside of the house which looked like somebody outside had stood there while the robbers were in the house. A short time after the robbery occurred Baker had a conversation in the town of Hope with the accused George Brown. He and another man were discussing with Brown about having carried some men to Baker's house the night of the robbery. Baker testified that George Brown said that they ought not to blame him for carrying the men down there and him not knowing where they were going. We here quote from the testimony of Baker as to what Brown said to him on that occasion:

"Here a while back, a short time, I carried a bunch out in the country; I didn't know where they was going; first thing I knew they had a suit case or two of whisky in the car and was drinking it, and he didn't know what was up and had to bring them back to town drunk."

The testimony of Baker as to what occurred at the scene of the robbery was in all re-

spects corroborated by that of his mother.

Harry Simmons made a confession and testified on behalf of the state. According to his testimony Arthur Neal, Joe Ed Smith, George Brown, and himself robbed Ben Baker and his mother. Joe Ed Smith and Simmons were working at the Brown Gin Company in Hope, and Arthur Neal lived in the town there, painting. George Brown operated a car for hire in the town of Hope. On the Sunday night that Baker's house was entered and the robbery occurred, Joe Ed Smith, Arthur Neal, George Brown, and Harry Simmons got in George Brown's car and started to Baker's for the purpose of robbing him. They knew that he had a considerable sum of money. Brown and Neal sat on the front seat, Brown driving the car, and the other two sat on the back seat. They were all dressed in blue overalls. All the parties put smut on their faces in order to disguise themselves. It was dark when they got to Baker's house. George Brown and Joe Ed Smith both had pistols and went into the house. After the robbery was over they got into the car and went back to Hope. They ran the car pretty fast, and it took about 40 minutes to get there. All the parties except George Brown got out of the car and went up to the light plant, where they washed their hands and faces and pulled off their overalls. Joe Ed Smith had on a soldier's uniform.

The engineer of the light plant at Hope heard about the robbery on Tuesday after it happened. According to his testimony on the Sunday night preceding the robbery, being the 23d day of November, three men came to the light plant. Two of them had on overalls, and the other one was in a soldier's uniform. One of the men was pretty black and smutty. They asked for water to wash their faces. There was nothing about them to attract the witness' attention, and he was not able to identify them. He knew George Brown and knew he was not one of the men.

A deputy sheriff was also a witness for the state. He went to the scene of the robbery on the next day after it occurred and found the things in the house piled in the middle of the floor as if the drawers and trunks in the room had been emptied. There was a rag with the things which had some smut on it. There were tracks behind the smokehouse where some one had evidently stood. Arthur Neal had on shoes at the time he was arrested, and the tracks looked like tracks which his shoes would make. Brown had a pistol in a dresser drawer in his room at the time he was arrested. He tried to keep the deputy sheriff from taking the pistol with him. The deputy sheriff went and got the overalls which Harry Simmons and Joe Ed Smith said they had on the night of the robbery. They were blue overalls and jumpers.

The testimony of other witnesses tending to corroborate the testimony of Harry Sim-

mons will be stated or referred to in the opinion.

The defense of the accused was an alibi. He denied that he left Hope on the Sunday night that the robbery occurred, in an automobile, and proved by several witnesses that at about the time the automobile is said to have left for Baker's house he was at a hotel in Hope, and that he stayed there and ate supper.

The jury returned a verdict of guilty and fixed the defendant's punishment at three years in the state penitentiary. From the judgment rendered, the defendant has duly prosecuted an appeal to this court.

J. O. A. Bush, of Prescott, and Steve Carri-gan, Jr., of Hope, for appellant.

Jno. D. Arbuckle, Atty. Gen., and J. B. Webster, Asst. Atty. Gen., for the State.

HART, J. (after stating the facts as above).

[1] Harry Simmons made a confession and was a witness for the state. According to his testimony, Arthur Neal, Joe Ed Smith, George Brown, and himself robbed Ben Baker and his mother at the house of the former in Nevada county, Ark. He described in detail how the robbery was committed. He was an accomplice of the defendant, and under our statute the latter cannot be convicted unless the testimony of the accomplice is corroborated by other evidence tending to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof. Kirby's Digest, 2384.

[2] It is earnestly insisted by counsel for the defendant that the testimony of Harry Simmons is not sufficiently corroborated to warrant the jury in finding the defendant guilty. We cannot agree with counsel in this contention. Simmons testified that they all went to the scene of the robbery in a Ford car which was driven by the defendant. They all had on blue overalls, and two of them went into the house, and the other two remained outside for the purpose of watching so that the ones in the house might be warned of the approach of any one. Their faces were covered with smut.

It was shown by witnesses for the state that George Brown owned a Ford car, and that he and other parties were seen in it in Hope on the Sunday evening that the robbery occurred, and that they left there a short time before dark. Baker says that they had smut on their faces and blue overalls on. Simmons also said that they stopped before they got to Baker's house and cut off some pieces of telephone wire. Baker testified that his mother's hands were fastened together by wire, and the wire was exhibited to the jury. The jury might have inferred from this fact

that it was telephone wire. Simmons testified that Arthur Neal stayed on the outside around the smokehouse as a watcher while the robbery was being committed. The deputy sheriff who arrested Neal observed these tracks on the next morning after the robbery and said that they looked like they had been made by a pair of shoes which Neal had on when he was arrested. Simmons said that they all had on blue overalls, and had disguised themselves by blacking their faces with smut. After the robbery was over they drove hurriedly back towards Hope, and separated before they got into town. The defendant went on with the automobile, and the other parties went to the light plant, where they took off their overalls and washed their faces. He also stated that Joe Ed Smith was dressed in a soldier's uniform. The engineer of the light plant remembered that some parties came there on that Sunday night, and that one of them was dressed in a soldier's uniform, while the other two had on blue overalls. He noticed that the face of one of them had a good deal of black on it when he washed. His attention was not particularly called to the parties, and he could not identify any of them. He knew the defendant, and knew that he was not one of them. Then, too, Baker had a conversation with Brown shortly after the robbery with regard to it, and the jury might have inferred from what Brown said that he had carried the parties to the scene of the robbery. These facts and circumstances, if believed by the jury, were a sufficient corroboration of the testimony of the accomplice and warranted the jury in finding the defendant guilty.

The court instructed the jury on the subject of the corroboration required of the testimony of the accomplice in the manner provided by the section of the digest above referred to and the decisions of our court construing it.

[3] After the jury had convicted the defendant and after the defendant had filed his motion for a new trial, the defendant filed a supplemental motion for a new trial. In it he exhibited an affidavit from Harry Simmons in which the latter stated that he was originally induced to enter a plea of guilty and testify against the defendant by the promise of the deputy sheriff that he himself would go free and by the threat that if he did not so testify he would get a long prison sentence.

In his affidavit Simmons denied that either himself or the defendant were present when the robbery was committed, or that they had anything whatever to do with it. In short, he repudiated in toto what he had testified to before the jury in the trial of the defendant and undertook to explain away his testimony.

In asking for a reversal of the judgment on this ground, counsel for the defendant re-

ly mainly on the case of *Bussey v. State*, 69 Ark. 545, 64 S. W. 268. In that case the defendant was tried and convicted of the crime of rape. The conviction rested almost entirely upon the testimony of the prosecuting witness, and the court held that under the peculiar circumstances of that case that it was better that the case should be retried than to enforce a judgment for the extreme penalty of death.

In the present case Simmons was before the court when he testified at the trial of the defendant, and the court had the opportunity to examine his testimony and demeanor on the witness stand and compare them with the statements made by him in his affidavit after the trial was ended and the defendant had been convicted by the jury. Simmons' testimony was corroborated in several important details, and it cannot be said that the trial court under the circumstances abused its discretion in not granting the defendant a new trial because Simmons made a written retraction of his former testimony and swore to the truth of it.

[4, 5] Again, it is contended that the judgment should be reversed because of certain prejudicial remarks made by the prosecuting attorney in arguing the case before the jury. In his closing argument to the jury the prosecuting attorney said:

"Here comes old Mrs. Smith, and testifies that she knows where George Brown was. I know old Mrs. Smith, and I know all about her. I cannot tell you here what I know, but I wish you knew."

The defendant objected to this argument and moved the court to admonish the jury not to consider it. The court overruled the objections of the defendant, and the defendant excepted to the ruling of the court.

The defense of the defendant was an alibi. Mrs. Smith ran a hotel in Hope, Ark., where the defendant took his meals. She was a witness in his behalf, and testified that he ate his supper at her hotel on the evening that Ben Baker's house was entered and he was robbed. She testified as to the details of a special conversation she had with the defendant on that evening, and gave her reasons for knowing that he was there. This was at an hour of the day when, according to the witnesses for the state, the defendant was on his way to the scene of the robbery. Thus it will be seen that she was a material witness for the defendant, and that her testimony, if believed by the jury, would have established his innocence of the charge against him. No evidence was introduced tending to impeach her character.

The prosecuting attorney went out of the record and stated that he knew all about Mrs. Smith, but could not tell the jury what

he knew of her, and wished that the jury could know. The prosecuting attorney is not allowed to state, as a matter of fact, that of which there is no evidence. His statement in the case at bar was not within the latitude of discussion the law accords to counsel. Its evil tendency and prejudice to the rights of the defendant are manifest. There is not a fact in the record from which an inference can be drawn that Mrs. Smith was of bad character. The prosecuting attorney went out of the record to state that he knew her character, and that he wished the jury knew it. This was an adroit way of asking the jury to draw an unfavorable inference about the character of the witness from a statement of fact made by the prosecuting attorney which was not in the record. The fact is the principle, the inference is the incident,

without which the fact cannot have existence. *Dunmore v. State*, 115 Ala. 66, 22 South 541. The remarks of the prosecuting attorney were similar to the remarks of counsel held prejudicial in *Fort v. State*, 74 Ark. 210, 85 S. W. 236, and *German-American Ins. Co. v. Harper*, 70 Ark. 305, 67 S. W. 755. The error of the court in this regard compels a reversal of the judgment.

Other statements were made in the closing argument of the prosecuting attorney which might be considered improper, but, as in our judgment they will not occur in another trial, we shall not extend this opinion by commenting on them.

For the prejudicial error in the closing argument of the prosecuting attorney to the jury, the judgment must be reversed, and the cause remanded for a new trial.

FIRST NAT. BANK OF MONETT v. WILSON et al. (No. 20584.)(Supreme Court of Missouri, Division No. 1.
June 2, 1920.)**1. Appeal and error §1009(1)—Where both parties claim legal title appellate court bound by verdict of court sitting as jury.**

Where on an appeal in a suit to quiet title both parties claim the legal title to the property without the intervention of a court of equity, the Supreme Court cannot review the facts as in equity cases, but is bound by the verdict of the court below sitting as a jury, the same as in any other action purely at law.

2. Appeal and error §1009(2)—Findings of fact by court cannot be reviewed, in absence of equitable issues, if sustained by evidence.

On an appeal in a suit to quiet title wherein no equitable issues were presented, findings of fact, made by the trial court at the request of appellant, are binding upon the Supreme Court as by a special verdict of the jury, and such court cannot review the facts upon which they are based, provided there is substantial evidence to sustain them.

3. Evidence §67(1)—Conspiracy to defraud creditor presumed to be continuous, and to include purchase from buyer at sheriff's sale.

In a suit to quiet title and for possession of realty, where the court found that defendant entered into a conspiracy with his brother, a codefendant, by which he received the brother's share in the property for the purpose of defrauding the latter's creditors, it will be presumed that such conspiracy continued until its purpose was accomplished, and that a subsequent purchase by defendant from the purchaser of the brother's interest at a sheriff's sale was made in pursuance of such conspiracy.

4. Fraudulent conveyances §77, 182(5) — Purchaser under sheriff's sale held trustee for creditor of original owner.

Where a person indebted fraudulently conveyed realty to his brother, who subsequently purchased from the purchaser at a sheriff's sale the interest of the indebted brother, sold under judgment against him, for a small consideration, the title acquired from the purchaser at such sheriff's sale was tainted with the original wrong, in that the original fraudulent title of the buying brother tended to depress the price at the sheriff's sale, and the property still remained that of the original owner and subject to the demands of his creditors; the brother being a trustee for them merely.

Appeal from Circuit Court, Greene County; Arch A. Johnson, Judge.

Suit by the First National Bank of Monett against E. S. Wilson and another. Decree for defendants, new trial denied, and plaintiff appeals. Reversed, with directions.

D. S. Mayhew, of Monett, for appellant.
W. Cloud, of Pierce City, and E. L. Burton, of Parsons, Kan., for respondent R. C. Wilson.

SMALL, C. I. This is a suit to quiet title to and for possession of certain lands and lots in Barry county. It was commenced in Barry county and taken by change of venue to Greene county. The petition is in the usual general form, and concludes with the statutory prayer and for possession. Defendant E. S. Wilson made no defense, but defendant R. C. Wilson filed answer containing general denial, except that he was in possession, and claimed to be and was the owner of said real estate. The answer proceeds:

"For further answer and counterclaim, defendant states that in the year 1907 the property in controversy was the property of J. F. Wilson, who died intestate, leaving the defendants Richard C. Wilson and Edward S. Wilson his sole and only heirs; that they continued to own and possess the same until the 22d day of June, 1910, when the defendant Edward S. Wilson and Vinette Wilson, his wife, conveyed by deed, duly signed and acknowledged and recorded, all of their right, title, and interest of the said Edward S. Wilson and wife of this defendant Richard C. Wilson for a valuable consideration, which said deeds were then and there delivered, and the possession of the said real estate passed to the exclusive control of this defendant, and has been held openly, exclusively, and notoriously by him since said date as the owner.

"That afterwards, to wit, March 21, 1911, J. C. Baker and his wife and T. A. Nicholson and his wife conveyed to the defendant all right, title, and interest which they had acquired in the real estate in controversy, for a valuable consideration, which, they, the said Baker and Nicholson, had acquired by reason of a sheriff's sale, upon an execution issued by the circuit clerk of Greene county, Mo., in the case of James H. McQuary, Plaintiff, v. Missouri Land Co., of Scotland, Limited, et al., defendants, wherein the said E. S. Wilson had become security upon bond for costs, and execution was issued and levied on the interest of the said Edward S. Wilson in said real estate.

"Wherefore this defendant avers that he was the owner of an absolute title to said real estate by reason of said conveyance, and that at the time of the commencement of this suit plaintiff had no right, title, or interest in or to the real estate in controversy, and the defendant prays the court to determine, ascertain, and decree his title to the said real estate, and for all other relief."

The reply specifically denied ownership of the property by defendant R. C. Wilson; admitted that on June 22, 1910, E. S. Wilson and wife made a deed to said R. C. Wilson purporting to convey their interest in the property to said R. C. Wilson, but alleged that at the time said deed was made said E. S. Wilson was indebted in the sum of about \$7,000, of which \$4,500 was due plaintiff, and that said deed was made and accepted for nominal consideration, and for the purpose of defrauding the creditors of said

E. S. Wilson, including the plaintiff; that at the time said property was worth \$14,000, and that ever since said conveyance said E. S. Wilson has remained in possession and exercised authority of ownership and enjoyed the rents and profits of the property; that at, or about, the same time said E. S. Wilson conveyed other property belonging to him to other persons to defraud his creditors, of which he continued in possession, etc.

"Further replying to defendant's answer, plaintiff says the purported quitclaim deed from J. C. Baker and Vesta Baker, and T. A. Nicholson and Martha Nicholson, as set forth in defendants' answer, does not state the true consideration for said quitclaim deed, and that said deed was made for a consideration, paid by the said E. S. Wilson, defendant, for the purpose of further hindering and delaying his creditors, and that all the right, title, and interest, which the said Baker and Nicholson had to said property was by virtue of a sale under an execution issued by the court of Greene county, and for which deed the said Baker and Nicholson never paid any consideration, all of which all of the defendants herein well knew. Wherefore, plaintiff prays the court to determine the title to said real estate as prayed for in its petition."

The cause was tried before the court sitting as a jury. No instructions nor declarations of law were asked or given. But, at the request of plaintiff, the court made the following findings of fact:

"First. That in his lifetime James F. Wilson, deceased, was the owner of [the property in controversy]. * * * That the said James F. Wilson died seized of said property in the month of March, 1907, leaving surviving him as his only heirs Edward S. Wilson and Richard C. Wilson, and they continued to be the owners of said property until the 22d day of June, 1910; that prior to July 10, 1910, Edward S. Wilson was the owner in fee of lot 5 in block 6 of the Monett Town Company's town site of Monett, Mo.

"Second. That in June and July of 1910 the said Edward S. Wilson was largely involved, owing debts in the neighborhood of \$5,500, and was surety on a bond in the case of McQuary et al. v. Missouri Land Company of Scotland et al., and about June, 1910, judgment was rendered in the Supreme Court of Missouri in said McQuary Case [230 Mo. 342, 130 S. W. 335], which rendered said Edward S. Wilson liable on said bond for costs.

"Third. That shortly after the rendition of said judgment the said Edward S. Wilson conveyed, by quitclaim deed, to the defendant, his brother, Richard C. Wilson, his one-half interest in the real estate inherited from his father, and executed a trust deed to secure the apparent sum of \$1,200 to said Richard C. Wilson on the property owned by him.

"Fourth. That said real estate so conveyed and the property so mortgaged was of the value in excess of \$10,000, and the amounts for which said pretended conveyances were made were \$4,500 for the quitclaim deeds and \$1,200 the pretended amount due under the trust deed.

"Fifth. The court finds that the above transactions were fraudulent, and made for the purpose of defrauding the creditors of the said Edward S. Wilson, one of whom was the plaintiff.

"Sixth. That thereafter a judgment was rendered in the McQuary Case against said Edward S. Wilson et al., and execution was issued at the instance of the circuit clerks of Barry and Greene counties, to collect his fees, together with the costs in the case, and there is no testimony to show that it was ordered by the opposite party to the judgment. That this execution was levied upon the real estate described in the plaintiff's petition, and a sale thereunder was had, at which the circuit clerk of Barry county and the circuit clerk of Greene county, both of whom had costs as clerks in the McQuary Case, became the purchasers of said estate in the sum of \$24. That thereafter a suit was instituted by said clerks, Nicholson and Baker, to set aside the deed from Edward S. Wilson to Richard C. Wilson.

"Seventh. The court further finds that while said suits were pending and before the date of trial, the said Richard C. Wilson purchased from said Baker and Nicholson the real estate referred to, paying therefor the sum of \$—, the amount of said payment being not very clear from the testimony. The witness Baker testifying that it was \$250. The court finds, however, that the purchase price was not in excess of \$600, and that the quitclaim deed was executed by said Baker and Nicholson to said Richard C. Wilson.

"Eighth. The court further finds that on the — day of March, 1911, the plaintiff in this action recovered a judgment against the defendant, Edward S. Wilson, for \$4,564, and an execution was issued upon said judgment and levied upon the property described in plaintiff's petition as the property of Edward S. Wilson, and the same was sold and bought in by the plaintiff bank on November 15, 1911, for the price and sum of \$100, and this suit was instituted for the purpose of decreeing title for said real estate in plaintiff's bank under its deed above mentioned.

"Ninth. The court further finds that, after the original conveyance made in 1910 by Edward S. Wilson to R. C. Wilson, the defendant Edward S. Wilson was insolvent, and has been in such condition from that time until the present.

"Tenth. There is no evidence that convinces the court that the purchase price paid by R. C. Wilson to Baker and Nicholson was the money of his brother, Edward S. Wilson."

There was evidence tending to support the finding of facts. There was an agreed statement of facts, in addition to the finding of the court, which shows that on September 24, 1910, judgment for costs was entered in said McQuary Case for \$600, against said Edward S. Wilson, and that execution was issued thereon on September 26, 1910, which was levied on the real estate in controversy, and on the 22d day of November, 1910, said real estate was sold by the sheriff of Barry county to said J. C. Baker and T. A. Nicholson for \$24, and that thereafter, on the

25th day of November, 1910, the sheriff executed a deed to them therefor, which was recorded in said Barry county December 19, 1910; that on February 18, 1911, said Nicholson and Baker commenced a suit in the circuit court of Barry county against defendants herein to quiet title to said land; that the quitclaim deed from Edward S. Wilson to R. C. Wilson, mentioned in paragraph 3 of the court's finding of fact, was made on the 22d day of June, 1910, and the \$1,200 deed of trust on July 10, 1910; that the deed from Nicholson and Baker and their wives to R. C. Wilson was dated March 1, 1911, and was filed for record March 25, 1911. Baker testified that the consideration for the deed from Baker and Nicholson to R. C. Wilson was \$150 instead of \$250, as recited in the finding of the court. The court rendered judgment for the defendants, and, after plaintiff's motion for new trial was overruled, it appealed to this court.

II. Under the pleadings, this case is one purely at law. The petition, being in the usual general form, simply alleges that plaintiff is the owner and entitled to the possession of the property, and asks the court to determine the title, and to declare the rights of the parties—all in the language of the statute—and to adjudge the title in plaintiff and award it a writ of possession. The answer of defendant R. C. Wilson denies plaintiff's ownership, and avers that he is the owner, setting forth his claim of title, to wit, that he owns one-half, as an heir of his father, James F. Wilson, and the other half by conveyance from his brother, E. S. Wilson, and wife, and also by deed from Baker and Nicholson, who purchased the interest of E. S. Wilson at sheriff's sale, and the prayer is that the title be declared in said defendant, so that the answer presents no equitable features at all. If said answer should be considered a counterclaim for affirmative legal relief, and said reply as an answer containing an equitable defense thereto, which we need not decide (because a deed made in fraud of creditors is as void at law as in equity), still the cause is not thereby thrown into equity for the reason that no affirmative relief is asked or prayed for in such reply. But the prayer of said reply is simply for "the court to determine the title to said real estate as prayed for in the petition." So that both parties claim the legal title to the property without the intervention of a court of equity.

[1] Under the cause thus presented, therefore, this court cannot review the facts, as in equity cases, but is bound by the verdict of the court below, sitting as a jury, the same as in any other action purely at law. *Koehler v. Rowland*, 275 Mo. 573, 205 S. W. 217, and cases cited; *Laclede Land & Investment Co. v. Goodno*, 181 S. W. 410; *Toler v. Edwards*, 249 Mo. 152, 155 S. W. 26; *Minor v. Burton*, 228 Mo. loc. cit. 563, 564, 128 S. W.

964; *Lee v. Conran*, 213 Mo. 404, 111 S. W. 1151; *Hayes v. McLaughlin*, Div. No. 2, this court, 217 S. W. 262, decided at the present term, but not yet [officially] reported.

[2] Furthermore, the plaintiff having requested the lower court to make a finding of facts, which the court did, we are bound by those findings as by a special verdict of a jury, and cannot review the facts upon which they are based, provided there is substantial evidence to sustain them, as there is in this case. *Railroad v. Southern Railway News Co.*, 151 Mo. 375, loc. cit. 380, 381, 52 S. W. 205, 45 L. R. A. 380, 74 Am. St. Rep. 545; *Sutter v. Raeder*, 149 Mo. loc. cit. 307, 50 S. W. 813; *City of De Soto v. Ins. Co.*, 102 Mo. App. 1, 74 S. W. 1.

So that we are limited in our power to review this judgment to ascertaining whether the conclusions of law of the lower court on the facts found by it were correct and according to the law applicable thereto.

III. The findings of the lower court is that in June and July, 1910, the property in question was fraudulently transferred by Edward S. Wilson, who was insolvent, to his brother, R. C. Wilson, to defraud his creditors; that it was so transferred for a pretended consideration; that it was then worth in excess of \$10,000; that afterwards in September, 1910, judgment for \$660 costs was rendered against E. S. Wilson, in the circuit court of Greene county, on which the clerk of that county ordered out execution, and the property was sold thereunder by the sheriff in November, 1910, for \$24, and bought in by Baker and Nicholson, the clerks of the circuit courts of Barry and Greene counties, respectively; that they thereupon instituted suit to quiet title against R. C. Wilson, with the result that on March 1, 1911, Baker and Nicholson conveyed the property by quitclaim deed to R. C. Wilson—Baker says for \$150, and the court finds the amount is uncertain, but for not exceeding \$600. The court finds that there is no evidence that convinces the court that the purchase price paid Baker and Nicholson was the money of Edward S. Wilson. This is not a finding that it was not his money, but simply a statement to the effect that the evidence does not satisfy the court that it was his money. But in the view we take of the case it matters not whether the small sum so paid was the money of Edward S. or R. C. Wilson.

In *State v. Bersch*, 276 Mo. 397, 207 S. W. 809, the defendants were indicted for setting fire to a certain stock of merchandise for the purpose of securing the insurance thereon. There was evidence of a conspiracy to thus fraudulently obtain the money from the insurance company. But it was urged that the conspiracy ended when the fire took place, as there was no evidence that any attempt was made to collect the insurance money. But the court held that the conspiracy con-

tinued, and was not ended until the insurance money was collected, and there was no evidence tending to show that the purpose of the defendants to obtain the money was abandoned. In other words, the conspiracy to defraud having been established, it will be presumed to continue, and not to be abandoned until its purpose is accomplished.

[3] In this case, therefore, it must be held that, inasmuch as the court found that R. C. Wilson entered into a conspiracy with Edward S. Wilson in June and July, 1910, by which he received and held his brother's property for the purpose of defrauding his creditors, including the plaintiff, such conspiracy continued, and the subsequent purchase from Baker and Nicholson, in March, 1911, was made in pursuance of such conspiracy and was part and parcel thereof.

[4] The fact that the defendant R. C. Wilson received the fraudulent deed to the property prior to the rendition of the judgment for costs under which Baker and Nicholson purchased enabled him to claim a title by virtue thereof superior to that of Baker and Nicholson, and thus force them to settle or sell out to him for a consideration wholly disproportionate to the real value of the property, clearly differentiates this case from *Funkhouser v. Lay*, 78 Mo. 458, relied upon by the respondents, where the fraudulent grantee's title was admittedly subsequent and subject to the deed of trust, and was and could in no way be used to depress the price of the property at the trustee's sale, at which the fraudulent grantee purchased. Here, the original fraudulent title of R. C. Wilson continued its work; it tended to depress the price of the property at the sheriff's sale, so that the property, worth \$10,000 or more, sold for \$24 only, and enabled him to purchase the property for \$150, or at least for not more than \$600, from the purchaser at such sheriff's sale. So that, even if R. C. Wilson paid the small consideration which was paid Baker and Nicholson for their deed with his own funds, he would reap a rich harvest from his original, fraudulent transaction. Neither law nor equity will permit a fraudulent grantee to thus take advantage of his own wrong. The title he acquired from Baker and Nicholson was tainted with the vice of the original wrong and conspiracy to defraud the plaintiff and other creditors of Edward S. Wilson, and was void as to them, and the property was in law still the property of Edward S. Wilson, and subject to the demands of his creditors. Or, in other words, R. C. Wilson held the title as trustee for such creditors. *Bobb v. Woodward*, 50 Mo. 95; *Ryland v. Callison*, 54 Mo. 513.

We hold, therefore, that on the face of the finding of facts herein the plaintiff is the owner of all the property purporting to be

conveyed by quitclaim deed from Edward S. Wilson to Richard C. Wilson, and upon which said Edward S. Wilson purported to make a deed of trust in favor of said Richard C. Wilson, and stated in said findings of fact to have been so conveyed and incumbered to defraud the creditors of said Edward S. Wilson.

We, therefore, reverse the case, with directions to the circuit court to set aside its judgment herein, and to enter up judgment declaring the rights and titles to the said property, of the plaintiff and R. C. Wilson, respectively, as found and declared by our opinion, and that said E. S. Wilson has no right nor title therein whatever, and that the plaintiff be let into possession, as tenant in common with defendant R. C. Wilson, of the land in which plaintiff has an undivided one-half interest, and that plaintiff recover possession of said lot 5 block 6, of Monett Town Company's town site of Monett, in which plaintiff owns the entire interest.

The motion for rehearing in this case is overruled.

BROWN, and RAGLAND, CC., concur.

PER CURIAM: The foregoing opinion of SMALL, C., is adopted as the opinion of the court.

All concur except WOODSON, J., absent.

LITTLE RIVER DRAINAGE DIST. v. HOUCK et al. (No. 20910.)

(Supreme Court of Missouri, in Banc.
May 21, 1920.)

1. Courts \S 231(6)—Supreme Court, having jurisdiction on constitutional question, not divested, unless question colorable or moot.

Where an appeal had been properly granted to Supreme Court on a ground that a constitutional question is involved, the Supreme Court cannot be divested of jurisdiction, unless it appears that the constitutional question is merely colorable, or, though at one time substantial, it has been passed upon by the court prior to the appeal in the case, and is therefore no longer a live question.

2. Appeal and error \S 22—Parties to appeal in Supreme Court cannot waive jurisdictional question.

With appellate jurisdiction fixed by the record nisi in the Supreme Court, neither party can change that jurisdiction by mere waiver of the jurisdictional question by acts of omission or commission.

3. Courts \S 24—Jurisdiction of subject-matter cannot be granted by consent.

Jurisdiction of the subject-matter is not a subject-matter of consent.

4. Courts — 231(22) — Appeal to Supreme Court transferred to Court of Appeals, where constitutional question not raised in Supreme Court.

Where appeal was taken to Supreme Court in action involving constitutionality of Rev. St. 1909, § 5538, and where appellants nowhere in their brief, points, and authorities, or in any manner, in the Supreme Court assert the unconstitutionality of the act, the appeal will be transferred to the Court of Appeals, not on the ground that by failure to raise the question the appellants waived the jurisdiction of the Supreme Court, but on the theory that by such failure the court concludes that the alleged constitutional question is merely colorable and not substantial.

Appeal from Circuit Court, Cape Girardeau; Frank Kelly, Judge.

Suit by the Little River Drainage District against Louis Houck and another. Judgment for plaintiff, and defendants appeal. Case transferred to Court of Appeals.

A. M. Spradling and Giboney Houck, both of Cape Girardeau, for appellants.

Oliver & Oliver, of Cape Girardeau, for respondent.

GRAVES, J. From our learned commissioner we borrow the facts as follows:

"This is a suit by plaintiff, drainage district, to foreclose a lien claimed by it for certain special taxes, levied by said district upon the real estate described in the petition, together with the interest, costs, and attorney's fees. The taxes are claimed to have been levied pursuant to section 5538, R. S. 1909, which authorizes a levy of 25 cents per acre against lands in the district for certain purposes therein set forth. The amount of the taxes sued for was less than \$1,000. The answer, among other things, pleaded that the said act was unconstitutional, in that it violated certain specified sections of the Constitution of this state, and of the United States; also contained a counterclaim against the plaintiff, drainage district, asking \$5,000 damages. On motion of the plaintiff, the counterclaim was stricken out. There was judgment for the plaintiff as prayed for \$926.79 taxes and 10 per cent. attorney's fees and other costs. Defendants asked a demurrer to the evidence, which was refused. The defendants filed a motion for new trial on the ground the court erred in refusing their demurrer, and in which they preserved their constitutional questions, also their exception to the ruling of the court in striking out their counterclaim. Defendants' motion for new trial being overruled, they appealed to this court.

"In this court, the appellants nowhere in their brief, points, and authorities, or in any manner, assert said act is unconstitutional, but simply assert the act does not authorize any lien on their property, and there is no provision for enforcing such lien or collecting such taxes."

[1] I. From the statement of the case it appears that the constitutional question was

duly lodged and preserved below, and when the appeal was taken it was properly granted to this court. Before the jurisdiction can be divested it must appear to this court (1) that the constitutional question is merely colorable, or (2) that although, at one time substantial, it has been previously passed upon by this court, and therefore no longer a live question. By previously, we mean prior to the appeal in the case, because we have often ruled that if a constitutional question was a live issue at the time the appeal was taken, our jurisdiction will not be ousted by reason of the fact that this court had decided the question adversely to appellant, after his appeal was taken.

But we have indicated in *State ex rel. Crow v. Carothers*, 214 S. W. 837, and *Scott v. Dickinson*, 217 S. W. 270, that the mere abandonment of the constitutional question in this court (although a live one when our jurisdiction obtained) would transfer the case to the Court of Appeals. To the doctrine of these cases we do not consent.

[2, 3] With appellate jurisdiction fixed by the record, *nisi*, in this court, neither party can change that jurisdiction by mere waiver of the jurisdictional question. We determine our own jurisdiction without the consent, or other action of either or both parties. Jurisdiction is not the subject-matter of consent. We mean jurisdiction of the subject-matter. Neither party, after there has been a fixed record in the trial court, as here, can change the jurisdiction of this court upon that case by either acts of omission or commission. The record *nisi* fixes the jurisdiction, and not the acts of the parties. In so far as *State ex rel. Crow v. Carothers*, and *Scott v. Dickinson*, *supra*, seemingly hold that by abandonment here the appellant may shift jurisdiction from this court to the Court of Appeals they should be overruled.

[4] The case should be transferred to the Court of Appeals for the following reasons: Appellant does not brief nor urge his constitutional point in the brief here. From that we can, and do, conclude that his alleged constitutional question is merely colorable, and not substantial. By this we pass upon the constitutional question, and find it without substance, and by reason of that fact transfer the cause, but do not agree that either party can, by either acts of commission or omission, waive our jurisdiction. From the act of omission we conclude the jurisdictional question is colorable only, and the case should be transferred, just as we would transfer a case when the alleged constitutional question (by reason of our previous rulings) was no longer a live question. But in both instances this court would be determining its own jurisdiction, and would not be permitting the parties, either by acts of commission or omission, to determine it for

us. This is the theory in *Botts v. Railroad*, 248 Mo. 56, 154 S. W. 53, and *Moore v. Railway*, 256 Mo. 165, 165 S. W. 304.

The exact contention was ruled by Lamm, P. J., in *Hartzler v. Met. Street Ry. Co.*, 218 Mo. loc. cit. 565, 117 S. W. 1125, whereat, in discussing a constitutional point, not argued in the brief of appellant, our court unanimously said:

"The failure of counsel to reason the point (though well equipped to do so) is tantamount to an abandonment of it. By saying so much as that, we do not mean to rule that if we, *prima facie*, had jurisdiction, we would lose it by the mere abandonment of the point; for jurisdiction is not given or lost by mere consent. What we mean to say is that we feel invited to broadly infer that, by their refusal to reason the point, counsel concede it no point to reason."

In other words this court passes upon its jurisdiction, and this without reference to the question of waiver. When the appellant fails to brief and urge his alleged constitutional question, we are at liberty to conclude that it is merely colorable, and not substantial, and upon that ground transfer the case. Such is the situation of this case. It is therefore transferred to the St. Louis Court of Appeals for final disposition upon the merits.

All concur except WOODSON, J., absent.

BLAIR and WILLIAMS, JJ., concur in result.

STATE v. JARVIS. (No. 21910.)

(Supreme Court of Missouri, Division No. 2, June 4, 1920.)

Burglary \Leftrightarrow 41(9)—Evidence held to sustain conviction for having custody of burglar tools.

Evidence held to sustain conviction for having custody of burglar tools in violation of Rev. St. 1909, § 4529.

Appeal from Circuit Court, Carter County; E. P. Dorris, Judge.

Miles Jarvis, alias James Riley, was convicted of having custody of burglar tools, and he appeals. Affirmed.

Frank W. McAllister, Atty. Gen., and John W. Broadus, Asst. Atty. Gen., for the State.

WILLIAMS, P. J. Upon an information charging him with having in his custody certain burglar tools as defined in section 4529, R. S. 1909, defendant was tried in the circuit court of Carter county, found guilty, and his punishment assessed at two years' imprisonment in the penitentiary. Defendant duly presented an appeal.

The information charged the appellant jointly with three other defendants. Defendant was granted a separate trial. The evidence tends to establish the following facts:

On the night of August 10, 1919, defendant and three companions were seen to drive through the city of Van Buren, Carter county, Mo., in a large automobile, which was owned by defendant. The occupants of the car were strangers in the town and attracted attention. They left the town and in a short time returned again and again departed. The defendant and his three companions drove the car about two miles from Van Buren, where they remained during the night, sleeping in the car. The next morning a camp fire was built near the automobile. The defendant and one of his companions remained near the camp, and two of his companions drove the car to Van Buren for the purpose of getting gasoline.

When the car arrived in Van Buren, Mr. John L. Moore, county clerk, and former sheriff of that county, asked the men if they were not in town the night before, and they denied that they had been in Van Buren the night before. Mr. Moore then took a loaded pistol from one of the pockets of the automobile and placed the two men under arrest. He thereupon called upon the deputy sheriff to assist him in searching the men. In the pockets of one man were found some pistol shells. Under the seat of the automobile were found two No. 12 shotgun shells, a wrecking bar or jimmy, a long roll of soft soap wrapped in a towel, and a meal sack. They also found in the car two flashlights, a small package of absorbent cotton, and also some automobile tools.

Upon being questioned, the two men stated that the appellant and the other man were up the road at the place where they had stayed all night. Thereupon the deputy sheriff, together with three other men, proceeded in a car up the road to where the men had camped during the night. There appellant and his companion were arrested. Appellant was unarmed at the time, but his companion had a pistol in the pocket of his coat which he was carrying on his arm. The two prisoners were taken to Van Buren and placed in jail. Thereupon at the deputy sheriff's request two men returned to the camp fire where the men had spent the night, and about five steps from the camp under some hickory bushes they found a box containing a hack saw, four hack saw blades, a pair of pliers, twenty dynamite caps, four of them fused with short fuses, and two searchlight batteries. The pasteboard box containing the absorbent cotton and the box found in the automobile both bore the same trade-mark, as did the pasteboard box which contained the dynamite caps and which was found near the camp fire. Two or three days later five sticks

of dynamite were found wrapped in paper under the end of a log about 200 yards from the place where the men had camped.

The state offered further evidence tending to show that the tools and materials thus found were such as were commonly used by burglars. These witnesses also testified that soft soap is used by burglars to place around cracks of a safe, and that nitroglycerin used in blowing safes can be procured by boiling dynamite; that when dynamite is boiled the nitroglycerin becomes separated therefrom and floats on top and is skimmed off and used in blowing safes.

The evidence upon the part of the defendant tended to establish the following facts: That some of these tools could be put to good use by persons other than burglars. Appellant, testifying in his own behalf, stated that his home was in St. Louis; that he left St. Louis August 8, 1919, in the automobile in company with his three companions, intending to go to Hot Springs, Ark., and on their way they delivered ten gallons of whisky to an unknown man whom they met by appointment in an automobile near Centerville; that they arrived in Van Buren on the night in question about 11:30 p. m., and that they were looking for a road to Doniphan, Mo. Finally they drove about 2 miles beyond Van Buren past a camp fire by the roadside. Appellant said he saw two men sitting by the camp fire. They drove the car about 200 yards beyond the camp fire, where they remained all night. The following morning the two men at the camp fire had departed, and thereupon the four men backed the car down to the camp fire. Thereupon two of his companions went to Van Buren to get food, and appellant and his remaining companion walked over to the woods to hide some whisky. Appellant admitted that he owned one of the pistols, but denied that he had in his possession the dynamite caps and fuse. He stated that the soap found in the automobile was used for washing pans and fixing leaks in the gas tank. Appellant testified that he had no intention of committing a burglary.

In rebuttal the state offered evidence tending to show that appellant's reputation for "honesty and integrity" in St. Louis was bad.

Fred Kelley, sheriff of Carter county, testified that on August 10, 1919, he twice passed the place on the road where the four men camped on that night, the first time being about 9 o'clock in the evening, and the last time about midnight, but that at that time there was no fire there.

We have not been favored with a brief by appellant, but in pursuance of our statutory duty we have carefully gone over the entire record. The evidence was sufficient to sustain the verdict. The information was in form which has been approved by prior decisions of this court, and we are unable to

find error in any of the instructions. In fact, we find no matter of error of sufficient importance to merit discussion. It therefore follows that the judgment should be affirmed. It is so ordered.

All concur.

HOECKER v. HOECKER. (No. 20854.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

1. Divorce \S 184(10)—Finding on conflicting evidence conclusive on appeal.

In divorce suit, where the evidence is in sharp conflict, and the evidence of either party is sufficient, if believed, to warrant a decree for such party, appellate court will defer to finding of trial court.

2. Divorce \S 240(5)—Alimony held not excessive.

Where value of husband's wealth was approximately \$80,000, and where wife had assisted husband in accumulating such wealth by cooking in restaurant and saloon conducted by husband and wife for many years, award to wife of \$20,000 alimony in gross and \$1,000 as attorney's fee held not excessive.

3. Divorce \S 240(2)—Alimony dependent on facts of particular case.

There is no hard and fast rule concerning the amount of alimony; the amount to be awarded depending on many factors, and each case turning more or less upon its own particular facts.

Appeal from Circuit Court, Jackson County; Clarence A. Burney, Judge.

Suit by Catherine Hoecker against Joseph Hoecker. Judgment for plaintiff, and defendant appeals. Affirmed.

The circuit court of Jackson county granted plaintiff a divorce from the defendant, and awarded her the sum of \$20,000 alimony in gross and also allowed her an additional \$1,000 as attorney fee. From this judgment plaintiff duly perfected an appeal to this court.

At the time of the trial the plaintiff was 62 years of age and the appellant was 69 years of age. These parties were first married in 1872, and for many years conducted a restaurant and saloon. The plaintiff did all the cooking for the restaurant, and otherwise aided in laying the foundation for some of the savings now held by the defendant. They did not own much property when they were first married, but it appears that after conducting the aforesaid business for a number of years they were able to purchase a farm in Miller county, upon which they moved and resided together until about 1901. Six children were born of this marriage. Four children are now living, two sons and

two daughters. The youngest is 21 and the oldest 44 years of age.

A disagreement occurred in 1901, and they separated. The two daughters, then aged respectively 5 and 15 years, left the farm in company with their mother. Shortly thereafter the older girl married, and the plaintiff resided with her for some time. After the first separation, plaintiff lived in Kansas for a while, and also in Arkansas, and finally, in 1914, came back to Miller county to live. After the first separation, the appellant procured a divorce from his wife, presumably upon service by publication. She testified that she knew nothing about it at the time. Shortly after the plaintiff returned to Miller county, and on March 27, 1914, she married appellant for the second time. After the second marriage they lived on the farm in Miller county until about July 15, 1915, at which time a quarrel ensued, and they again became separated. On that day the plaintiff, together with her daughter Margeret, then 20 years of age, left the home of appellant, and later moved to Kansas City. The plaintiff testified that appellant had a bad temper; that he often became intoxicated, and when in an intoxicated condition he would curse and abuse her, and at one time struck her.

On the day of the separation plaintiff states that she told her daughter Margeret not to go out in the wet woods after the cows, and not to milk them unless they were up; that at this appellant made the remark, "If you don't want to milk these cows right, don't milk them at all," and began quarrelling. The daughter and Sam Poor, son-in-law of the parties, left the house for the purpose of milking the cows. After they had gone, appellant continued to quarrel, and tried to hit plaintiff on the head with a chair. She threw up her arm, and received the blow on the arm. Appellant ordered the plaintiff to go, and she refused, and he told her that, if she didn't, "they will carry you out"; that appellant then went out to the pasture, where the daughter and son-in-law were milking, and turned the cows and calves together.

Thereafter appellant and Sam Poor returned to the house, and were in one of the rooms settling up a financial matter between themselves, when plaintiff came to the door, which was fastened by an old-fashioned button on the inside. The son-in-law arose and opened the door, so she could enter. When plaintiff entered the room, defendant jumped up and put his hand on a chair, as if he were going to attack the plaintiff, and swore at her. The daughter came in between them and said, "Dad, you can't strike mother when I am here." Plaintiff further states that at other times appellant cursed her and called her "A g— d— whore, a g— d— son of a bitch, a thief, and a liar,"

and said that he had kept his money locked up to keep her from stealing it. During the quarrel on the day of the separation, plaintiff says that appellant said, "To-morrow I will go to town, and when I come back, if you are here, something will happen that people will read about." Appellant told his son to take plaintiff away, and that she went to her son's house and stayed for three weeks, and saw appellant every day, but that he never spoke to her. She further says that appellant failed to provide for her, and that she did not have a pair of shoes when she left his home; that he dared her to make a store bill, and said that "If I did I would have to leave that part of the state."

The daughter Margeret corroborated the testimony of her mother, except that she did not see her father strike her mother, but that she did see a mark or bruised place across her mother's arm after the trouble. Mrs. Elizabeth Poor, another daughter, did not see or hear the difficulty, but afterwards saw the mark on her mother's arm.

A Mr. Bunch, who lived in that neighborhood, states that about the day of the separation he was on the outside of appellant's house, and that he heard loud talking; that he knew appellant's voice, and that he was talking very loud and angry, and quarrelling with plaintiff and her daughter. A Miss Barton, who lived in the same neighborhood, testified that she frequently heard appellant and his wife quarrelling, and at one time she heard appellant call plaintiff "a d— old whore," and told her that he did not want her to stay there any longer.

The evidence upon the part of the defendant as to what occurred in substantially as follows:

The son Herman, who lived upon one of appellant's farms, described the trouble on the day of the separation as merely a family quarrel. This witness testified:

"They were just quarrelling—nothing to it—and we told them to quit; asked them to quit. My father would shut up occasionally for 10 or 15 minutes, and then mother would keep on chewing the rag, until father would get mad again, and he would have to tell what he thought, and that was the way it went on until about 10 or 11 o'clock in the night, and I told them to come and go home, and I took mother and sister to our home."

This witness testified that his father told him to take his mother away, but said nothing about keeping her away. The appellant's son John, describing the quarrel which occurred shortly before the separation, said:

"Well, just as near as you might term it, it was nothing but a family scrap; that is all there was to it—nothing serious—nothing more, perhaps, than occurs in common life."

He was asked if he heard his father call his mother bad names and replied, "Well, as

far as I know, it was used on both sides."

Appellant, testifying in his own behalf, denied that he called his wife bad names, as testified to by plaintiff's witnesses, and said they had a quarrel on the day in question, and that his son took plaintiff out of the room, and "she kept quarrelling outside the room"; that later that evening she commenced "the same music," and appellant told his son to take her away to his home, that he didn't like to hear "that growling." When asked if he quarreled with his wife, that evening he said, "Yes; I did once in a while, when my gall would boil over." He denied that he ever struck her with a chair, or that he told her to leave and never come back. He also testified that he never refused to furnish her with things to eat and wear. Appellant did not testify concerning the amount and value of his property.

The evidence upon the part of the plaintiff tended to show that appellant owned 770 acres of land in Miller county, about half of which was bottom land and the rest was upland; that the bottom land was worth about \$100 an acre and the upland about \$30 an acre, making the total value of the land at approximately \$50,000. Plaintiff also testified that appellant had over \$30,000 in cash loaned out. Appellant's son, testifying on behalf of appellant, stated that the bottom land was worth about \$50 and the upland about \$20 an acre, and that there were about 200 acres of the land which was bottom land.

R. P. Stone, of Eldon, and Robert Walker, of Hermann, for appellant.

Joseph S. Rust, of Kansas City, for respondent.

WILLIAMS, P. J. (after stating the facts as above). [1] I. It is contended by appellant that the evidence was not sufficient to warrant the court in granting plaintiff a divorce. The evidence upon this point will be found fully set forth in the foregoing statement. There was a sharp conflict in the evidence. If plaintiff's evidence is to be believed, she was undoubtedly entitled to a decree. If the appellant's evidence is to be believed, she was not so entitled. Any court, in passing upon this question, would be materially aided, if afforded an opportunity of seeing the witnesses "in action." The learned trial court had this opportunity. Under such circumstances, we feel that it is but proper that we should defer to his finding in the matter (*Cherry v. Cherry*, 258 Mo. 391, loc. cit. 403, 167 S. W. 539), and that therefore the contention of appellant be disallowed.

[2] II. It is further contended that the alimony awarded was excessive. We are unable to agree with this contention. There was evidence tending to show that appel-

lant's farm was worth about \$50,000, and that he had over \$30,000 in money loaned out. The appellant, although testifying in his own behalf, did not undertake to inform the court as to the value of his property, nor did he deny the testimony of plaintiff that he had \$30,000 loaned out.

[3] There was evidence, then, tending to show that appellant's total wealth was approximately \$80,000. There is no hard and fast rule concerning the amount of alimony. Many factors influence the amount to be allowed, and each case seems to turn more or less upon its own peculiar facts. We have carefully weighed and considered the evidence before us, and are unable to say that the amount allowed in this case was excessive. *Howard v. Howard*, 188 Mo. App. 564, loc. cit. 567, 176 S. W. 483.

It therefore follows that the judgment should be affirmed. It is so ordered.

All concur.

STATE ex rel. MEYER BROS. DRUG CO. v.
KOELN, Revenue Collector. (No. 21990.)

(Supreme Court of Missouri, In Banc. May 21, 1920.)

Constitutional law § 100 — Taxpayer having no vested right to deduct property taxes from income taxes, repeal of statute destroys right.

While Income Tax Law 1917, § 32, authorized a taxpayer to exhibit to the collector the amount of tax paid on real or personal property which should be deducted, a taxpayer had no vested right to the deduction; consequently the repeal of section 32 by Act May 26, 1919 (*Laws 1919*, p. 721), destroyed the right, and no such deduction could be made out of the income taxes for 1918, for at the time the section was repealed property taxes were not payable, etc.

Appeal from St. Louis Circuit Court; Charles B. Davis, Judge.

Petition by the State, on the relation of the Meyer Bros. Drug Company for a writ of mandamus against Edmond Koeln, Collector of Revenue for the City of St. Louis, Mo. From a judgment for relator, respondent appeals. Reversed.

Frank W. McAllister, Atty. Gen., Charles H. Danes, City Counselor, and H. A. Hamilton, Asst. City Counselor, both of St. Louis, and John N. Gose, Asst. Atty. Gen., for appellant.

Joseph W. Folk, Nelson Thomas, Abbott Fauntleroy, Cullen & Edwards, and John C. Vaughan, all of St. Louis, for respondent.

F. M. McDavid and S. C. Bates, both of Springfield, amici curiæ.

BLAIR, J. Section 32 of the Income Tax Law as passed in 1917 (*Laws 1917*, p. 538) reads as follows:

"Any person, corporation, joint-stock company, association or insurance company who shall have paid a tax assessed upon his real or personal property to the state during any year shall be permitted to exhibit the receipt or receipts thereof to the assessor to the full amount in the payment of income taxes assessed against such person, corporation, joint-stock company, association or insurance company during said year."

Prior to March 1, 1919, respondent duly made return of its income for the year 1918, and a tax thereon of \$1,138.94 was assessed as income tax for that year. By the act of May 26, 1919 (Laws 1919, pp. 721, 722), effective on that date, the Legislature repealed section 32 of the Income Tax Law of 1917.

It is alleged that thereafter, during 1919, respondent paid to appellant property taxes aggregating \$1,024.38 and received receipts therefor. Subsequently, and on December 17, 1919, respondent exhibited these receipts to appellant and therewith tendered \$114.91 and demanded that the amount of the property tax receipts be credited on the income tax bill of \$1,138.94, and the property tax receipts and money tendered be accepted in full discharge thereof, and a receipt in full for the income tax be issued and delivered to respondent. Appellant refused to comply with this demand, and the present proceeding was begun to coerce compliance. From an adverse judgment the collector appeals.

Appellant contends that respondent had no right to the demanded credit because the section which gave that right had been repealed prior to respondent's payment of its property taxes and demand of credit therefor. The gist of respondent's contention is that a right to the credit had vested prior to the repeal of section 32 of the act of 1917, and that repeal could not destroy or affect such vested right.

In the act of May 6, 1919 (Laws 1919 p. 718, et seq.), which took effect in August, 1919, the Legislature specifically applies the increased tax and reduced exemptions to incomes for the year 1919 and thereafter. No such limitation appears in the act of May 26, 1919, which repealed section 32 of the act of 1917, but an emergency clause was appended which purports to put the repeal into immediate effect for the reason that section 32 "is confusing and misleading, and in practical results destructive of the end sought by said act," which is said to create "an emergency within the meaning of the Constitution." This gives some hint of what the Legislature had in mind, but does not reach the question whether respondent had acquired a vested right to deduct its property taxes, paid in 1919, from its income tax for 1918, payable in the fall of 1919, which was beyond the reach of legislative action.

Appellant agrees with respondent that the Legislature cannot destroy a vested right. He contends that respondent had acquired

no vested right to the claimed deduction prior to the repeal of section 32. In *State ex rel. v. Koeln*, 211 S. W. 31 et seq., it was held that the property taxes deductible under section 32 were those which became due and payable in the same year in which the income tax from which they were deductible became due and payable. Respondent's income tax for 1918 was assessed prior to March 1, 1919. The assessment was then complete, and the mode and amount of that assessment was exactly the same as if respondent had owned no property subject to assessment and taxation on June 1, 1918. At the time respondent's income tax was assessed on income for 1918 (March, 1919) respondent, so far as it alleges, had paid no property taxes which were deductible under section 32, and, of course, had neither received nor presented any receipts therefor. The time therefor had not arrived, under the decision in *State ex rel. Koeln*, supra. The same thing was true at the time section 32 was repealed, May 26, 1919. What, then, was the right or privilege which had accrued to respondent on May 26, 1919, which is said to be beyond the reach of legislative interference? The income tax had been assessed for 1918, but would not become due until the fall of 1919; and, unless respondent paid property taxes in the fall of 1919 and presented receipts therefor to the collector (*State ex rel. v. Koeln*, supra), payment for the full amount of the income tax could have been compelled even had section 32 not been repealed. The right to a deduction of property taxes had not accrued either when the income tax was assessed or when section 32 was repealed. It could never have accrued under section 32 until after (1) payment of property taxes, and (2) presentation of receipts therefor. The power of the state to impose the income tax without this privilege of reduction under section 32 is not questioned. No greater income tax was assessed than would have been assessed had the act of 1917 not contained section 32 at all. The assessment was not reduced or affected by that section. Its provisions related to the time of payment and authorized certain deductions at the time of collection upon conditions with which the taxpayer might or might not comply, as he saw fit. The class entitled to these reductions could not come into actual existence until there was a compliance by the taxpayers with the conditions of section 32. Until that time there was merely a privilege available upon conditions stated. This was all respondent had when section 32 was repealed—i. e., an "expectation based upon the continuance of" section 32—and this was not a vested right. *State v. Railroad*, 242 Mo. loc. cit. 375, 147 S. W. 130.

There is nothing in *Ludlow-Saylor Wire Co. v. Wollbrinck*, 275 Mo. 839, 205 S. W. 196, which indicates a contrary view. So far as that decision discusses section 32, it was dealing with the question of the constitutionality

of the section. It viewed the "class" created by that section as it would exist after income taxpayers had paid property taxes and demanded and received credit therefor on their income taxes. The question discussed was whether this was permissible under the Constitution. The court did not then decide or attempt to decide the question determined in *State ex rel. v. Koeln* supra, or the question whether the class referred to came into existence at one time or another. The concurring opinion of the learned writer of the *Ludlow-Saylor* decision, which he filed in the *Koeln* Case, fully justifies this view, as does the nature of the question discussed in the *Ludlow-Saylor* Case. Neither are the Wisconsin decisions in point. Under the income tax law of that state the time of payment has nothing to do with the accrual of the right to the deduction of property taxes from income taxes. It appears that in that state the right of deduction accrues before the income taxes are assessed. *Van Dyke v. Milwaukee*, 159 Wis. 460, 146 N. W. 812, 150 N. W. 509. Had the right so accrued in this case, the Wisconsin decisions would be applicable and respondent's position sound. As already pointed out, such is not our law.

The briefs are in agreement upon practically every question except that which we have discussed. We hold that respondent had no vested right at the time of the repeal of section 32 which prevents giving effect to that repeal in this case.

The judgment is reversed.

All concur, except WOODSON, J., absent.

McLARTY v. GRIGGS. (No. 21257.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

1. Appeal and error §544(2)—Record proper only can be reviewed in absence of bill of exceptions.

Where the record on appeal does not contain a bill of exceptions, the appellate court can review nothing except the record proper.

2. Appeal and error §882(19) — Appellant, praying that interest in realty be determined, cannot claim relief to defendant error for want of prayer in answer.

In a suit to obtain title to realty, where plaintiff in his petition has prayed that the court adjudge the interest of the parties under Rev. St. 1909, § 2535, he is, on appeal, in no position to object that the trial court erred in decreeing title to be in defendant, when defendant's answer did not contain a prayer so to do.

Appeal from Circuit Court, Pemiscot County; Sterling H. McCarty, Judge.

Suit by Dorothy McLarty against Joe Griggs. Judgment for defendant, and plaintiff appeals. Affirmed.

This is an action under section 2535, R. S. 1909, to ascertain and determine the title to 80 acres of land in Pemiscot county, Mo. The petition is in conventional form, and, after asserting ownership in plaintiff and alleging that defendant claims some interest therein, the petition asks the court "to try, ascertain and determine the estate, title, and interest of the parties plaintiff and defendant severally in and to said real property, and to define and adjudge by its judgment or decree the estate, title and rights and interests of the parties plaintiff and defendant, respectively, in and to the same." (Italics ours.) The answer admits that defendant claims to own, and alleges that he does own, the land in controversy, and that plaintiff has no right, title or interest therein. The reply was a general denial. Trial was had before the circuit court of Pemiscot county, without a jury, resulting in a judgment decreeing that plaintiff had no title, interest, or estate in said land, but that the title thereto was in the defendant. Thereupon plaintiff duly appealed to this court.

N. C. Hawkins, of Caruthersville, for appellant.

Ward & Reeves, of Caruthersville, for respondent.

WILLIAMS, P. J. [1] I. The record filed in this court by the appellant does not contain a bill of exceptions. In fact no showing is even made that a bill of exceptions was ever filed. Under such conditions we have nothing before us for review except the record proper.

[2] II. The only point raised upon the record proper is that the court erred in decreeing title to be in defendant when defendant's answer did not contain a prayer so to do.

The statute (section 2535, R. S. 1909), contemplates that in such actions the court will "define and adjudge by its judgment or decree the title, estate and interest of the parties severally in and to such real property." In the case at bar the plaintiff in his petition specifically asked that this be done. Having requested the court to ascertain and adjudge the interest of defendant in said land, he is certainly in no position to criticize the court for so doing. This exact point was ruled against the present contention of appellant in the case of *Lumber Co. v. Jones*, 220 Mo. 190, loc. cit. 197, 119 S. W. 366, and further discussion is unnecessary.

The judgment is affirmed.

All concur.

McLARTY v. DORSEY et al. (No. 21253.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

Appeal from Circuit Court, Pemiscot County; Sterling H. McCarty, Judge.

Action by Dorothy McLarty against W. H. Dorsey and another. Judgment for defendants, and plaintiff appeals. Affirmed.

N. O. Hawkins, of Caruthersville, for appellant.

Ward & Reeves, of Caruthersville, for respondents.

WILLIAMS, P. J. This is an action under section 2535, R. S. 1909, to determine title to 268 acres of land in Pemiscot county, Mo.

The pleadings and the record in this case are in the same condition as that discussed in the case of *McLarty v. Griggs*, 222 S. W. 391, delivered by this division of the court at this same sitting of the court. The only question properly presented upon the record before us is the identical question decided in the *Griggs* Case. For the reasons therein stated the judgment herein is affirmed.

All concur.

McLARTY v. SWEARENGEN. (No. 21259.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

Appeal from Circuit Court, Pemiscot County; Sterling H. McCarty, Judge.

Action by Dorothy McLarty against W. A. Swearengen. Judgment for defendant, and plaintiff appeals. Affirmed.

N. C. Hawkins, of Caruthersville, for appellant.

Ward & Reeves, of Caruthersville, for respondent.

WILLIAMS, P. J. This is an action under section 2535, R. S. 1909, to determine title to certain real property in Pemiscot county, Mo.

The pleadings and the record in this case are in the same condition as that discussed in the case of *McLarty v. Griggs*, 222 S. W. 391, delivered by this division of the court at this same sitting of the court. The only question properly preserved and presented upon the record before us is the identical question decided in the *Griggs* Case. For the reasons therein stated, the judgment herein is affirmed.

All concur.

WENZEL et al. v. O'NEAL et al. (No. 19549.)

(Supreme Court of Missouri, in Banc.
May 21, 1920.)

1. Tenancy in common §19(2) — Cotenant may acquire title free from trust, where obligation enforced is that of common ancestor.

In the absence of fraud or collusion, a cotenant may buy at either a judicial or mortgage

sale, and acquire title free from any trust so far as other cotenants are concerned, in cases where the obligation enforced by the judgment sale or mortgage sale is the obligation cast upon the land by the common ancestor.

2. Tenancy in common §19(4)—In absence of fraud, cotenant purchasing at mortgage sale acquires title free from trust.

Where land is sold under a deed of trust placed upon the land by the common ancestor, a cotenant, after the ancestor's death, may purchase the land at the mortgage sale, and title so acquired is in the purchaser personally, and not as trustee for himself and the other cotenants, there being no fraud, and this is true notwithstanding the purchaser partly paid for the property out of the proceeds of a deed of trust, which, after the sale, he had placed thereon.

3. Mortgages §376 — Trustee making sale under trust deed is liable for distribution of proceeds.

A trustee making a sale under a deed of trust, and not the purchaser at such sale, is liable for the proper distribution of the proceeds among those entitled thereto.

Appeal from Circuit Court, Greene County; Guy D. Kirby, Judge.

Suit by George E. Wenzel and others against Belle D. O'Neal and others, to set aside a trustee's sale. Decree for plaintiffs, and defendants appeal. Reversed and remanded, with directions.

Wright Bros. and Frank B. Williams, both of Springfield, for appellants.

G. G. Lydy, of Springfield, for respondents.

GRAVES, J. In this case we borrow the statement of facts from one of our learned commissioners, as follows:

"This is a suit in equity between the children of Hannah Sabrina Wenzel, deceased, in which plaintiffs seek to set aside the purchase at a trustee's sale by the defendant Belle D. O'Neal of lot 67, Ozark Land Company's addition to Springfield, and to have said lot, and another lot, to wit, lot 68, in said addition, partitioned amongst all of them, in equal shares, as provided by their mother's will. Mrs. Wenzel died June 19, 1914, at the age of 88 years. These two pieces of property constituted her entire estate. She had no personal property. She left no debts, to speak of, except a duebill for \$582.20 to her daughter, Mrs. O'Neal, for borrowed money, and a note to Mrs. Barton for \$750, secured by a deed of trust on said lot 67. Said lot 67 had a one-story cottage upon it, and was worth \$2,500 to \$3,000. Said lot 68 had a two-story dwelling house upon it, and was worth about \$4,500. She left surviving her six children, the defendants, Emma J. Fitzwater (Buchanan), with whom she resided in Springfield, and Belle D. O'Neal, who then lived in Oklahoma, and the plaintiffs, Clara A. White, of Estancia, N. M., Sarah E. Rohlf, of Jacksonville, Ill., George E. Wenzel, of Chicago, and Ambrose W. Wenzel, who lived in St.

Louis. All attended the funeral except Mrs. White and Ambrose W. Wenzel. After the funeral the will was procured, which made Belle D. O'Neal executrix without bond, and divided Mrs. Wenzel's property equally amongst her six children. The condition of her estate was then discussed, and the existence of the \$750 deed of trust and the \$582.20 claim of Mrs. O'Neal against her mother was disclosed by Mrs. Fitzwater and Mrs. O'Neal to their brother George and sister Sarah, who made no objection thereto. The former testify they also told George and Sarah that the \$750 deed of trust would come due in November, 1914, and that Prof. Calland had notified their mother before her death that it would have to be paid at that time; that George and Mrs. Rohlf promised to do their part toward taking care of the incumbrance, and to notify Ambrose and Mrs. White of it, so they might co-operate. This, however, is denied by them, and, on the other hand, they say that Mrs. O'Neal informed them that the note could run a year or two. Prof. Calland, of Drury College, was the trustee in the deed of trust, and had made the loan to Mrs. Wenzel for Mrs. Barton, who resided at Berkeley, Cal. He had been her general agent in handling her funds for many years, and was, it is fair to assume from the testimony, vested with authority to collect and foreclose deed of trust securing her notes, without special instructions from her. He also had been the agent of Mrs. Wenzel in her lifetime, and as such was in charge of her two pieces of property, which he rented, and from which he collected the rents. Mrs. O'Neal named as executrix, living in Oklahoma, was disqualified, and Emma J. Fitzwater was, in June, 1914, duly appointed executrix in her stead. By mutual agreement between the heirs present at the funeral, and consent and advice of the probate judge, Mrs. Fitzwater was to collect the rents without any order of the probate court, but account for them as executrix. Prof. Calland continued to have charge of the property as before, and collected the rents and paid them over to Mrs. Fitzwater as long as she was executrix, and to Mrs. O'Neal, when she was appointed executrix, which was in April, 1915, when the letters of Mrs. Fitzwater were removed by reason of her marriage to Mr. Buchanan. Mrs. O'Neal had moved to Springfield from Oklahoma at the time of her appointment. Nothing having been done towards meeting the \$750 deed of trust, for the purpose of raising money to pay it off, as well as to pay the claim of Mrs. O'Neal, Mrs. Fitzwater, who was then still executrix, on October 29, 1914, executed two notes, in blank as to the payee, one for \$582.20, and one for \$800, and also executed a deed of trust to secure these notes on said lot 68 instead of lot 67, because the former was the more valuable and the money could more easily be obtained on it as security than upon said lot 67. She sent these notes and deed of trust to her brother George in a letter, which was as follows:

"Springfield, Mo. 10/29/14.

"The note for \$750.00 secured by deed of trust against home place is now due with interest and the holder wants her money, hence it becomes necessary to make a new loan. Also as you know sister Belle paid for mother the

sum of \$582.20 for rebuilding the house in April, 1907. Mother lacked this amount to pay for the improvements and she gave her a duebill for that amount, stating for what purpose it was given, a copy of which is herewith inclosed, and as she can either file this as a claim with interest from 1907 against the estate and have the home sold under the hammer or payment to her for the face value of the duebill will be acceptable to her if paid now.

"We have added this amount with a probable \$50.00 for expense for securing the loan to the \$750.00, making a total of \$1,382.30. For whatever amount less than the \$50.00 for expenses we can get the loan it will be credited on the \$750.00 note.

"As the time under the laws of Missouri for filing Belle's claim is limited to one year from date of administration, this loan must necessarily be accepted or rejected at once.

"[Signed] From your loving sister, E. J. Fitzwater, administratrix, Springfield, Mo.'

"George Wenzel replied to this letter, saying that the writer refuses to sign the notes and deed of trust above referred to, and that, as for the defendant Belle C. O'Neal having a claim against the estate, the writer had a claim also, as he stated, for money he had sent to his father and mother when they first came to Springfield in the early 80's, which, he said, would amount to around \$1,000, and that, if the defendant Belle was going to put in her duebill for \$582.20 against the estate, he was going to put in his claim against the estate. In his testimony George Wenzel says he visited Mrs. Rohlf, Christmas, 1914, and showed her Mrs. Fitzwater's letter of October 29, 1914. He says: 'I told her I wouldn't sign any blank deed of trust and notes.' He understood from the letter that the deed of trust sent him to sign was to take up the \$750 deed of trust. He also sent Mrs. Rohlf a copy of his letter of May, 1915, to Mrs. Fitzwater above set forth. He refused to sign the notes and deed of trust sent him, because they did not say who they were to be paid to. He consulted a lawyer about them as soon as he received them. He wrote also to his sister Mrs. White and his brother Ambrose, and sent them a copy of Mrs. Fitzwater's letter of October 29, 1914, and of his letter of January, 1915, in reply. He also visited Ambrose in St. Louis in February, 1915, to see him about the blank notes and deed of trust and Mrs. Fitzwater's letter of October 29, 1914. He also sent Mrs. White, Mrs. Rohlf, and Ambrose Wenzel copies of the blank notes and deed of trust.

"Ambrose Wenzel testified that he refused to sign the new papers, because they were in blank, and because they were on lot 68, and the mortgage was on lot 67.

"No notice of the trustee's sale, which occurred June 3, 1915, was sent to plaintiffs by any one, and plaintiffs had no knowledge of the sale until after it was made. Previous to this, on April 24, 1915, the probate court of Greene county allowed Mrs. O'Neal's claim against the estate for \$863, being principal and interest, presumably, for a number of years.

"In the meantime, neither of the plaintiffs, up to the time of the sale, made any effort to raise money to pay off the deed of trust, or had any further communication with either of

their sisters at Springfield, after George Wenzel's letter of January, 1915, in which he refused to execute the documents sent to him and protested against the claim of his sister Belle.

"Prof. Calland had notified Mrs. O'Neal several times that the note would have to be paid when due, and after the statutory period of nine months from the death of Mrs. Wenzel had expired he wrote Mrs. O'Neal two letters, one dated April 16, 1915, stating that he would advertise the foreclosure on May 2d, unless the note was paid before that time, and one dated May 7, 1915, in which he notified her that he had advertised the sale for June 4, 1915. Prior to this, and after plaintiffs' refusal to sign a new note, Mrs. O'Neal had endeavored to get some one to purchase and carry the \$750 note, but was unsuccessful, because the note was past due. After receiving Prof. Calland's letter of April 16, 1915, Mrs. O'Neal telephoned him, 'I guess you will have to sell it; I can't do anything more.'

"The plaintiffs all testified they had no way of raising money to pay off their share of the \$750 note, except by mortgaging the property their mother left them, except George Wenzel, who said he had a lot in Chicago Cemetery, on which he could have raised the money to pay his share.

"At the trustee's sale, June 3, 1915, Mrs. O'Neal was the highest bidder for \$1,550, the only other bid having been \$1,500. Before the sale she had arranged to borrow \$1,200 on the property in case she bid it in from the defendant Angie L. Scott, which she did by a deed of trust, in which defendant Wright is trustee. Out of this loan, the next day after the sale, she paid the trustee, Calland, in cash \$826, the amount of the note, interest, and costs, and gave him a receipt as administratrix for \$724, the surplus of her bid over the debt and costs. Said receipt is as follows:

"Springfield, Mo., June 4, 1915.

"Received of W. C. Calland, trustee in deed of trust given by Hannah S. Wenzel in favor of Mary Barton to secure a note of \$750.00, on lot 67 in Ozark Land Company's addition, the sum of \$724.00 being the entire difference between the amount of said note of \$750.00 and cost of sale, and the amount of my bid for said property, \$1,550.00, on foreclosure of said deed of trust. Belle D. O'Neal, Administratrix of the estate of Hannah S. Wenzel, Deceased.'

"She testifies that she kept the balance of the \$1,200 loan from Angie L. Scott for her personal use, and that without any order of or report to the probate court she applied the \$724, which she receipted for as administratrix to the trustee, upon her claim of \$863 against the estate which had then been allowed for that sum. After receiving a trustee's deed under said sale, Mrs. O'Neal claimed to own the property, and collected the rents, amounting to \$75, and used them for her own purposes. Prof. Calland continued to act as her agent, and collected the rents for her. In July, 1915, at the instance of plaintiffs, her allowance of \$863 by the probate court was set aside and a new trial had, which resulted in its being allowed again. There was an appeal to the circuit court, from thence to the Springfield Court of Appeals. The claim was finally allowed for

\$582.20, the amount of its face value without interest.

"The court below made a finding of facts, embodying most of the matters we have stated, and expressly found that there was no fraud or collusion between the trustee and Mrs. O'Neal in making said sale, and that said sale was made of his own motion, and was in no way directed, requested, solicited, or under the control of Belle D. O'Neal.

"The court further found that said deed of trust fell due November 1, 1914, and that plaintiffs were aware, as a matter of fact, of the existence thereof, and prior to the trustee's sale had opportunity to pay off the incumbrance or their part thereof, and failed to do so.

"But the court also found that in consequence of the relationship between the plaintiffs and Mrs. O'Neal, as cotenants, and that she was executrix of the estate at the time of the trustee's sale, she became trustee for all the heirs and devisees, and holds title to said lot 67 as such trustee.

"There was accordingly a decree entered for plaintiffs as prayed in their petition, and the defendants appealed to this court."

I. In this case Belle D. O'Neal was a cotenant and an administratrix, and a confusion of this situation has led the trial court to go wrong in our judgment. It must not be overlooked that the mortgage debt upon this property was placed there by the ancestor of all these cotenants.

[1] I think this court has squarely ruled that, absent fraud or collusion, a cotenant can buy at either a judicial or mortgage sale, and acquire a title free from any trust, so far as other cotenants are concerned, in cases where the obligation enforced by the judgment sale, or mortgage sale, is the obligation cast upon the land by the common ancestor. We so ruled in *Becker v. Becker*, 254 Mo. loc. cit. 680, 681, 683, 163 S. W. 865. At page 683 of 254 Mo., at page 869 of 163 S. W., Walker, J., said:

"There was no semblance of fraud or even unfairness in the conduct of the defendant in this transaction. The foreclosure of the deed of trust was made, not on his initiative, but by the holder of the note [the St. Paul Benevolent Society] after a four-year default in the payment of interest. Formal notice was given as required by the deed, and the property was sold at a public sale free and open to all bidders. Under this state of facts, it is straining the rule to hold that the purchase of the property by the defendant was in trust for the plaintiff to the extent of his interest."

It is true that Judge Walker does assign another reason why no trust should be declared in that case, but the opinion (one in banc) was fully concurred in by the full bench, and had any member of the court desired to disown the doctrine stated, his concurrence would have been explicit and special, or would have been a concurrence in the result. Not only so, but in *Dudgeon et*

al. v. Hackley et al., 182 S. W. loc. cit. 1007, this court in banc again approved the Becker Case, supra, with but one dissent, which will be noted later. We also approved what was said by Mr. Justice Lurton in Starkweather v. Jenner, 216 U. S. loc. cit. 523, 30 Sup. Ct. 382, 54 L. Ed. 602, 17 Ann. Cas. 1167. This Starkweather Case was one growing out of a sale under a deed of trust. In this case Mr. Justice Lurton says:

"But it is plain that the principle which turns a cotenant into a trustee who buys for himself a hostile outstanding title can have no proper application to a public sale of the common property, either under legal process or a power in a trust deed. In such a situation, the sale not being in any wise the result of collusion nor subject to the control of such a bidder, he is as free, all deceit and fraud out of the way, as any one of the general public."

Regardless as to what may have heretofore been written, this, we think, is the reasonable rule. It stands conceded that, in cases of this character, had the sale been a judicial sale for the payment of the ancestor's debts, the cotenant could have purchased at such a sale. Had the deed of trust been foreclosed by a judgment of a court in this case, such judicial sale would have given the cotenant the unrestricted right to purchase. Why not the same right under an authorized public sale under a deed of trust, executed by the common ancestor? It may be urged that at the judicial sale the court can control the fairness of such sales, but equity will likewise control the sale under the deed of trust if there is any fraud or collusion. We can see no substantial reason for a different rule in the two classes of cases. Under our more recent rulings, and under the ruling of Mr. Justice Lurton, supra, we think that Mrs. O'Neal had the right to purchase at this sale, and absent fraud or collusion, her purchase gave her a title clear of any trust.

[2] II. We cannot concur in the view urged, to the effect that the other cotenants have an interest in the lot sold under the deed of trust. Mrs. O'Neal had the right to purchase at that sale, and, when she did so purchase, the title was in her, and not in her as a trustee for herself and the other cotenants. Absent positive fraud, this is the rule.

[3] She partly paid for the property, it is true, out of the proceeds of a deed of trust, which, after the sale, she placed thereon. But this does not change the situation. If at the sale the property became hers, then the money paid to her upon the deed of

trust became and was hers. The money arising from the sale (all of it) was due the trustee in the deed of trust. This trustee was bound: First, to pay off the note secured by the deed of trust; and, second, to pay the remainder to the parties entitled thereto. The trustee making the sale is and was liable for the proper distribution of the proceeds. If he wrongfully applied the funds, to the damage of the cotenants, he is the party to whom they should look. If by paying it to the administratrix of the estate he paid to the proper party, he is released of liability, otherwise not.

If the sale gave Mrs. O'Neal a good title, as our case law holds, then the proceeds of a deed of trust placed upon the property was her money. She invested none of the heirs' money in the property. If she did not fully pay the trustee, Calland, that is not a matter within the issues here. This was a matter between her and the trustee. And, on the other hand, if Calland paid the money to the wrong party, such is not an issue here. That is to say, if by direct act or by indirection, he paid the money to Mrs. O'Neal as administratrix, and not to her personally, the situation of the heirs is not changed. The heirs have to look to the trustee of the deed of trust. He is the party that received their money. And, further, if Mrs. O'Neal properly got the surplus as money belonging to the estate (if it did so belong), she would be liable for any misapplication of it, and her bond would have to respond, if she did not.

As to the proceeds of a deed of trust, our late Brother Bond spoke in his dissenting opinion in Dudgeon v. Hackley, 182 S. W. loc. cit. 1007. This dissenting opinion was prepared as an original opinion in the division, and revamped and made a dissent in the court in banc. The ruling there is especially in point, because our late learned Brother tried to make a trust estate out of the fact that the purchaser had paid for the property by a deed of trust on the property after the sale. This court did not take that view of it, and rejected Brother Bond's views.

In concluding we rule that Mrs. O'Neal got full title to the property sold by Calland, the trustee, and that as to such property she is the owner now, subject only to her deed of trust, that the other heirs have no interest therein, for these reasons the judgment nisi should be reversed, and the cause remanded, with directions to enter a decree not in conflict with these views.

All concur, except WOODSON, J., absent.

STATE v. NASH et al. (No. 21922.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

Indictment and information \Leftrightarrow 110(12)—**Information charging disturbance of religious worship held sufficient.**

Information for disturbing a congregation of people met for religious worship, charging a misdemeanor in the language of Rev. St. 1909, § 4713, *held sufficient.*

Case certified from St. Louis Court of Appeals.

Ed. Nash and another were convicted of disturbing a congregation of people met for religious worship. A conviction was affirmed by the Court of Appeals (216 S. W. 1004), and the case certified to the Supreme Court. Affirmed.

Frank W. McAllister, Atty. Gen., and O. P. Le Mire, Asst. Atty. Gen., for the State.

WILLIAMS, P. J. Upon an information charging them with disturbing a congregation of people met for religious worship, defendants were tried in the circuit court of Christian county, found guilty, and each fined the sum of \$1.

Thereupon defendants duly appealed to the Springfield Court of Appeals. The Court of Appeals affirmed the judgment. The opinion therein will be found reported in *State v. Ladd*, 216 S. W. 1004. The case was certified here on the ground that the opinion therein conflicted with certain opinions of the St. Louis Court of Appeals and the Kansas City Court of Appeals.

The only question involved is as to the sufficiency of the information, which, omitting formal parts, is as follows:

"William L. Vandeventer, prosecuting attorney within and for the county of Christian, in the state of Missouri, informs the court upon his official oath, that Dewey Ladd, Clarence Smith, Ed Nash, and Dutch Forgey, on or about the 16th day of March, 1919, in the said county of Christian, in the state of Missouri, did theb and there unlawfully, willfully, maliciously, and contemptuously disturb and disquiet a congregation of people then and there met for religious worship, by then and there making a loud noise, and by rude and indecent behavior within their place of worship and so near the same as to disturb the order and solemnity of the meeting, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the state.

"William L. Vandeventer, Prosecuting Attorney."

It will be noted that the above information charges a misdemeanor and is in the language of the statute. Section 4713, R. S. 1909.

We are of the opinion that the information is sufficient. *State v. Stubblefield*, 32 Mo. 563.

The matter has been fully and ably discussed by our learned brethren on the Court of Appeals, each judge thereof having written an opinion thereon. Every phase of the subject will be found fully treated therein. We fully concur with the views expressed in the majority opinion by Farrington, J., and in the separate concurring opinion by Sturgis, P. J., and for that reason further discussion here is deemed unnecessary. For the reasons therein stated, we affirm the judgment.

All concur.

STATE v. EBBELLER. (No. 21887.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

1. Receiving stolen goods \Leftrightarrow 3—**Guilty knowledge must be tested by actual belief of defendant, and not by what a reasonably prudent person would believe.**

In a prosecution for receiving stolen goods, an instruction, permitting a conviction if the facts were such as would have caused a reasonably prudent person exercising ordinary caution to have believed that the property had been stolen at the time received was erroneous, since the test is as to the actual belief of defendant.

2. Receiving stolen goods \Leftrightarrow 3—**Elements of offense stated.**

In a prosecution for receiving a stolen automobile, conviction may be had on a finding that the automobile had been stolen, and that defendant received it knowing it to have been stolen; further intent not being required.

Appeal from St. Louis Circuit Court; Charles B. Davis, Judge.

Frank Ebbeller was convicted of knowingly receiving a stolen automobile, and he appeals. Reversed and remanded.

Upon an indictment charging him with receiving a stolen automobile knowing the same to have been stolen, defendant was convicted in the circuit court of the city of St. Louis, and his punishment fixed at two years' imprisonment.

In appellant's brief no point is raised as to the sufficiency of the evidence. Only two errors are assigned, and they have to do with the giving of instructions. Such facts as are necessary to an understanding of the issues presented will be stated in the course of the opinion.

Thos. B. Harvey, of St. Louis, for appellant.

Frank W. McAllister, Atty. Gen., and George V. Berry, Asst. Atty. Gen., for the State.

WILLIAMS, P. J. I. The court's instruction No. 2, which is attacked by appellant, is as follows:

"By the term 'knowing' that the property was stolen is not meant absolute personal and certain knowledge on the part of the defendant that the property mentioned in the indictment had been stolen, but such knowledge and information in his possession at the time he received the same, if you believe he did receive it, as would put a reasonably prudent man, exercising ordinary caution, on his guard, and would cause such a man exercising such caution, and under circumstances which you believe defendant received the property, to believe and be satisfied that the property had been stolen.

"The mere naked fact of the possession of said property by the defendant raises no presumption that the defendant knew that said property had been stolen by another."

It is contended that the above instruction is erroneous, in that it permits a conviction, even though the defendant may not have had guilty knowledge that the property had been stolen.

It will be noticed that the instruction does permit a conviction if the facts were such as (in the opinion of the jury) would have caused a reasonably prudent person, exercising ordinary caution, to have believed that the property had been stolen at the time received.

[1] We are inclined to the view that this point is well taken, and that the learned attorney representing the appellant is correct in stating that—

"The question is not what some other person would have believed and known from the circumstances attending the receipt of the property, but what did this defendant believe and know."

In the case of *Kasle v. United States*, 233 Fed. 878, 147 C. C. A. 552, the Circuit Court of Appeals for the Sixth Circuit, had before it this identical question. The language used in condemning a like instruction is so clear and concise that we feel justified in quoting the following excerpt therefrom:

"Plainly such tests as these of guilty knowledge on the part of the accused subjected him to a standard of conduct and of capacity to detect crime, which the jury might conclude to be the standard of reasonable and honest men of average intelligence, when acting under circumstances like those which might be found to have existed here. The effect of such test was to charge the accused with guilty knowledge or not upon what the jury might find would have induced belief in the mind of a man such as they were told to consider, rather than the belief that was actually created in the mind of the accused; or, at last, the accused might be condemned even if his only fault consisted in being less cautious or suspicious than honest men of average intelligence are of the acts of others. The result of the rule of the charge

would be to convict a man, not because guilty, but because stupid. The issue was whether the accused had knowledge—not whether some other person would have obtained knowledge—that the goods had been stolen. The circumstances must have had that effect upon the mind of the accused, to constitute knowledge in him. The issue must be determined upon the individual test of the accused. It may well be that the tests stated in the charge are proper enough to fix civil liability for the acts or omissions of a defendant, but hardly to fasten upon him an intent to commit a felony. There is some conflict in the decisions upon this subject, but we think the tests of the charge are opposed to the clear weight of authority. This may be fairly illustrated by the following: *State v. Alpert*, 88 Vt. 191, 204, 92 Atl. 32; *Peterson v. United States*, 213 Fed. 920, 922, 923, 130 C. C. A. 398 [C. C. A. 9]; *State v. Rountree*, 80 S. C. 387, 391, 61 S. E. 1072, 22 L. R. A. (N. S.) 833; *State v. Daniels*, 80 S. C. 368, 371, 61 S. E. 1073; *State v. Goldman*, 65 N. J. Law, 395, 397, 47 Atl. 641; *Cohn v. People*, 197 Ill. 482, 485, 64 N. E. 306; *Robinson v. State*, 84 Ind. 452, 456; *State v. Denny*, 17 N. D. 519, 525, 526, 117 N. W. 869; *Forrester v. State*, 69 Tex. Cr. R. 62, 152 S. W. 1041, 1042; *Pickering v. United States*, 2 Okl. Cr. 197, 101 Pac. 123, 124; *Drummond v. State*, 103 Miss. 221, 224, 60 South. 138." 233 Fed. 887, 147 C. C. A. loc. cit. 561.

Further discussion or citation of authority is, we think, entirely unnecessary to establish clearly the grave error which this instruction contains, but in passing it is necessary that we refer to some former decisions of this court which might be thought to indicate a contrary view.

In support of his contention that the instruction is proper, the learned Attorney General cites *State v. Cohen*, 254 Mo. 437, loc. cit. 457, 162 S. W. 216, Ann. Cas. 1915C, 86; *State v. Weinberg*, 245 Mo. 584, loc. cit. 570, 150 S. W. 1069; *State v. Sakowski*, 191 Mo. 635, loc. cit. 643, 90 S. W. 435, 4 Ann. Cas. 751; *State v. Kosky*, 191 Mo. 1, loc. cit. 6, 90 S. W. 454.

A mere reference to *State v. Cohen* will disclose that the case is nowise in point. Neither is the case of *State v. Weinberg*, supra. In the latter case the point under discussion was the sufficiency of the evidence to support the verdict. This is also true of the case of *State v. Richmond*, 186 Mo. 71, 84 S. W. 880, which is cited in the *Weinberg* Case.

The question as to the sufficiency of the evidence to support a verdict is an entirely different proposition from the one now involved in the instruction under review. There might be sufficient evidence to sustain a conviction, and yet the jury might not believe it, or might not draw therefrom the necessary inference of fact which forms the basis of a conviction. The facts which the instruction in the case at bar requires to be found are at best nothing more than facts from which the ultimate and necessary fact of

guilty knowledge might be inferred. The instruction relieves the jury of finding or inferring this ultimate fact which is necessary for them to find before convicting the defendant.

In the case of *State v. Sakowski*, supra, an instruction similar to the one under review is found copied on page 643 of that opinion, together with numerous other instructions. Why the instruction is so copied is not apparent. No point seems to have been made concerning this instruction, and no discussion concerning the same is to be found in the opinion. It appears to have at one time been the practice in this court to copy all of the instructions in a case into the statement of facts, even though no point was raised concerning the instruction. This practice, now long since discontinued, has undoubtedly been the source of much confusion among the members of the bar, who in many instances have drawn the conclusion that since an instruction was copied into the statement and not condemned by the opinion therefore it must have been approved by the court. There is no justification, however, for such a conclusion, and no one is warranted in assuming that the court has passed upon anything other than the matters discussed in the opinion. This case then should not be considered as in point.

In the case of *State v. Kosky*, supra, an instruction almost identical with the one under review is found copied on page 6 of said opinion in 191 Mo. (90 S. W. 455). On page 17 of the opinion in 191 Mo. (90 S. W. 459) we find this language, to wit:

"The instructions, as applicable to the first count in the information, are free from objection."

It thus appears that the question did not receive specific attention or discussion at that time, and we doubt very much if the question now presented was at that time called to the attention of the court. This is the only opinion of this court which we have been able to find which in any manner undertakes to approve the instruction. In so far as this case undertakes to approve the instruction under review, it is hereby expressly overruled.

[2] II. Appellant further contends that the instructions given failed to require the finding of a criminal intent. We are unable to agree with this contention. Instruction 1 required the jury to find that the automobile had been stolen, and that defendant received the car knowing the same to have been stolen. Under the well-settled rule in this state the above requirements constitute the gravamen of the crime, and further intent is not required. *State v. Cohen*, 254 Mo. 437, loc. cit. 452, 162 S. W. 216, Ann. Cas. 1915C, 86, and cases therein cited.

Because of the error discussed in para-

graph I above, it follows that the judgment should be reversed, and the cause remanded. It is so ordered.

All concur.

FOREST LUMBER CO. v. OSCEOLA LEAD & ZINC MINING CO. (No. 19893.)

(Supreme Court of Missouri, Division No. 1. June 2, 1920.)

1. Judgment \S 501—Not vulnerable to collateral attack because of error in decision.

None of the defenses against the judgment rendered, including an objection to the constitutionality of a statute, which might have been urged, and which the court had jurisdiction to decide, remained open for consideration in a later case where the validity of the judgment was assailed; for erroneous decision does not render a judgment subject to collateral attack.

2. Judgment \S 334—Writ of error coram nobis lies only in court where judgment rendered.

The writ of error coram nobis lies only in the court where an erroneous judgment has been rendered because of a mistake of fact of which the court was not informed, and, since superior courts do not try the facts in the exercise of appellate jurisdiction, the Supreme Court has no power, on such writ, to set aside a judgment of the circuit court on the ground that its judgment was based on a mistaken belief that the judgment of another circuit court on which the parties' rights depended was a final one.

Appeal from Circuit Court, Jasper County; J. D. Perkins, Judge.

Action by the Forest Lumber Company against the Osceola Lead & Zinc Mining Company. From judgment for plaintiff, defendant appeals. Appeal dismissed.

George V. Farris, of Joplin, for appellant.
H. S. Miller, of Webb City, for respondent.

GOODE, J. This action was filed to recover from the defendant damages caused to plaintiff by the act of defendant in removing from leasehold premises in Newton county articles of personal property against which plaintiff held a lien for labor and material. Both of the parties to the action are business corporations. The property involved consisted of two steam boilers, an engine, and other pieces of machinery and appliances used in carrying on lead and zinc mining. The lien of the plaintiff on these articles was filed against the Sleepy Hollow Mining & Development Company, another corporation which was engaged in mining in Newton county. The articles of machinery and equipment the plaintiff held a lien on had been located in Jasper county before the lien claim was filed and before the work and

material were done and furnished for which a lien was asserted, and had been taken from Jasper county to Newton county by the Sleepy Hollow Company after it had acquired the title to them by purchase from their original owner, the Leroy Mining Company. To secure payment of the purchase price, or part of it, the Sleepy Hollow Company gave a deed of trust in the nature of a chattel mortgage on the articles to J. T. Todd, as trustee for the Leroy Mining Company. The purchase by the Sleepy Hollow Company occurred October 21, 1913. On February 23, 1914, after the Sleepy Hollow Company had moved the property to Newton county, the deed of trust on it was recorded in that county; and it was in Newton county that the plaintiff, the Forest Lumber Company, did work and furnished material for the housing of the articles in frame buildings, we understand, and perhaps did other work to prepare them for use in the mine of the Sleepy Hollow Company in Newton county. They were located on leased premises, but we need not describe the premises.

The lien claim or statement of the Forest Lumber Company was filed in the office of the clerk of the circuit court of Newton county January 22, 1914, and on the same day said company, the present plaintiff, filed a suit in said court to establish its lien against the property in controversy. On a day not stated, in May, 1914, said property was sold under the aforesaid chattel mortgage or deed of trust and bought by Amos Hatton, not for himself, but for the Osceola Lead & Zinc Mining Company (this defendant), of which he was the president. Said articles of property were detached from their place in the Newton county mining plant and transferred by the defendant back to Jasper county. This was done after the plaintiff's lien statement was on file in the office of the circuit court of Newton county and after an action to enforce it had been begun. Lien statements were filed by other claimants against the property, to wit, by the United Iron Works, a corporation, and the Yoder-Becker Company, a corporation, and an action was brought to enforce the lien of the Yoder-Becker Company. On or about May 23, 1914, said United Iron Works filed a suit in equity, as provided by the statutes of this state, in the circuit court of Newton county, to which all persons and parties claiming a lien or any kind of interest in said property were made defendants, and the action previously brought by the Yoder-Becker Company to establish its lien was consolidated with said equitable proceeding. On June 8, 1915, the United Iron Works, the plaintiff in said equity suit, dismissed its suit to establish its lien against the Sleepy Hollow Company, to which, as stated, all the other persons, including the Osceola Lead & Zinc Mining Company, claiming liens or any kind

of interest in the controversy, were parties, and in the order of dismissal it was considered and adjudged "that the defendants go hence without day and have and recover of and from the plaintiff the costs of this action and that execution issue therefor." On June 10, 1915, two days later, plaintiff, the Forest Lumber Company, filed a motion to set aside the order of dismissal, presumably on the ground that the Forest Lumber Company had a right to have its lien enforced in the suit in equity, and that the dismissal of the case by the United Iron Works, as far as it was concerned, did not involve, necessarily, the dismissal of the case as an entirety, but that the other lienors had the right to have their liens established. This motion was sustained, the judgment of dismissal was set aside, and the suit in equity then went on to a judgment in favor of the Forest Lumber Company, the present plaintiff, enforcing its lien against the articles in controversy and giving the lien priority over the deed of trust under which the Osceola Lead & Zinc Mining Company, the defendant, had acquired title by purchase at the trustee's sale.

The present action, as stated before, was instituted by the Forest Lumber Company to recover from the defendant the damages suffered by the plaintiff in consequence of the removal of the property to Jasper county by the defendant while plaintiff held a lien against it, and while the suit was pending in which said lien was finally decreed to be prior in point of time to that of the deed of trust. The case went to trial in the circuit court of Jasper county, at Joplin, at the April term, 1916, and resulted in a judgment rendered May 22, 1916, in favor of the plaintiff for the sum of \$895.45 damages, against the defendant. Within four days a motion for new trial was filed and, that motion having been overruled, this appeal was prosecuted from the judgment.

From the statement it will be gathered that plaintiff founded its cause of action on the adjudged priority of its lien to the deed of trust under which the defendant purchased and removed the property, pending a suit to enforce the lien. In a decision given November 20, 1916, said judgment of the Newton circuit court was reversed by the Springfield Court of Appeals, whither the case had gone on a writ of error. The cause for the reversal was that the Newton circuit court had discharged the defendants without day when the United Iron Works dismissed its suit, had afterwards reinstated said cause against all the defendants, including the defendant in the present case, and had rendered judgment without further notice to this defendant and when it had no reason to anticipate further proceedings being taken in the case. *Forest Lumber Co. v. Hatten*, 189 S. W. 625. Afterwards said

suit to enforce plaintiff's lien was tried a second time, with the result that the court decreed the deed of trust under which defendant acquired title to the property was a lien prior to the plaintiff's lien, and that defendant's title was good against plaintiff's lien, which judgment was affirmed by the Springfield Court of Appeals. *United Iron Works Co. v. Sleepy Hollow Mining & Development Co.*, 198 Mo. App. 562, 198 S. W. 443.

The facts we have stated regarding the reversal by the Springfield Court of Appeals of the judgment of the Newton circuit court in the equity case, of the subsequent retrial of said case, and of the decision in it that defendant's title was superior to the lien of plaintiff, are not shown in the record of the present appeal, but in the petition or motion of defendant filed herein for the writ of error coram nobis to be presently mentioned.

It looks like the defendant possessed a complete defense to the present case of the plaintiff to recover damages for the removal of the property to Jasper county while plaintiff had a lien which had been given precedence over defendant's title, when, in truth, as it turned out, plaintiff's lien was subordinate to defendant's title. But that defense was not interposed in this action, and until the motion for new trial was filed the lower court's attention was not called to the fact that the judgment of the Newton circuit court was not final, but had been carried up to the Springfield Court of Appeals by writ of error. Nothing was said about it in the answer to plaintiff's petition; but, instead, the defendant averred the judgment given by the Newton circuit court upon plaintiff's lien was void and of no effect, for the reason that it was obtained under the provisions of the Mechanic's Lien Act of 1911, and that this act was unconstitutional, in that it deprived persons of their property without due process of law, and was a local or special law regarding liens which contravened subsection 1 of section 53 of article 4 of our state Constitution. *Laws 1911, p. 312*. The answer then went on to state the facts regarding the giving of the deed of trust on the property by the Sleepy Hollow Company while the property was still in Jasper county and the purchase by defendant thereunder, the judgment of dismissal of the equity suit, and its reinstatement without notice to defendant—defenses which had been passed on and adjudicated in the equity suit in the Newton circuit court, or could have been if asserted by the defendant.

[1] None of those defenses remained open for consideration in the present case; for the constitutional question, even if defendant's contention regarding it is sound, as to which we say nothing, was one which the Newton circuit court had the right to decide; and an erroneous decision upon it would not

render the judgment void and subject to collateral attack. The proper course for the defendant to have pursued to correct the error of the Newton circuit court, if one was committed, was to take the cause to the proper court of review by appeal or writ of error. *State v. Rich*, 20 Mo. 393, 395; *State v. York*, 22 Mo. 465. And, as already stated, the cause was taken to the Springfield Court of Appeals by writ of error, but unfortunately that fact was not set up by way of defense to the present action. Manifestly the judgment of a court cannot be treated as a nullity in a collateral proceeding merely because the judgment was given on an unconstitutional statute. In such a case the judgment would be valid until reversed or set aside, whether the decision of the point was right or wrong.

[2] It may be that appellant's counsel has concluded the validity of the first judgment of the Newton circuit court in the equity suit cannot be attacked in this case for reasons going to the constitutionality of the Mechanic's Lien Act of 1911, for no brief or assignment of errors has been filed on the merits of the present appeal. Instead of presenting the merits for decision, the defendant filed a petition in this court for what is denominated therein a writ of error coram nobis to set aside the judgment of the Jasper circuit court in the present case, for the reason the judgment of the Newton circuit court, which is the foundation of plaintiff's cause of action in this case, had been reversed by the Springfield Court of Appeals. Said petition was filed after the appeal had been lodged here and on the day it was set down for a hearing. The petition should have been addressed to the court in which the judgment was rendered, and will not lie here. Although the common writ of error which is sued out to have a judgment reversed for an erroneous decision on a point of law runs from the court of review to the trial court, the writ of error coram nobis lies only in the court where an erroneous judgment has been rendered in consequence of a mistake of fact of which the court was not informed. The purpose of the writ is to make known the error of fact and thereby enable the court to vacate the erroneous judgment. In the exercise of appellate jurisdiction in legal actions superior courts do not try the facts, and relief against an error of fact must be obtained in the court where it occurred. We have no power to grant a writ to set aside the judgment of the Jasper circuit court upon the ground that its judgment was based on a mistaken belief that the judgment of the Newton circuit court was a final one. *Roughton v. Brown*, 53 N. C. 393.

We think the best way to dispose of the petition of the defendant for the writ it has prayed is to dismiss the same without prejudice and without any intimation as to the merits of the application.

As the defendant has filed no assignments of error or brief in the case, as required by our rules, its appeal should be dismissed. It is so ordered.

All concur, except WOODSON, J., absent.

SOEHNGEN et al. v. JANTZEN et al.
(No. 21946.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

Appeal and error 1009(3) — Conclusions reached by trial court in equity action deferred to.

Where testimony in an equity case was exceedingly contradictory and largely given by witnesses who testified in person before the court, the Supreme Court will defer somewhat to the conclusions reached by the trial court.

Appeal from St. Louis Circuit Court;
Thomas C. Hennings, Judge.

Bill by William A. Soehngen against John Joseph Jantzen and others. Plaintiff dying after commencement of action, it was revived in the name of Gerald Soehngen, administrator of plaintiff's estate, and others as heirs. Decree for plaintiffs and defendants appeal. Affirmed, and remanded for enforcement of decree.

See, also (App.) 218 S. W. 423.

On September 29, 1916, William A. Soehngen filed in the circuit court of the city of St. Louis, Mo., a bill in equity against above-named defendants, alleging therein that he was the owner and entitled to the possession of the real estate in controversy and described in petition; that he derived his title thereto through a sheriff's deed made pursuant to an execution sale under a decree in favor of plaintiff in the case of William Soehngen v. John Joseph Jantzen, numbered 82106 in the circuit court aforesaid; that after the filing of said suit numbered 82106 on November 16, 1912, to wit, on January 13, 1913, defendants John Joseph Jantzen and Emma Jantzen, his wife, fraudulently placed a deed of trust on said property to secure a \$2,500 note, for the purpose of defrauding plaintiff, etc. The purpose of this suit was to declare plaintiff the owner of said property; to cancel said deed of trust; to put him in possession of said property; to have a decree entered reciting that said Emma Jantzen has no inchoate right of dower in said property; to restrain foreclosure proceedings under said deed of trust; to recover damages, etc.; and asking for general relief.

After the commencement of this action, plaintiff died, and it was revived in the name of his legal representative and heirs.

Defendants filed a joint amended answer

herein, containing a general denial. It further alleges that the sheriff's deed to plaintiff aforesaid was without consideration, or, if there was any consideration, the same has failed. They accordingly prayed that said sheriff's deed to plaintiff dated September 11, 1916, be canceled, etc.

The answer, after describing said \$2,500 note and coupons attached, secured by the deed of trust aforesaid, alleges that, with the knowledge of plaintiff, said notes were negotiated by defendants, in order to raise money to pay bequests under the last will and testament of Margaretha Jantzen amounting to \$1,910, as well as securing additional moneys with which to pay a judgment in favor of Anna Weber, sister of plaintiff, for \$632, etc.; that plaintiff stood by without objection, knowing that defendants were negotiating said note and deed of trust as aforesaid, and after said loan was perfected accepted his portion of the bequests specified in said will, etc.; that by reason of foregoing plaintiff is estopped from attacking the validity of said deed of trust. It is further alleged in said answer that said deed of trust was foreclosed on October 19, 1916, and at said foreclosure sale John A. Hurster purchased the real estate aforesaid, free from the lien of the judgment rendered in said cause 82106, division No. 7 of the circuit court aforesaid; that said execution sale and sheriff's deed cast a cloud upon the title to said real estate which they ask to have removed, etc.

The case was tried as though a reply, with a general denial, had been filed, and will be disposed of here accordingly.

To prevent repetition, we will consider the evidence and rulings of the trial court, as far as necessary, in the opinion.

The court below found the issues in favor of respondents, and entered its decree accordingly. Appellants filed their joint motion for a new trial, which was overruled, and the cause duly appealed by them to this court.

T. O. Stokes and Taylor R. Young, both of St. Louis, and T. T. Hinde, of Madison City, Ill., for appellants.

Jos. C. McAtee, of Clayton, for respondents.

RAILEY, C. (after stating the facts as above). 1. The motion for a new trial filed herein by defendants contains but three assignments of error, as follows:

"First. The judgment and decree of the court is against the law.

"Second. The judgment and decree of the court is against the evidence.

"Third. The judgment and decree of the court is against the law, the evidence, the law under the evidence, and the great weight of the evidence."

It will be observed that no complaint is made in respect to the admission or rejection

of testimony by the court. The case will accordingly be disposed of here upon the above assignments of error.

2. It appears from the record that William Soehngen, the original plaintiff herein, now deceased, was the son of Margaretha Jantzen, who died testate in 1910. Defendant Joseph Jantzen was the second husband of said Margaretha, and stepfather of said William Soehngen. On August 30, 1910, said Margaretha Jantzen executed a will in which, after making provisions for certain legatees, she gave all the residue of her property to said defendant Joseph Jantzen, and named him as her executor without bond.

Defendants upon cross-examination of Mr. Joseph C. McAtee proved by him that the case of *Wm. Soehngen v. Joseph Jantzen* (No. 82106) was filed November 18, 1912.

Upon a trial of above case in the circuit court aforesaid the following judgment was entered:

"It is therefore adjudged and decreed that the defendant holds the above-described premises as a trustee *ex maleficio* for and in favor of the plaintiff, to the extent and fractional part that the sum of \$500 bears to the entire value of the said property, and holds the same upon a constructive trust for the use and benefit of the plaintiff as the owner of an equitable estate in fee therein, and that the title of the defendant in and to the above-described premises should be and is hereby divested out of him and vested in plaintiff to the extent of said fractional part, and that the ratio of said fractional part should be and is hereby ordered determined by the actual sale price of said property when sold, that said above-described premises should be and are hereby ordered sold by the sheriff of the city of St. Louis in the manner provided by law for the holding of judicial sales, and that said sheriff report the result of said sale to this court for its approval.

"It is further ordered that the costs of this proceeding be and are hereby adjudged against the defendant, for which let execution issue."

The above judgment was affirmed by the St. Louis Court of Appeals (186 S. W. 1109, 1110). Thereafter said real estate was sold under the decree of the circuit court aforesaid. The plaintiff therein purchased said real estate at the execution sale under the decree aforesaid for \$650, and the sheriff made him a deed to said property. Defendant's attorney announced at said sale that whoever bought would take the property subject to said \$2,500 deed of trust and hence no one else bid on the property at said sale. The sheriff's deed recites that said \$650 was paid by said plaintiff.

Without pursuing this branch of the case further, we are satisfied from the record before us that said William Soehngen, by virtue of the sheriff's deed aforesaid, acquired a good title to the property in controversy, unless the \$2,500 deed of trust was valid, and became a prior lien on said property to the judgment rendered in case 82106, *supra*.

3. The testimony relating to the validity of the \$2,500 note and deed of trust securing same is exceedingly contradictory, and largely given by witnesses who testified in person before the court. We will therefore defer somewhat to the conclusions reached by the trial court in respect to this matter. *Coal Co. v. Halderman*, 254 Mo. 596, 163 S. W. 828; *Robbins v. Robbins*, 258 Mo. 175, 167 S. W. 502; *Henderson v. Henderson*, 265 Mo. loc. cit. 733, 178 S. W. 175; *Price v. Rausche*, 186 S. W. 968.

We hereby adopt as our own that part of the trial court's decree as follows:

"The court finds that in reality and fact neither the sum of \$2,500 or any part thereof was paid for said notes and deed of trust, and that the defendant John Joseph Jantzen did not receive same; that said notes and deed of trust were made, executed, and recorded for the purpose of hindering, defeating, and defrauding plaintiff of the rights asserted by him in the petition filed in case No. 82106 and of the judgment obtained by him thereunder; that for this purpose the defendants John Joseph Jantzen and Emma Jantzen, his wife, conspired and confederated together to execute and record said notes and deed of trust, and that said notes and deed of trust have always been and are now in their possession; that defendants and each of them had full notice at all times and before the execution of said notes and deed of trust of plaintiffs' claim and interest in and to said property, but regardless of the same wrongfully attempted to defraud the said William A. Soehngen of his right in and to the same by incumbering the said premises hereinabove described as aforesaid; that they are now wrongfully withholding possession of said property from plaintiff, to his damage in the sum of \$120; and that the reasonable value of the rents and profits of said premises is \$20 per month.

"The court further finds that the defendants Pegram and Hill are and were without interest in the said notes and deed of trust; that neither of them parted with any property or money in the premises, but were used by their co-defendants merely as straw men or dummy instrumentalities as the conduit by which the said fraudulent scheme was furthered; that the defendant Hill, as trustee, attempted to advertise and sell the said above-described premises under said deed of trust on October 19, 1916, and that he should be enjoined from attempting to further execute any of the duties of trustee and of attempting to deliver any title under and by virtue of the said deed of trust, and that said attempted sale as conducted by him upon the said 19th day of October was void and of no force and effect; that the recorded deed of trust hereinbefore referred to constitutes and is a cloud upon the title of plaintiffs, and that the said deed of trust should be and hereby is adjudged void and of no force and effect and ordered canceled of record, and that plaintiffs should be adjudged the legal owners of the said above-described property free and clear of any incumbrance done or suffered by defendants; that they should be placed in and restored to the possession of said property; that the said Emma Jantzen should be

declared dowerless in the premises, and defendants restrained from proceeding with the sale of said property under the said deed of trust; that plaintiffs should be awarded damages in the sum of \$120 and the monthly rents and profits of said property be fixed at \$20; and that plaintiffs should recover their costs against defendants.

"It is therefore adjudged and decreed that plaintiffs are the legal owners of the premises hereinabove described, free and clear of any incumbrance done or suffered by defendants, and that the plaintiffs be placed in and restored to the possession of said property by the sheriff of the city of St. Louis; that the deed of trust of record in Book 2592, page 551; of the office of the recorder of deeds of the city of St. Louis be and hereby is canceled and extinguished of record; that the said Emma Jantzen be and is hereby declared dowerless in the premises; that defendants be and hereby are restrained from proceeding with the sale of said property under said deed of trust; that the plaintiffs be and hereby are awarded damages in the sum of \$120, and the monthly rents and profits of said premises be and hereby are fixed at \$20 per month; and that plaintiffs recover their costs against defendants and execution issue therefor."

After carefully reading the record the second time, we are well satisfied with the foregoing conclusions of the lower court. The defendant Joseph Jantzen received, as executor, \$2,150.69, which was more than enough to pay the legacies provided for in his wife's will. He not only appears to have squandered this money, but forced his wife's children to litigate through the various courts to collect the small trusts declared in their favor while he is still in possession of said property.

The judgment below is affirmed, and the cause remanded, in order that the trial court may take such steps to enforce its decree as may be deemed advisable.

WHITE and MOZLEY, CC, concur.

PER CURIAM. The foregoing opinion of RAILEY, C., is hereby adopted as the opinion of the court.

All concur.

HARTNETT et al. v. LANGAN et al.
(two cases).

SAME v. CONNOLLY et al.

(Nos. 21130, 21131, 21426.)

(Supreme Court of Missouri, Division No. 1.
April 10, 1920. Rehearing Denied
June 2, 1920.)

1. Life estates §20 — Remaindermen held bound by accepting benefits of agreement of life beneficiary as to interest.

Where after the death of the trustee who had dissipated the trust fund his widow and

son made good the same, giving notes for the amount to the life beneficiary, remaindermen who asserted rights in the notes are bound by the beneficiary's agreement on receiving partial payment as to the interest which should be paid.

2. Trusts §382 — Heirs and surety of trustee held discharged by beneficiary's acceptance of payment.

Where on death of trustee who had dissipated the trust fund his son and his widow gave notes for the amount of the fund, and there was no contention of mistake as to the amount, remaindermen who accepted a note as well as payment to the life beneficiary, who was deemed by the parties entitled to the entire fund, cannot assert any liability against the trustee's heirs or his surety.

3. Trusts §168 — Where trustee dissipated trust fund, his heirs cannot be deemed the successors as trustees.

Where trustee dissipated trust fund, his heirs were not his successors as trustee, for there was no fund to devolve upon them.

4. Trusts §244 — Where trust consisted of personal property, it passes on death of trustee to his administrator.

Where the trust fund was personal property, it would pass on death of trustee to his administrator as bailee, and not to the trustee's heirs.

5. Trusts §315(1) — Son of trustee not entitled to compensation for preserving or restoring trust fund.

Where the widow and son of a trustee who had dissipated a fund gave their notes for the amount thereof and voluntarily turned them over to the life beneficiary, held that, as they were not successors of the trustee, and having voluntarily surrendered the notes, they are not entitled to compensation for preserving or restoring the trust fund as successors to the trustee.

6. Executors and administrators §519(1) — Foreign executor cannot collect note given by resident and secured by property in state.

A foreign administrator has no title to nor right to collect or receipt for a note of citizens of the state and secured upon property in the state.

7. Trusts §181(1) — Foreign trustee cannot collect notes given by Missouri citizens and secured by property in this state.

Where the will of an Illinois resident giving and bequeathing property to one for life with remainders over did not provide for any trustee, and the Illinois courts thereafter appointed a trustee to hold funds derived from sale of property devised, such trustee has no title to or right to collect or receipt for notes executed by citizens of Missouri and secured upon property in that state which were given to make good such fund previously dissipated by a Missouri trustee, for the powers of the Illinois trustee are derived wholly from the laws of that state, which do not operate beyond the limits of that jurisdiction.

8. Wills ⚡707(1)—Necessity of suit to protect parties seeking construction of will not ground for award of attorney's fees.

Where the widow and son of a trustee appointed to hold a fund derived from sale of land devised by a resident of a foreign state to one for life with remainders over made good the fund which the trustee dissipated, giving their own notes which were surrendered to the life tenant, and thereafter one note was paid, the other lost, *held* that, notwithstanding it was necessary for such parties to bring an action to protect themselves against a trustee appointed by the courts of the foreign state as well as against remaindermen, such parties were not entitled to an award of attorney's fees, though they demanded a construction of the will.

9. Trusts ⚡244—Heirs of trustee not bound to account on theory that he had made profit out of trust fund.

Where a trustee dissipated a trust fund, *held*, that his widow and son who made good the amount of the fund could not be required to account for supposed profits resulting from the trustee's investment of the fund; it appearing that property which he delivered to his son many years before his death was practically exhausted in making good the trust fund, and that the trustee was without estate at time of his death.

10. Wills ⚡634(8)—Remainders to heirs of life tenant held "contingent remainders."

Where a testator gave property to his niece for life, remainder in fee to the heirs of her body, or, in default of issue at her death, then remainder in fee to enumerated relatives, the remainder in fee to the heirs of the body of the niece was, under Rev. St. 1855, c. 32, § 6 (Rev. St. 1909, § 2873), a contingent remainder, as it could not be told who such heirs would be until the death of the niece.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contingent Remainder.]

11. Wills ⚡545(4)—"In default of such issue at her death" meant without issue living at time of her death.

Where testator gave property to a niece for life, remainder to the heirs of her body, with other remainders over "in default of such issue at her death," that expression meant without issue living at the time of her death.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, In Default of Issue.]

12. Wills ⚡439—Intention of the testator is paramount.

In construing a will the intention of the testator is paramount.

13. Wills ⚡634(14)—Remainder to father, mother, brothers, and sister of life tenant or their heirs per stirpes held "contingent remainder" as to latter class.

Where testator gave property to his niece for life, remainder to her lawful issue and in default of issue to her father, mother, brothers, and sister, or their heirs taking per stirpes,

the remainder to the latter class, under Rev. St. 1855, c. 32, §§ 6, 7 (Rev. St. 1909, §§ 2873, 2874), was contingent and hence where a sister died leaving one child who died without issue before the life tenant the father of such child inherited nothing.

14. Wills ⚡555(4)—Remainder held contingent, and issue of remaindermen to take as purchasers not by descent.

Where a testator gave property to his niece for life, remainder to her lawful issue, and in event of her death without issue then to her mother, father, brothers, and sister, or their heirs per stirpes, the remainder to the latter class being contingent, depending on whether the individuals named should outlive the life tenant, their heirs took not by descent, but as purchasers under the will, and hence, where a sister died leaving one child, who died without issue before the life tenant, the heirs of such child could take nothing.

15. Wills ⚡506(3)—Remainders to designated persons and their heirs per stirpes held not to include husband of deceased life tenant, whose only child died before life tenant.

Where a testator gave property to his niece for life, remainder to the heirs of her body, and in default of such issue at her death to her father, mother, brothers, and sister, or their heirs taking per stirpes, under the statute of descent and distribution providing for descent first to the children or their descendants, second, to the father and mother, third, to the brothers and sisters, and then to the husband and wife, the husband of a deceased sister whose only child died before the life tenant is not entitled to take as against surviving brothers, etc.

16. Wills ⚡545(4)—Life tenant held not entitled to take as heir of her father and mother, who had contingent remainders.

Where a testator gave land to his niece for life, remainder to the heirs of her body, and in default of issue to her father, mother, brothers, and sister, or their heirs taking per stirpes, the niece could not by inheritance take as heir of her father or mother, etc., who died before her; their interest being contingent.

17. Wills ⚡548—Rights of survivors of class taking per stirpes.

Where testator gave property to his niece for life and remainder to the heirs of her body, and in default of issue to her father, mother, brothers, and sister, or their heirs taking per stirpes, and all of the enumerated class save three brothers died before the niece, one brother leaving issue surviving, the three surviving brothers and the issue of the dead brother are entitled to the whole, the three brothers each taking a one-fourth interest, and the issue of the dead brother taking the other fourth.

18. Appeal and error ⚡843(2)—Question of validity of decree of court of foreign state immaterial.

Where in a proceeding for the construction of a will brought by a debtor the decision of the Missouri court adjudicating the rights of the parties was upheld on appeal, and the

successful parties affirmed the validity of a decree of the Illinois court also in their favor, the question of the validity of such decree which was attacked by unsuccessful parties need not be determined.

19. Trusts — 181(1) — Foreign trustee held not entitled to take fund.

A trustee appointed by the courts of Illinois, at the instance of remaindermen is not by virtue of his appointment entitled to receive from Missouri debtors, etc., funds which on the death of the life tenant belonged to remaindermen.

20. Appeal and error — 877(4) — Erroneous provision for payment of funds of a state to foreign trustee held harmless.

Error in providing for payment of funds to foreign trustee held harmless as to appellants where the successful parties entitled to the funds made no objection.

Woodson, J., dissenting.

Appeal from St. Louis Circuit Court; J. Hugo Grimm, Judge.

Suit by George W. Hartnett and another against Mary Grace Langan, administratrix of the estate of Peter Langan, deceased, and William Connolly. From the judgment, plaintiffs appeal, and the first-named defendants likewise appeal, as does William Connolly. Modified and affirmed.

W. B. & Ford W. Thompson, of St. Louis, for plaintiffs.

Ford & Jones, of Carlyle, Ill., Bruce A. Campbell, of East St. Louis, Ill., S. P. Bond, of St. Louis, and Hugh V. Murray, of Carlyle, Ill., for defendants Langan, McNally, Bond, and Schlafly.

Tibbetts & Green, of Guthrie, Okl., and Sanders & Forgey, of St. Louis, for defendant Connolly.

SMALL, C. I. Appeal from the circuit court of the city of St. Louis.

The facts we find to be substantially as follows:

In 1856 William Tighe, a resident of Carlyle, Clinton county, Ill., died, leaving a will, the sixth clause of which was as follows:

"6th. I give, bequeath and devise to my niece, Winefred Langan for life the other half of the residue of my estate, remainder in fee to the heirs of her body, or in default of such issue, at her death then remainder in fee to her father, mother, brothers and sisters equally, or their heirs taking per stirpes."

The will was duly probated in Illinois, and a duly certified copy thereof filed in the probate court of St. Louis county on June 26, 1856. At the time of his death, said Tighe owned an undivided one-half interest in a lot at the corner of Fourth and Market streets in St. Louis. This was embraced within the property mentioned in said sixth clause, so that thereby said Winefred Langan, after-

wards Winefred McCabe, was entitled to a life estate therein, and the remainder in fee passed to other parties as provided in said sixth clause of said will.

In 1869, all the parties in interest being before the court, the circuit court of the county of St. Louis rendered a decree in partition under which the property was sold, and one-fourth of the proceeds, to wit, \$27,859.87, was paid over to Michael J. Hartnett, appointed by the court in said cause as trustee, "to be by said Hartnett loaned out or invested for the benefit of Winefred McCabe, wife of John McCabe, and all others specified in the will of William Tighe." The court further ordered that, upon receipt of said sum, said Hartnett give bond in the sum of \$33,000 to be approved by the court, which he afterwards did, with Constantine Maguire and Catharine Phillips as sureties. Said Michael J. Hartnett remained trustee until his death in St. Louis in the year 1902. During all this time Mrs. McCabe continued to reside in Carlyle, Ill., and Hartnett paid her 6 per cent. per annum on said sum as the supposed income thereof, which he had made as trustee under said order of the court. Upon the death of said Hartnett, it proved that he was and for some years had been insolvent and had used the fund for his own purposes. After his death the plaintiff George W. Hartnett, his son, and Catharine Hartnett, his widow, knowing nothing of the character of the trusteeship of the father and husband, but supposing that he owed Mrs. McCabe said sum individually, continued to pay the interest thereon to Mrs. McCabe, and in 1904 they gave their notes and incumbered their property in St. Louis to secure Mrs. McCabe. The widow made a note, dated October 26, 1904, to Thomas F. Cook, for \$12,859.87, and a deed of trust to James H. Maguire, trustee, to secure this note, which was due five years after December 3, 1904, bearing 5 per cent. per annum before maturity, and 8 per cent. per annum after maturity, on property at Second and Spruce streets, which was her individual property, and which she had owned prior to her marriage. The plaintiff George W. Hartnett at the same time made a note to said Cook for \$15,000, due five years after November 3, 1904, with 5 per cent. interest per annum before maturity, and bearing 8 per cent. after maturity, to secure said note on an undivided one-half interest in property at Sixth and Walnut streets. These notes were made in the name of Cook, but were intended as security for Mrs. McCabe, and afterwards the plaintiff George W. Hartnett went to Carlyle and tendered them to Mrs. McCabe, but she told him that she would prefer that he keep the securities for her, as his father had done before him. But afterwards, on the 10th of October, 1905, Mrs. McCabe, accompanied by

the defendant Bond, as her attorney, called upon George W. Hartnett in St. Louis and requested him to turn over the securities to her (Mrs. McCabe), which he did, and took from her a receipt therefor reading as follows:

"(Duplicate.)

"Received of George W. Hartnett promissory note of \$12,859.67, dated October 26, 1904, to order of Thomas F. Cook, signed by Catharine Hartnett and secured by deed of trust of same date, in which Catharine Hartnett is party of the first part, James H. Maguire party of the second part, and Thomas F. Cook party of the third part; also received promissory note of \$15,000.00, dated October 27, 1904, to order of Thomas F. Cook, signed by George W. Hartnett and secured by deed of trust of same date, in which Geo. W. Hartnett (unmarried) is party of the first part, James H. Maguire party of the second part, and Thos. F. Cook party of the third part. That these notes, secured by deeds of trust, were held by George W. Hartnett as trustee for Winefred McCabe for cash money of Winefred McCabe in the possession of George W. Hartnett.

"[Signed] George W. Hartnett.
"Winefred McCabe."

Afterwards an appraisal of the property was had, and the security was found insufficient, and the plaintiff George W. Hartnett made another deed of trust on other property, dated November 14, 1905, to Sterling P. Bond, as trustee, and Winefred McCabe, as beneficiary. It conveyed certain real estate in the town of Bridgeton, St. Louis county. It was given as additional security for both the \$15,000 note he had previously made and the \$12,859.67 note his mother had previously made to Cook and delivered to Mrs. McCabe. The widow, Catharine Hartnett, also at the same time made a similar deed of trust, as additional security, by which she transferred her homestead and residence at 2909 Washington avenue in St. Louis. Thereafter the interest was paid to Mrs. McCabe on both notes, always at the rate of 5 per cent. per annum after maturity, as well as before, up to May 16, 1911, when the plaintiff George W. Hartnett sold his one-half interest in the Sixth and Walnut streets property for \$18,500, and paid the \$15,000 note, delivering the money to Mrs. McCabe, and receiving a deed of release executed by her individually, releasing the deed of trust on the property sold. On May 22, 1911, George W. Hartnett also sold the property in Bridgeton, and out of the proceeds paid Mrs. McCabe \$1,019.67, all that was left after paying prior mortgages thereon, and took her receipt therefor reading as follows:

"Received, St. Louis, Mo., May 22, 1911, of Catharine Hartnett, ten hundred and nineteen $\frac{67}{100}$ dollars, being on account of note for \$12,859.67 held by me and secured by deed of trust on property on northwest corner Second and Spruce streets, St. Louis, Mo. The above payment on account reduces the amount

of note of \$12,859.67 to \$11,840.00, drawing 5 per cent. interest per annum from June 3, 1911.

"\$1,019.67. [Signed] Winefred McCabe."

At the same time this payment was made, it was indorsed upon the note itself by Mrs. McCabe's attorney. Mrs. Hartnett paid \$964.47 interest on her note at the same time, and took a receipt which is as follows:

"Received, St. Louis, Mo., May 22, 1911, of Catharine Hartnett, nine hundred and sixty-four $\frac{67}{100}$ dollars, being eighteen months' interest in full due me to June 3, 1911, on \$12,859.67 note at 5 per cent. per annum. The above interest is for the note from Catharine Hartnett of \$12,859.67, being secured by deed of trust on property on northwest corner of Second street and Spruce street, St. Louis, Mo. "\$964.47. [Signed] Winefred McCabe."

Mrs. McCabe also then released the Bridgeton property and Mrs. Hartnett's homestead from her deed of trust securing the note of Mrs. Hartnett for \$12,859.67. This release was also made in her individual capacity. During this transaction the note for \$12,859.67 seems to have been lost or mislaid, as it was never afterwards found. The properties incumbered by the son were conveyed to him by the father several years before, with the verbal understanding that the conveyance was made "for the purpose of looking out for Mrs. McCabe's trust."

Mrs. Hartnett, as devisee of Mrs. Phillips, surety on her husband's bond as trustee, received property sufficient to pay the note she gave Mrs. McCabe, and this property descended to the plaintiffs as Mrs. Hartnett's heirs. But we find from the evidence that Mrs. Hartnett did not, when she gave said note, or at any time, know of the existence of such bond, or that Mrs. Phillips or she, as devisee of Mrs. Phillips, was in any manner liable thereon.

On June 8, 1914, in a proceeding in the circuit court of Clinton county, Ill., Fred Schlafly was appointed trustee for all the beneficiaries under the sixth clause of the will of said Tighe, and was ordered by the said court to demand and take from Mrs. McCabe all moneys, choses in action, etc., in her hands, amounting to \$28,784.33. He was required to give bond in the sum of \$50,000 as such trustee. Upon giving bond and being duly qualified, he took over the said sum, being money and securities, from Mrs. McCabe. George W. Hartnett sent his check to Mrs. McCabe for the interest due July 3, 1914, but it was returned to him by said Schlafly, requesting him to make the check payable to him, Schlafly, as trustee. Hartnett then visited Mrs. McCabe at Carlyle, and she informed him that Schlafly had been appointed trustee, and that it was all right to pay the interest to him, which Hartnett accordingly did, and took Schlafly's receipt therefor as trustee. Thereafter the interest

was paid by George W. Hartnett to Schlafly as trustee until some time in January, 1917, when said Hartnett desired to pay the balance principal and interest due on the \$12,859.67 note and secure the release of the deed of trust still on his mother's property securing said note. It then developed that the note could not be found and was lost and had never been seen since the partial payment of \$1,019.43 had been made thereon. Thereupon, on January 10, 1917, the plaintiff George W. Hartnett tendered to said Schlafly \$351.81 interest at 5 per cent. per annum and \$11,840 principal in payment of said note, which he claimed was the full amount due, and demanded a surrender of said note and release of the deed of trust securing it. The note being lost, Schlafly could not surrender it, and did not agree that the interest tendered for the time after Mrs. McCabe's death was sufficient. A bond for the lost note was also spoken of, but no agreement was reached.

Thereupon, on January 19, 1917, plaintiffs brought this suit, making said Schlafly and all known beneficiaries and claimants under the sixth clause of said will, or their legal representatives, parties by name, and also making all of such beneficiaries and claimants and all persons representing or claiming under them as were unknown parties defendant, as unknown parties under the statute, and caused publication to be made notifying them of the suit, as required by our statutes.

The plaintiffs filed an amended petition, which set up the principal facts substantially as above narrated. Said petition alleged that said Michael J. Hartnett had never been discharged as such trustee, "Nor were the plaintiffs herein, as his heirs at law and successors in said trust, ever discharged from the terms and provisions of said trust created by said decree, that plaintiffs herein, as such trustees, secured the said trust for the use and benefit of said Winefred McCabe during her life, and that under the terms of said trust they are required to pay over to the beneficiaries, defendants herein named, the said principal of said trust and the interest that accrued thereon since the death of said Winefred McCabe."

The petition then alleges, in substance, that the defendants set up conflicting claims to said sums and take different views of the proper construction to be given the sixth clause of said will; also that plaintiffs were not informed that said sums were trust funds under said will, but were deceived in turning over said note and money to Mrs. McCabe, as her individual property; that they are entitled to an accounting from her administrator, defendant Slater, and also defendant Fred Schlafly, who as well as Mrs. McCabe, were trustees of their own wrong.

The prayer of the plaintiffs' petition was that the court construe said sixth clause in the will of said Tighe, and determine the rights of the parties interested therein, and

order distribution of the fund in court accordingly; also to decree that said Schlafly account for and pay into court all such funds paid over to him or in his hands, so that the same may be paid over to persons entitled thereto, as decreed by the court; that plaintiffs have a decree discharging the heirs of said Michael J. Hartnett and the sureties on his bond, as trustee; also that said decree cancel said note and deed of trust for \$12,859.67; also that plaintiffs recover out of said trust funds reasonable compensation for their services as successors to their father in said trust in paying over said entire fund, and for their attorney's fees and costs, and for other relief.

At the time of the filing of the petition, January 19, 1917, by leave of court, plaintiffs were allowed to and did pay into court, as a tender and in payment of said note, the sum of \$12,211.68, which was afterwards by order of court deposited in the National Bank of Commerce in St. Louis as a special deposit, drawing 2 per cent. per annum.

Defendant Mary Grace Langan, administratrix, and certain other named defendants, filed answer by their attorneys Ford & Jones, Bruce A. Campbell, and S. P. Bond. They set up in said answer, as a counterclaim against the plaintiffs, in effect, that the property which the plaintiff George W. Hartnett made deeds of trust upon to secure Mrs. McCabe and other property was purchased by Michael J. Hartnett with the trust funds in his hands, from which large profits were made; that such profits belonged to the trust fund in addition to the principal thereof, for which the plaintiffs were liable, and against whom the defendants ask an accounting and judgment therefor. They also alleged in said answer that the will of said Tighe had been construed by a decree of the circuit court of Clinton county, Ill., in a suit commenced prior to the bringing of the plaintiffs' suit, and that said court had determined that said defendants were the owners of said trust fund, and were entitled to share in said fund under said will in certain proportions, which the answer sets out and which the decree of the lower court determined was correct; that full faith and credit must be given to said Illinois court's decree under the Constitution of the United States, and that the matters in dispute between the parties in interest as to their shares in said fund had already been adjudicated by said decree in Illinois.

Defendant Fred Schlafly, and Fred Schlafly as trustee, stated in his answer that Mrs. McCabe died October 9, 1916, without ever having any heirs of her body, and that previous to her death her father, mother, brother James Langan, and sister Catharine Langan, II, had departed this life. It also stated that the \$15,000 note of George W. Hartnett and the \$12,859.67 note of Catharine Hartnett were given to restore the trust fund, which

had been lost by the original trustee, Michael J. Hartnett, and were given to Mrs McCabe to hold, and she did hold possession thereof, and preserved the said fund for whomsoever should be entitled to it upon her death; that at the November term, 1916, of the circuit court of Clinton county, Ill., in a proceeding in which all the beneficiaries under the sixth clause of said will were defendants, and Mrs. McCabe was plaintiff, said court construed the will and appointed said Schlafly to take and hold said funds in possession of Mrs. McCabe, as required by said will; that said decree was made January 27, 1917; that said defendant Schlafly gave bond as required and took possession of the money and choses in action constituting said funds of Mrs. McCabe, and holds them as such trustee; that said court determined the proportion or interest which all the parties to this suit had in said funds, and said decree is binding upon them; that said cause in Illinois was commenced, and the plaintiffs were informed thereof, prior to the commencement of this suit.

The defendant William Connolly filed separate answer, claiming that, as husband and heir of his deceased wife, Catharine Langan (II) Connolly, and as heir of his daughter, Winefred Connolly, both of whom predeceased Mrs. McCabe, he was entitled to four twenty-firsts of said estate.

The answer of the defendant Frank Slater, public administrator, claimed that, as administrator of the estate of Mrs McCabe in this state, he was entitled to \$210.49 on account of interest which had accrued on said funds from June 3, 1916, to October 9, 1916, the date of the death of Mrs. McCabe. His answer also took the view that said sixth clause of the will created a vested remainder in the parties named as taking upon the death of Mrs. McCabe without issue, and, if so, Mrs. McCabe herself was entitled to two thirty-fifths of said fund, as one of the heirs of her father, mother, brother, and sister, who died before she did.

Proper pleadings were filed putting all the various claims of the parties, plaintiffs and defendants, in issue. We have not undertaken to set out even the substance of the language of the different pleadings, but only a bare outline of the material portions thereof. Other facts in evidence or stated in the pleadings may be hereafter referred to in the course of the opinion.

The court below decreed that plaintiffs pay into court \$1,075.44 (in addition to the amount paid in at the commencement of the suit), less such amount as the Bank of Commerce should pay as interest on said sum on deposit with said bank, that thereupon the note and deed of trust for \$12,859.67 made by Mrs. Catharine Hartnett, the mother of the plaintiff, should be deemed canceled and satisfied, and that the heirs of Michael J. Hartnett,

and of Catharine Hartnett deceased, and of Catherine Phillips, deceased, surety on the bond of said Michael J. Hartnett as trustee, also then should be discharged from all liability to any of the defendants in the case and, denied plaintiffs any other relief prayed for. The court decreed against the relief asked against the plaintiffs by the defendants Mary Grace Langan and others in their cross-bill, but found and decreed for said defendants as to the construction of the will, holding that they were entitled to the fund in court under the sixth clause of the will of said Tighe and that the defendants William Connolly and Kate Mulcahy took no interest under said will, and that the defendant Frank Slater, public administrator in charge of the estate of said Winefred McCabe, deceased, had no interest in said fund except \$207.20, the amount of interest due Mrs. McCabe on Mrs. Hartnett's note at the time of her death—that is, Mrs. McCabe's death. All the parties appealed, except defendants Slater and Mulcahy.

[1] II. The first question is whether the tender and payment into court by the plaintiffs of \$12,211.68 was sufficient to pay the amount due on the note in controversy. If the note bore interest at only 5 per cent. per annum after Mrs. McCabe's death, then the tender was sufficient, but, if after that time it bore interest at the rate of 8 per cent. per annum, the tender was insufficient. The note in controversy was dated October 26, 1904, and was originally for \$12,859.67, due on or before five years from December 3, 1904, with interest at 5 per cent. per annum until maturity, and after maturity at 8 per cent. per annum. It was secured by deed of trust of even date with the note upon real estate in the city of St. Louis on Second and Spruce streets, which was the individual property of Mrs. Hartnett, and owned by her before her marriage. It and another note for \$15,000 made by her son, the plaintiff George W. Hartnett, which was paid several years before this suit was brought, were given to Mrs. McCabe to make good the sum of \$27,859.67 which Mrs. Hartnett and her son believed the husband and father, Michael J. Hartnett, had during his lifetime for many years held in trust for and owed Mrs. McCabe personally and individually. They knew nothing about the terms of the trust or how it arose or was created, or that any other persons were interested therein.

Mrs. McCabe lived at Carlyle, Clinton county, Ill. Mrs. Hartnett and her son always paid interest on these notes to her personally after their maturity, as well as before, at the rate of 5 per cent. per annum. On May 22, 1911, Mrs. Hartnett paid Mrs. McCabe \$1,019.67 (besides interest due to June 3, 1911, at 5 per cent.), reducing the amount due on her note of \$12,859.67 to \$11,840. She gave Mrs. Hartnett a receipt dated May 22,

1911, for the money so paid, which is set out in our statement of facts, and which concludes as follows:

"The above payment on account reduces the amount of note of \$12,859.87 to \$11,840.00 drawing 5 per cent. interest per annum from June 3, 1911.

"\$1,019.67.

Winefred McCabe."

This is an express statement of Mrs. McCabe's in writing, made on May 22, 1911, that by the payment on that day of \$1,019.67 there is a balance of \$11,840 left due on her note against Mrs. Hartnett, to draw interest from June 3d following—that is, June 3, 1911—at 5 per cent. per annum, to which date the interest had been paid at the same time. Thereafter, as long as she lived, she and Schlafly also, after he was appointed trustee by the circuit court of Clinton county, Ill., in 1914, and until her death in 1916, always collected and were paid interest at the rate of 5 per cent. per annum. Although the note was given to Mrs. McCabe for her benefit only, the remaindermen now seek to treat it as given for their benefit also. If so, they must take it as she held it and ratify the act of Mrs. McCabe in changing the interest it originally bore after maturity to 5 per cent. per annum after June 3, 1911.

We must find this point, therefore, in favor of the plaintiff, and that their deposit in court when they brought the suit was sufficient to pay all that was owing on the note. The lower court was therefore wrong in holding said payment into court was insufficient.

[2] III. Although the note was given to Mrs. McCabe by Mrs. Hartnett under the impression that it was for her sole benefit, and that she owned the principal of the trust fund, as well as the interest or income thereof which she had always received, still it was afterwards turned over to Schlafly, as trustee for the remaindermen, and they are now in court claiming it as a part of said trust fund. Said note (together with the son's note of \$15,000, which was paid before this suit was brought) was taken by Mrs. McCabe and given by Mrs. Hartnett to make up the full amount of the trust fund owing by the father. The remaindermen must take it, as Mrs. McCabe received it, as the full amount of the trust fund. No mistake or error is charged or shown to exist as to the amount. Therefore the decree was right in declaring that the heirs of Michael J. Hartnett and of Mrs. Phillips, as surety on his bond, as such trustee, be discharged from all liability upon payment of the amount due upon the note in question, which we hold the plaintiffs have done.

[3-5] IV. The plaintiffs, as heirs of Michael J. Hartnett, were not his successors as trustee of the trust fund: (1) Because the trust fund had been dissipated, and there was no such trust fund to devolve upon them as heirs; (2) the trust fund, being personal

property, had it existed, would have passed into the custody of the administrator of said Michael J. Hartnett (had there been one) as bailee, and not to his heirs (Hook, Adm'r, v. Dyer, 47 Mo. 214; State ex rel. v. Trust Co., 209 Mo. 472, 108 S. W. 97); (3) the plaintiff George W. Hartnett voluntarily surrendered the trust fund which he and his mother created into the hands of Mrs. McCabe several years before her death, and did not claim to hold or administer the same under said will at any time.

Therefore the plaintiffs were not entitled to receive any compensation for preserving or restoring the trust fund as successors to their father, as trustee.

[6-8] V. Nor were the plaintiffs entitled to any allowance for attorney's fees or expenses for bringing and prosecuting this suit. It is true the plaintiffs were obliged to bring the suit in order to secure a valid release of their property from the lien of the deed of trust. A foreign administrator has no title to nor right to collect or receipt for a note from citizens of this state and secured upon property in this state. Crohn v. Bank, 137 Mo. App. 712, 118 S. W. 498; Richardson v. Busch, 198 Mo. 187, 95 S. W. 894, 115 Am. St. Rep. 472; Naylor v. Moffatt, 29 Mo. 126; McCarty v. Hall, 13 Mo. 480; Bartlett v. Hyde, 3 Mo. 490; State ex rel. v. Bunce, 187 Mo. App. 614, 615, 173 S. W. 101.

Schlafly, not deriving his powers as trustee from the will of Tighe, the testator, which made no provision for any such trustee, but simply from the order of the circuit court of Clinton county, Ill., had no more title or power to collect and receipt for the balance due on the note and deed of trust in question than would a foreign administrator. The power of both is derived wholly from the laws of the state where they are appointed, and those laws do not operate beyond the limits of such state. Curtis v. Smith, 6 Blatchf. 537, Fed. Cas. No. 3,505; Scudder v. Ames, 89 Mo. loc. cit. 522, 14 S. W. 525; McPike v. McPike, 111 Mo. loc. cit. 225, 226, 20 S. W. 12; and other authorities supra.

Before Schlafly could legally collect said note, he should have been appointed trustee by a court in this state. Curtis v. Smith, supra. But, while the plaintiffs could not have legally paid the note to Schlafly, they could have paid it directly to the remaindermen entitled to it, or, if there was difficulty or uncertainty in determining who they were, plaintiffs could deposit the money due on the note in court and make all claimants parties to a suit in equity, and ask the court to cancel the note and satisfy the deed of trust, as they did do. As we understand the authorities, including Sandusky, Ex'r, v. Sandusky, 265 Mo. 219, 177 S. W. 390, relied upon by the plaintiffs, it is only the executor or other parties appointed to carry out the provisions of a will who are allowed counsel

fees in suits for the construction of the will. In any event, we know of no case in which the debtor of an estate or those claiming under him, or her, as here, have been held entitled to such allowance, although it was necessary for them to pay the amount due into court and to seek the aid of a court of equity in relieving their property from the incumbrance of the debt.

This suit was brought primarily for the benefit of the plaintiffs, and not for that of the defendants. In such cases counsel fees are not allowable to the plaintiffs, and the lower court was right in so ruling.

[9] VI. As to the counterclaim or cross-bill set up in the answer of defendants Mary Grace Langan and others against the plaintiffs. This counterclaim is based upon the allegations in said answer that plaintiffs' ancestor, Michael J. Hartnett, invested the trust funds in certain real estate from which he or they realized large profits, and which the beneficiaries of said fund are entitled to in addition to the principal of such fund. We have examined the evidence carefully. It shows that said Michael J. Hartnett died without any property; that two pieces of property which a number of years before his death he conveyed or caused to be conveyed to his son, George W. Hartnett, were largely, if not wholly, used by the latter in paying the \$15,000 which he paid to Mrs. McCabe. The evidence does not sustain the claim that said property or any property was purchased by said Michael J. Hartnett with such trust fund, but that he probably spent such fund from time to time in living expenses, and that was one of the reasons, as shown by the evidence, which induced Mrs. Hartnett to mortgage her property and give the note in suit to make good her husband's debt. The lower court was right in finding against the said defendants on their counterclaim or cross-bill against the plaintiffs.

[10-13] VII. The next question is one arising between the defendants themselves. The defendant William Connolly is the father of Winefred Connolly, and her mother, Catharine Langan Connolly, was a sister of Mrs. McCabe. Both Mrs. Connolly and her daughter, Winefred, died before Mrs. McCabe. William Connolly therefore claims an interest in said fund as the heir of his deceased daughter, her death having occurred after that of her mother; in other words, his contention is that the sixth clause of said will created a vested remainder in the remaindermen therein mentioned and their heirs, subject to be divested upon the birth of issue to Mrs. McCabe; that Mrs. McCabe never had any children; therefore said remainder so vested was never divested and his wife, Catharine Langan Connolly, Mrs. McCabe's sister, took a vested interest in her own right, and also took as an heir of her mother and father, who died before she did;

that upon his wife's death her interest descended to his daughter, and, his daughter dying before Mrs. McCabe, he inherited her interest. On the other hand, said defendants Mary Grace Langan and others assert that said will created no vested remainder in any one during the life of Mrs. McCabe, but only a contingent remainder in such of the remaindermen mentioned in the will (in case Mrs. McCabe died without leaving issue) as were alive at the time of her death, or, if dead, in the heirs per stirpes of the deceased remaindermen, living at the time of Mrs. McCabe's death. We agree to this contention and that said William Connolly therefore has no rights under said sixth clause of said will. Said sixth clause is as follows:

"6th. I give, bequeath and devise to my niece, Winefred Langan for life the other half of the residue of my estate, remainder in fee to the heirs of her body, or in default of such issue, at her death then remainder in fee to her father, mother, brothers and sisters equally, or their heirs taking per stirpes."

When this will was made, and ever since, the following statutory provisions were in force (R. S. 1855, vol. 1, p. 356, §§ 6 and 7; R. S. 1909, §§ 2873, 2874):

"Sec. 6. Where a remainder in lands or tenements, goods or chattels, shall be limited, by deed or otherwise, to take effect on the death of any person without heirs, or heirs of his body, or without issue, * * * the words 'heirs' or 'issue' shall be construed to mean heirs or issue living at the death of the person named as ancestor.

"Sec. 7. Where a remainder shall be limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heir or heirs of the body of such tenant for life shall be entitled to take as purchasers, * * * by virtue of the remainder so limited in them."

Under said section 7, the remainder to the heirs of the body of Mrs. McCabe was a contingent remainder, because it "could not be told" who such heirs "would be until her death, when the contingent remainder in fee under the" will "would vest." *Godman v. Simmons*, 113 Mo. loc. cit. 127, 128, 20 S. W. 972; *Emmerson v. Hughes*, 110 Mo. 627, 19 S. W. 979. And under said section 6 the words "in default of issue at her death" meant without issue living at Mrs. McCabe's death. *Faust v. Birner*, 30 Mo. 414; *Naylor v. Godman*, 109 Mo. 543, 19 S. W. 56; *Yocum v. Siler*, 160 Mo. 281, 61 S. W. 208; *Gannon v. Pauk*, 200 Mo. loc. cit. 82, 98 S. W. 471. Construed in view of said statutory provisions and the intention of the testator, which rides down every other consideration in construing a will, said sixth clause means that the devise is to Winefred Langan for life, remainder in fee to her descendants living at her death, or, if she have no descendants living at her

death, then the remainder in fee to her father, mother, brothers, and sisters, if then living, or, if dead, to their heirs, taking per stirpes. Mrs. McCabe never had any children nor their descendants living at the time of her death, but, if she had had children or their descendants then living, they would then have taken the fee and her father, mother, brothers, and sisters, or their heirs per stirpes would have taken no title whatever. Their rights and title were wholly contingent upon Mrs. McCabe's dying without leaving descendants, which could not be ascertained until she died, and consequently the estate of her father, mother, brothers, and sisters, or their heirs per stirpes, was a contingent remainder, and did not vest during the lifetime of Mrs. McCabe in any of them, and only vested in such of them as were living at the time of her death. *Godman v. Simmons*, 113 Mo. 127, 128, 20 S. W. 972; *Dickerson v. Dickerson*, 211 Mo. 483, 110 S. W. 700; and other authorities *infra* and *supra*. Therefore neither Mrs. Connolly nor her daughter, as her heir, took anything under said sixth clause which would pass to their heirs by inheritance, because they died before Mrs. McCabe. *Dickerson v. Dickerson*, 211 Mo. 483, 110 S. W. 700; *De Lassus v. Gatewood*, 71 Mo. 380; *Emmerson v. Hughes*, 110 Mo. 627, 19 S. W. 979; *Buxton v. Kroeger*, 219 Mo. loc. cit. 240, 117 S. W. 1147.

[14, 15] Indeed, the remainder to the father, mother, brothers, and sisters, or their heirs per stirpes, was subject to another contingency besides that of Mrs. McCabe dying without leaving issue, for this reason: The father, mother, brothers, and sisters were only to take the remainder in case they were living at the time of Mrs. McCabe's death, because, if they were then deceased, their heirs were to take their portion per stirpes, not as heirs by descent, but as purchasers under the will. *Buxton v. Kroeger*, 219 Mo. loc. cit. 256, 257, 117 S. W. 1147. At the time the will was made it was impossible to say that any such remaindermen would survive Mrs. McCabe, and no one was to take as such remaindermen who did not survive her. Consequently for this reason, too, such remainder was contingent, and vested in none of such remaindermen except those who survived Mrs. McCabe. *Emmerson v. Hughes*, 110 Mo. 627, 19 S. W. 979; *Emison v. Whitlesey*, 55 Mo. loc. cit. 258; also authorities *supra*.

The remainder being thus doubly contingent and taking effect or vesting only upon the death of Mrs. McCabe in such of the remaindermen or their heirs as were then living, the heirs who were to take the deceased remaindermen's portion under said will were the persons who were, or would have been, the heirs of such deceased remaindermen at the time the remainder vested, or at the date of Mrs. McCabe's death. A deceased heir of such remaindermen, of course, could take

nothing, because not in existence when the estate vested. As no one is heir to the living, so it may be said that the dead are heirs to no one. At the date of Mrs. McCabe's death, Mrs. Connolly and her daughter both being dead, the daughter could not, and did not, take as her mother's heir under said will, and she could transmit nothing by inheritance to her father and he was not the heir of his wife. Who, then, were or would have been the heirs of Mrs. Connolly at the time of her (Mrs. McCabe's) death, her descendants all then being dead? Our statutes of descents and distributions, then as now, provided as to the course of descent as follows:

"First, to his children, or their descendants, in equal parts; second, if there be no children, or their descendants, then to his father, mother, brothers and sisters, and their descendants in equal parts; third, if there be no children, or their descendants, father, mother, brother or sister, nor their descendants, then to the husband or wife. * * *" Rev. St. 1900, § 332.

Under the plain language of the statute, therefore, Mrs. Connolly's surviving brothers, and the living descendants of her brother then dead, would be her heirs at the time of Mrs. McCabe's death, because Mrs. Connolly then had no living descendants, and her father and mother and one of her brothers (leaving descendants) were dead. Consequently the share Mrs. Connolly would have taken had she been alive when Mrs. McCabe died passed under said sixth clause to her surviving brothers and the living descendants per stirpes of her brother then deceased, and not to her husband. We must therefore rule, as did the circuit court, that defendant William Connolly was entitled to no part of the fund in controversy.

[16] VIII. Mrs. McCabe had nothing but a life estate under said will and could inherit nothing from her father, mother, brother, or sister, whose deaths preceded her death, for the reason that their interests, being contingent upon surviving her, never took effect because they died before she did. Consequently Kate Mulcahy, as Mrs. McCabe's devisee, received nothing, and the public administrator in charge of the estate of Mrs. McCabe was entitled to nothing except unpaid interest up to the death of Mrs. McCabe, which the court allowed him.

[17] IX. At the time of Mrs. McCabe's death both her father and mother and one brother and one sister and her descendants were dead, leaving surviving her only her brothers John, Peter, and William, and the children of her deceased brother, James. Therefore John, Peter, and William were each entitled to one-fourth interest in the trust fund, and the remaining fourth vested in the children of James, as found and decreed by the court below.

[18] There are many questions raised between the respective parties in this court, as to the validity of the decree of the circuit court of Clinton county, Ill., construing said clause of said will, but it is not necessary for us to discuss or pass on those questions, because we have construed said will and determined the rights of the parties thereunder, the same as did the said Illinois circuit court, and the parties defendant in favor of whom we have so decided affirm the validity of said decree in Illinois in all things.

We therefore reverse the judgment of the circuit court herein, and remand the case, with directions to modify its judgment herein, so as to decree said note and deeds of trust of said Catharine Hartnett, originally for \$12,589.67, mentioned in the petition, fully paid, satisfied, and canceled, without any further payment thereon by the plaintiffs than the money already tendered and paid into court by them, and also that said trust is fully paid and satisfied, and the heirs of said Michael J. Hartnett, the trustee, and Catherine Philips and Constantine Maguire, sureties on his bond, and their heirs, be fully discharged from all further liability on account thereof. All court costs should be decreed against the defendants, and be paid out of said fund in court.

[19, 20] Defendant Schlaflly has no right as trustee appointed by the Illinois court to collect or receive said fund, and the judgment below is erroneous in authorizing him to do so. Still the parties defendant in interest make no objection here to said decree for that reason, but consent thereto, and consequently it will be binding upon them, so far as plaintiffs are concerned. Schlaflly may be considered as appointed by the lower court as the successor of Michael J. Hartnett, trustee, and, as such, authorized to receive and pay out said funds as directed. With this understanding, we do not disturb the ruling of the lower court as to said Schlaflly receiving and disbursing said fund as trustee. In all other respects, except as above indicated, the decree of the circuit court is affirmed.

BROWN and RAGLAND, CC., concur.

PER CURIAM. The foregoing opinion of SMALL, C., is adopted as the opinion of the court. All the Judges concur, except WOODSON, J.

STATE v. HARDIN et al.

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

Criminal law §1182 — Where information proper and record reveals no error, conviction must be affirmed.

Where no bill of exceptions has been filed, and the information is in proper form, and the

record of trial and subsequent proceedings reveal no ground for criticism, judgment of conviction must be affirmed.

Appeal from St. Louis Circuit Court; Charles B. Davis, Judge.

Harvey Hardin and another were convicted of robbery in the first degree, and appeal. Affirmed.

Frank W. McAllister, Atty. Gen., and Lewis Hord Cook, Sp. Asst. Atty. Gen., for the State.

WILLIAMSON, J. The appellants, Harvey Hardin and Dave H. Henderson, having been convicted upon a charge of robbery in the first degree and sentenced to imprisonment in the penitentiary, have prosecuted an appeal to this court. No bill of exceptions has been filed, and we are consequently confined to the record proper in our examination of this case. No brief has been filed in behalf of appellants.

We have examined the information and all of the proceedings had thereunder. The information is in proper form, and the record of the trial and subsequent proceedings reveals no ground for criticism.

No error appearing, the judgment of the trial court should be affirmed. It is so ordered.

All concur.

WILLIAMS v. SCHAFF.

(Supreme Court of Missouri, Division No. 1.
April 10, 1920. Motion for Rehearing and Modification Overruled June 2, 1920.)

1. Master and servant §88(7)—Railroad employees going to distant town for lodging not in service unless journey is necessary.

In view of the custom for railroad employees sent out for duty on the line to live where they work, a laborer and his foreman, who after finishing their day's work in a town traveled to an adjacent town to secure lodging, will not be deemed in the service of the company on their journey back to work, so as to render the railroad liable for the foreman's negligence in ordering the laborer to board a moving freight train, unless the journey to secure lodging was reasonably necessary.

2. Master and servant §284(2)—Relation of railroad employees lodging away from point of work question for jury.

Whether plaintiff, a railroad laborer, and his foreman, returning to point of work during working hours from a town where they lodged at night, were in the company's service, so as to render it liable for the foreman's negligence in ordering plaintiff to board a freight train, held a question for the jury, under plaintiff's testimony that lodging could not be found at the point of work.

3. Commerce \Leftrightarrow 27(8)—Employé, constructing new semaphore for interstate and intra-state commerce, not within the federal act.

Employés engaged in constructing a new semaphore and depot to be used in place of old structures in inter as well as intra state commerce do not come within the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), for the improvements might be destroyed before completion and never be used.

4. Commerce \Leftrightarrow 8(6)—Federal Employers' Liability Act exclusive as to a case within it.

In a case within the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) the federal law is exclusive and supersedes the state laws on the subject.

5. Appeal and error \Leftrightarrow 1035—Judgment reversed where case tried on erroneous theory that federal liability act applicable.

Where an action was erroneously tried on the theory that federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) applied a judgment for plaintiff must be reversed where the state rules of law affecting liability are different or are not less favorable to defendant.

6. Appeal and error \Leftrightarrow 882(3)—Defendant's request for instruction held not to preclude claim of inapplicability of federal liability act.

Where the petition of a railroad laborer in one count relied on the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), and in another count on common-law liability, and the railroad company denied liability under each count, the fact that it requested an instruction that it was not liable at common law will not preclude it from attacking a judgment after trial on the theory that the federal act applied, where it also requested an instruction that it was not liable under such act.

7. Master and servant \Leftrightarrow 243(2)—Railroad laborer held not trespasser in attempting to board freight train.

Where pass given a railroad's foreman for himself and a laborer was honored on a freight train on which they rode to their lodging place, the laborer who was injured in his attempt to obey the foreman's direction to board a moving freight train on which they intended to return cannot be deemed a trespasser, notwithstanding the company's rules forbidding transportation on such train, it appearing that neither was familiar with the rules.

8. Master and servant \Leftrightarrow 272—Pass admissible on question of railroad foreman's authority to direct laborer.

In an action by a railroad laborer hurt in attempting to board moving freight train at direction of his foreman, a free pass which had been given the foreman for himself and one man was admissible on the question as to his authority to direct the laborer.

9. Trial \Leftrightarrow 244(4)—Instruction held erroneous in emphasizing fact that employé injured had free pass.

Where a railroad carpenter was given a free pass for himself and a laborer, and the laborer was injured in attempting to board a moving freight train at the direction of the carpenter,

an instruction submitting whether the carpenter's direction was negligent and he should have known it was erroneous in unduly emphasizing the free pass, though it might be considered on the question as to the carpenter's authority.

Graves, J., dissenting.

Appeal from Circuit Court, Pettis County; Hopkins B. Shain, Judge.

Action by James A. Williams against Charles E. Schaff, as receiver of the Missouri, Kansas & Texas Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

J. W. Jamison, of St. Louis, Montgomery & Montgomery and Carl S. Hoffman, all of Sedalia, for appellant.

Claude Wilkerson and Paul Barnett, both of Sedalia, and F. P. Sizer, of Monett, for respondent.

GOODE, J. This plaintiff, in an attempt to get on a freight train of the defendant company, fell under the wheels and his left arm and left leg were so badly mangled it was necessary to amputate them. The accident occurred February 19, 1917, at the station of McAlester in the state of Oklahoma. Only six days before plaintiff had taken employment from the company as a common laborer in the bridge construction and repair department; but he had been in the service of the company previously for three or four months in the same department. The local headquarters of the department were at Muskogee, Okl., a town and station on defendant's railway 50 miles north of McAlester, and where the foreman of the bridge department hired plaintiff. Eight or ten miles south of McAlester is the station of Savannah, and to this station plaintiff, on February 18, 1917, was ordered by the general foreman of the department to go with a carpenter by the name of Hughes, to help Hughes in the construction of a semaphore, a device used by the railway company to signal trains. The general foreman said to plaintiff in Hughes' presence, "You will go with Mr. Hughes to Savannah to work on the semaphore signal." The company furnished Hughes a pass for the transportation of himself and plaintiff to Savannah. The pass was for "one carpenter and one employé, when presented with form 214—between stations on McAlester Dist." Said form notified "passenger conductors and train auditors that the form identified Hughes and one man" as entitled to use the pass from Muskogee to Savannah. The printed rules of the company regarding the use of passes were put in evidence, and one of them provided that no pass would be honored on a freight train not scheduled to carry passengers unless it bore on its back this endorsement:

"Good on freight trains." Further, that passes, must not be used for travel on personal business. Defendant was building a new depot at Savannah and a new semaphore to take the place of old one still in use.

The old semaphore was used for signaling both intrastate and interstate trains of the defendant company, as the railway lines of the company extend through several states, and it operates trains through them. At the time of the accident the new semaphore had not been put into use for any purpose; but when completed it would be one of a succession of semaphores along the interstate lines of the defendant company, just as the old one was and had been. Plaintiff and the carpenter, Hughes, who is spoken of by plaintiff as a "straw boss," worked on the semaphore during the day of the 18th, and, not having finished it at the hour for quitting work, intended to continue their task the next day. Hughes said to plaintiff there "wasn't any place to stay in Savannah"; so they would run up to McAlester for the night and return to Savannah in the morning. Accordingly they took passage on a freight train and were carried to McAlester, the conductor treating the pass, when presented by Hughes, as authority to carry them. Plaintiff said he personally knew nothing of whether or not there was a hotel or other place to stop in Savannah and didn't look for one. They spent the night at a hotel or boarding house selected by Hughes, ate breakfast at a restaurant he selected and went to the depot to take a train back to Savannah. A freight train had been made up at North McAlester, two miles away, and it came along past the depot at McAlester at 8 o'clock, but did not stop. Hughes spoke to the engineer or some one in the engine as it passed, and then told plaintiff they (Hughes and plaintiff) would get on that train. Hughes caught the train near the front end; then said to plaintiff: "Come on; it is safe." Plaintiff attempted to get on; but when he caught, or caught at, a grab-iron on the side of a car, the rocking of the train, which was running from five to ten miles an hour, according to diverse testimony, threw plaintiff off his balance, caused him to lose his hold of the grabiron, and he fell under the train and received the injuries we have stated. Plaintiff testified the train seemed to be going pretty slow, and he thought he could catch it; that he asked Hughes if it was safe before trying to get on, because he (plaintiff) did not know at what speed the train was running or whether it would be safe to attempt to catch it. He and Hughes had been waiting at the station since 7 o'clock, and the defendant company afterward paid plaintiff for that hour, which was the one when his day's work began. There was testimony that passes and orders like those Hughes was given for him-

self and plaintiff were honored on freight trains as well as on passenger trains. Hughes so testified—said he had used such free passes for from three to five years on all kinds of trains; had never been given a book containing rules about the use of passes; had used them "on everything that came along" going to and coming from work, and was never instructed not to ride freight trains with such a pass. It should be stated that in an accident which occurred during plaintiff's first employment by defendant his right arm was broken at the elbow and he was left crippled in that arm, so his use of it was not "very good." In his effort to clutch the grab-iron he caught hold with his right hand, but failed to catch with his left; failed also to place his foot in the stirrup, and his hold by his right hand was jerked loose.

For convenience we have spoken of the Missouri, Kansas & Texas Railway Company as the defendant company; but the actual defendant is Charles E. Schaff, who was receiver of the company and operating its lines.

The petition was in two paragraphs, of which the first was drawn on the supposition that the plaintiff was hurt while he was assisting defendant as a carrier engaged in interstate commerce, and hence the case was controlled by the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665). The second paragraph stated a cause of action based on the theory that plaintiff's work when he met with the injury was in connection with defendant's intrastate business. The court instructed there could be no recovery on the second cause of action.

The only finding of negligence upon which the jury were authorized to return a verdict for plaintiff was that Hughes gave him a negligent order to get on the moving freight train. In addition to finding that averment had been proved, the jury were required to find the following facts: Plaintiff at the time of the injury was engaged in defendant's service, under the direction and control of Hughes; that Hughes was foreman over him at the time, and had authority to direct the movements of plaintiff in going about his work, and to and from it; Hughes was furnished with a pass for himself and one employé; plaintiff and defendant were, at the time, engaged in interstate commerce; in obedience to the order of Hughes, and in the scope of plaintiff's employment, he undertook to get on the train and was jerked loose from the grabiron, caused to fall under the train and injured; the order of Hughes, if given, constituted negligence; plaintiff's injuries were the direct result of such negligent order, and that plaintiff did not assume the risk of the hazard to which he was exposed.

Whether he assumed the hazard depended, the court instructed, on whether it was one ordinarily incident to the business and

known and appreciated by plaintiff; but if plaintiff was not aware of the danger, and did not appreciate the risk of getting on moving freight trains, he did not assume the risk.

The court also instructed that if the jury found plaintiff was not engaged in defendant's business when hurt, but for his own convenience had made the trip to McAlester, and when hurt was seeking transportation back to his place of employment, plaintiff assumed the risk of boarding the train, and the verdict must be for defendant.

A verdict was given for plaintiff, and his damages assessed at \$25,000. After judgment had been entered on the verdict, defendant took this appeal.

[1, 2] 1. The assignment of error for first attention is that plaintiff made no case for the jury, because the only act of negligence the jury was required to find, namely, the order of Hughes for plaintiff to get on a moving train, occurred when neither plaintiff nor Hughes was engaged in the business of defendant. If this assignment is good, plaintiff cannot recover on either the federal statute or at common law. According to the testimony of plaintiff himself, he was free to go where he pleased after the day's work was over and to select for himself a place to eat and sleep. Naturally he would defer, somewhat, to Hughes, his foreman, in choosing lodgings; but in doing so would not be acting under Hughes' authority as foreman, but simply under his influence. Defendant had neither agreed to pay plaintiff's personal expenses while in its service, nor had reserved any control over him in respect of his board and lodging. The custom is so general for employes of a railroad company when sent out for duty on the line to live where they work, in some boarding house or hotel, or in "bunk cars" of the company, that we may presume it was incumbent on plaintiff and Hughes to stay overnight in Savannah, if they could find a suitable place; that is, one of the kind commonly used by persons in similar employment. Therefore, unless it was reasonably necessary for them to go to McAlester to spend the night, they were not engaged in the work of the company while they were away; and the company is no more responsible for the accident to plaintiff than it would have been if they had gone to a dance at McAlester and the accident had happened during their return trip. The argument for plaintiff at this point leaves out of view the necessity of the trip, and takes for granted plaintiff and Hughes, whatever was their reason for going to McAlester, were acting in the scope of their employment when they started back after 7 o'clock, the hour when they were supposed to commence work for the day. But this was not so if they left Savannah on an errand of their own. The duty of plaintiff

to obey the orders of Hughes as foreman was primarily to do so when at Savannah and at work on the semaphore; and Hughes would have authority over his movements at McAlester after 7 o'clock in the morning only in the event plaintiff had been forced to go there in consequence of inability to procure accommodation for the night at Savannah. The only evidence on this question was the testimony of plaintiff himself that Hughes said there was no place to sleep in Savannah. This testimony having been received without objection conduced to prove the necessity to hunt quarters elsewhere; and, for aught that appears, McAlester was as accessible as any place. Such being the condition of affairs, the pertinent inquiry is not as to whether plaintiff and Hughes were within their employment while traveling to McAlester, and while passing the night there, but whether they were engaged in defendant's service on the way back to their task, and after the hour for them to resume work had arrived.

The question of the necessity of the trip was not as pointedly instructed upon as it could have been; but an instruction given by the court of its own motion, fairly presented it, in the absence of requests by the parties for more definite charges. The requests of plaintiff required the jury to find the command of Hughes was given "in the due performance of his duties"; but did not require them to find the existence of the only condition under which the command would have been given in the performance of Hughes' duty, namely, that the parties had gone to McAlester because they could find no place to stay overnight in Savannah.

A refused request of defendant excluded a verdict for plaintiff if the jury found he "was required to provide and pay for his own board and lodging; had the right to select the place where he would board and lodge," and in the exercise of that right, went with Hughes to McAlester. Said instruction took no account of the possible necessity to go there; and, as far as it had any merit, was covered by the one we have summarized, given by the court of its own motion and denying a recovery if the trip was taken by plaintiff for his own convenience and not as incident to his employment.

In view of the evidence to prove there was no place in Savannah where Hughes and plaintiff could spend the night, we hold it was not shown beyond an inference to the contrary the parties were acting outside the scope of their duty to defendant when the accident happened.

The liability of an employer for injury to a workman in his service, where the workman is absent from the place of his task, depends, in instances like the present, on whether the absence was voluntary on the part of the workman and for some purpose

of his own, or, for some reason, was involuntary and compelled; and one of the reasons may be the conditions at the spot where his task lay. Two contrasted cases present this proposition clearly. In one a miner had been killed by an exposed and charged electric wire running along a passage in the mine, while the deceased was returning at noon from a social call on a fellow workman. The defendant was held not to be liable for the accident on the theory that the deceased was a servant engaged in the master's work when killed; the court citing in support of the proposition, 1 *Shear. & Red. Negligence*, § 190; *Wright v. Rawson*, 52 Iowa, 329, 3 N. W. 106, 35 Am. Rep. 275; *Kennedy v. Chase*, 119 Cal. 637, 52 Pac. 33, 63 Am. St. Rep. 153. In the aspect of the case that the defendant had maintained a defective appliance in a place where it was dangerous, because the workmen were accustomed to assemble there, the court held there had been neglect which afforded ground for recovery. *Ellsworth v. Metheney*, 104 Fed. 119, 44 C. C. A. 484, 51 L. R. A. 389. In the other case an employé was hurt by an explosion while he was eating lunch on a dry knoll some distance from where he had been at work. According to the habit of the workmen, and as the employer knew, he had gone to the knoll to eat because the part of the grounds where he was working was marshy. He was allowed to recover. *Thomas v. Railroad*, 108 Minn. 485, 122 N. W. 456, 23 L. R. A. (N. S.) 954. In the emergency, such as, according to the immediate hypothesis, the plaintiff and his boss found themselves, it was as good cause to leave Savannah for the night as was the marshy ground for the injured employé to go to the dry knoll to spend his dinner hour. In another case very similar to this one, an electrical engineer had gone out on a line of the defendant railroad company to work, and in the course of his duty was due the next day at the station where the headquarters of the department were to receive further orders. He desired to get in the previous evening, so he might obtain a night's rest, and to accommodate him the train conductor at the station where he had been working telegraphed the conductor of a freight train which would pass the station to "slow down" there so plaintiff could get aboard and be carried to headquarters. The conductor did not cause the train to "slow down"; and, in endeavoring to catch the side of a car as it passed, the plaintiff fell under it and an arm and leg were cut off. A contested point therein, as here, was whether the plaintiff was engaged in interstate business when hurt; the railroad company arguing that he was not because, at the time, he was not engaged in any work at all for the company. In disposing of the proposition, the court

declared it was the plaintiff's duty to get back to headquarters, and until his duties, begun in the morning, were concluded at night, he must be regarded as being engaged in interstate commerce; meaning, of course, that during the workday he was in the company's service, and as its trains were engaged in interstate transportation, the plaintiff was engaged in interstate commerce. The point of the plaintiff's freedom of action at the close of the day was pressed; but the court rejected it because, as he was under the duty to return to headquarters, he was still occupied for the company when he attempted to return by the freight train. *Dumphy v. Railroad*, 82 W. Va. 123, 95 S. E. 863.

That an employé, on his way to and from his work, and using in his movements the premises or an instrumentality of the master, which he is authorized to use, is at the time in the master's service and may recover, if hurt by any negligible defect in the property, on the ground of a breach of the master's duty to furnish a safe place or appliance, is a doctrine accepted by many courts. But if, when hurt, he is going away from his task on his own business, or returning to it after leaving it on his own business, and not from some kind of compulsion, the same courts rule the other way. There is discord, real or apparent, in the decisions, and the cases pro and con are collected in notes to *King v. Mendota Coal Co.*, L. R. A. 1916F, 1220, and to *Taylor v. Bush & Sons Co.*, 12 L. R. A. (N. S.) 853. And see *Hartman v. Steamship Co.* (D. C.) 244 Fed. 567. The court of last resort, in cases of injuries to employes of carriers engaged in interstate commerce, has declared on the subject as follows:

"In leaving the carrier's yard at the close of his day's work, the deceased was but discharging a duty of his employment. See *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 260. Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work and partook of the character of that work as a whole; for it was no more an incident of one part than of another. His day's work was in both interstate and intrastate commerce, and so when he was leaving the yard at the time of the injury his employment was in both." *Erie R. R. Co. v. Winfield*, 244 U. S. 170, 173, 37 Sup. Ct. 556, 557 (61 L. Ed. 1057, Ann. Cas. 1918B, 662).

The same principle of liability will govern if the employé was forced away from the locality of his task and to get back there was directed by his superior to use an instrumentality of the employer, when the order to do so was negligent by reason of the instrumentality being dangerous to use, either from a defect or its operation. If Hughes and plaintiff were in service, as determined by the test we have pointed out, when the former directed plaintiff to board

the moving train, then the case is like one heretofore decided by this court, where an employer was held answerable to an employé injured while he was obeying a negligent order of his foreman to board a train. *Foster v. Railroad*, 115 Mo. 165, 21 S. W. 916. See, too, *York v. Railroad*, 117 Mo. 405, 22 S. W. 1081; *Herdler v. Range Co.*, 136 Mo. 3, 37 S. W. 115.

[3] 2. We have to determine next whether plaintiff was engaged, when hurt, in a task so closely connected with interstate commerce as to bring him within the provisions of the federal Employers' Liability Act (Act Cong. approved April 22, 1908, 35 U. S. Stat. at L. 65, c. 149, as amended by act approved April 5, 1910 [U. S. Comp. St. §§ 8657-8665]). The statute makes a common carrier "liable in damages to any person suffering injury while he is employed by such carrier in such commerce"; that is, in commerce between any of the several states or territories as provided in the first lines of the act. The meaning of the words "while he is engaged by such carrier in such commerce," controls the decision of the question whether state law or the federal act determines, in a particular case, the liability of the carrier to an injured employé. A mass of adjudications has been made on the subject by state courts of last resort and federal courts of intermediate resort, and some of them favor the view that plaintiff was injured while employed by defendant in interstate commerce. *Grow v. Oregon Short Line R. Co.*, 44 Utah, 160, 138 Pac. 398, Ann. Cas. 1915B, 481; *Saunders v. Railroad*, 167 N. C. 375, 83 S. E. 578. In the cited cases employés were killed while assisting to install on the lines of the defendant companies a system of automatic block signals similar, we understand, to the semaphore plaintiff was working on. The particular block or semaphore the deceased brakemen were helping to construct had not been completed or introduced into the general system of signaling devices. Nevertheless the courts thought the men were engaged in work connected with interstate commerce, because, in the first case, the portion of the system already completed was in use for signaling interstate trains, and the signaling block the deceased was engaged upon would be thus used when finished; and, in the second case, a new system of signals was in process of erection to take the place of an old system; exactly the fact here, except that this plaintiff was helping to build a single semaphore to be substituted for an old one. Without referring to other cases to the same effect, but less like this case in their facts, we state that, notwithstanding the cogency of the reasoning of the opinions, the force of all of them as precedents appears to be broken by the most recent decisions of the Supreme Court of the United States on the subject.

1 *Roberts, Fed. Liabl. of Carriers*, § 485, p. 840. Where the carrier conducts both an intrastate and an interstate business, and its employés are occupied first with the one and then with the other, the relation of the particular work the employé is performing when hurt to the interstate business of the carrier, is resorted to as one criterion of whether the federal statute controls, and is the decisive criterion, we think, when the facts are like those before us. And in settling the tests of the application of the statute the courts have been forced to make close distinctions. According to the latest judgments of the Supreme Court of the United States, it is not essential that the appliance the injured employé was working on at the time was or had been itself actually in use as a means of interstate commerce, if it was "so closely connected therewith as to be a part of it," to quote the language of the opinion in the *Pedersen Case*, 229 U. S. 146, 151, 33 Sup. Ct. 648, 649 (57 L. Ed. 1125, Ann. Cas. 1914C, 153). That plaintiff was injured through the negligence of a coemployé under these circumstances: A bridge over which interstate trains passed was in process of repair, and the repairs consisted in taking out an old girder and inserting a new one. A person had to pass over an intervening temporary bridge to reach the old one, and the temporary bridge was in use, too, for interstate trains. While carrying a sack of bolts over the temporary bridge to the one undergoing repair *Pedersen* was negligently run down by an interstate train. He was held to have been engaged in interstate commerce on this line of reasoning: Bridges are indispensable in such commerce and should be kept in repair, and the work of keeping them in repair "is so closely related to such commerce as to be in practice and legal contemplation a part of it." The court further said:

"The contention to the contrary proceeds upon the assumption that interstate commerce by railroads can be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? * * * Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such." We emphasize.

The court thought the work of taking bolts to the old bridge to be used in repairing it, though a minor task was essentially a part of the larger one. Those facts were held sufficient to sustain a finding that *Pedersen* was engaged in interstate commerce

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when injured. Three judges dissented, declaring the true rule was that only employes engaged in the work of interstate transportation were within the act, and not those who kept up the instrumentalities whereby transportation was conducted. The words we have emphasized suggest that, although an employé helping with repair work upon an appliance used in interstate traffic is within the statute, one engaged in constructing an appliance that will be, but has not yet been, so used, is outside the scope of the act. An employé who was negligently hurt while mining coal in a colliery of a carrier, the coal to be used in interstate commerce, was held not within the act. *Del., etc., Ry. v. Yurkouis*, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397. In *Ill. Cent. R. Co. v. Behrens*, a member of a switch crew was killed while assisting to move cars loaded with intrastate freight in the city of New Orleans; but the crew also handled interstate freight. The court decided the deceased was not within the purview of the federal act when killed, though, upon the completion of his immediate task, he was expected to engage in another which would have been a part of interstate transportation under the statute; "for by its terms," said the court, "the true test is the nature of the work being done at the time of the injury." 233 U. S. 473, 478, 34 Sup. Ct. 646, 648 (58 L. Ed. 1051, Ann. Cas. 1914C, 163). In *Shanks v. Railroad Co.* the rulings of the United States Supreme Court up to the date of the decision were reviewed, and in the light of them the plaintiff *Shanks* was held not to have been employed in interstate traffic while putting in a shaft to transmit power to machinery by which locomotives that drew both interstate and intrastate trains were repaired. The court said:

"Coming to apply the test to the case in hand, it is plain that *Shanks* was not employed in interstate transportation, or in repairing or keeping in usable condition a roadbed, bridge, engine, car or other instrument then in use in such transportation. What he was doing was altering the location of a fixture in a machine shop. The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines some of which were used in such transportation." 239 U. S. 556, 559, 36 Sup. Ct. 188, 190 (60 L. Ed. 436, L. R. A. 1916C, 797).

The like ruling was made where an employé lost his life in switching coal from a storage track to a coal shed, thence to be taken to bins and chutes and used, as occasion required, on locomotives engaged in both kinds of commerce. The court said there was no close or direct relation to interstate transportation in taking the coal to the chutes; that the employé was doing no more than

putting the supply in a convenient place for use when it was required. *Chicago, etc., Ry. v. Harrington*, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941. A plaintiff had been injured while working in a tunnel which was in the process of construction by a carrier and to be part of its line for all its trains. At the time of the accident it was incomplete and had never been used in interstate commerce. The opinion said it was certain under the recent decisions of the court, whatever doubt might have existed at the time the judgment below was rendered, that the plaintiff was not engaged in interstate commerce at the time he was hurt; consequently no cause of action was alleged under the federal act. *Raymond v. Railroad*, 243 U. S. 43, 37 Sup. Ct. 268, 61 L. Ed. 583. An employé hurt while employed on the construction of a bridge which had never been provided with rails nor used as a railroad was not doing interstate work when hurt in the course of his employment, although the employer intended the bridge to be a means of interstate traffic when it was completed. *Bravis v. Railroad*, 217 Fed. 234, 133 C. C. A. 228. The opinion said the bridge had not been used in interstate transportation and could not be used until finished; the fact that the intention was to use it at some future time did not make it a means of interstate commerce; the intention might be changed and the bridge not be used in that way at all. Answering the argument that the cutoff, of which the bridge would constitute a part, was the correction of a defect in the defendant's road for interstate trains, the court said the argument was too remote and inconsequential; that the building of the cutoff was a new construction work as much as would be the building of a new engine or car to take the place of an engine or car worn out in interstate commerce.

The national courts in construing the act in question, and in order to determine the status of an employé injured when employed upon an instrumentality which, as yet, has not been put into use in interstate business, but is intended to be, have drawn a distinction between construction work and repair work, and hold a workman engaged in repairs on an appliance employed in interstate traffic is within the provisions of the act; whereas one helping to make a new appliance to be thus used in the future is not so engaged. This is the rule formulated in an exhaustive annotation on the question, wherein many cases are cited in its support. *Airliné R. R. v. Horton*, L. R. A. 1915C, note on foot of page 63. It is true, as said in a well-reasoned case, the distinction between repairs and construction work must not be too finely drawn; the particular matter the court then had under advisement being whether an employé killed in putting in new cross-arms on old poles to carry electric wires used in telegraphing and signaling was engaged in interstate commerce. The court held the work

was in the nature of repairs, and therefore the case fell within the federal act. *Ross v. Sheldon*, 176 Iowa, 618, 154 N. W. 499. Neither the semaphore plaintiff was assisting to build nor the new depot was yet in use in any kind of commerce; for the old semaphore and depot had not been discarded. In fact the new ones were incomplete and the semaphore appears to have been far from completion. As suggested by Judge Sanborn, in the *Bravis Case*, neither had ever been used, and it is possible neither ever would be used, for some mishap might destroy them.

[4-6] The substantive rules of tort liability, as fixed by the adjudications in this state, differ materially from those which obtain in cases falling under the federal statute, particularly in regard to the doctrines of contributory negligence and assumption of the risk. Under the law of the state, contributory negligence on the part of an injured party is usually a defense; whereas under the federal statute it goes only to reduce damages; and assumption of the risk is given a wider scope by the national courts than is allowed in Missouri. The Supreme Court of the United States has held that in a case within the act of Congress, the federal law "is exclusive and supersedes state laws upon the subject." *Chicago, etc., Ry. v. Wright*, 239 U. S. 548, 551, 36 Sup. Ct. 185, 186 (60 L. Ed. 431). For these reasons it is plain that if a cause of action was not within the scope of the act, but was tried as though it were, it must be retried unless the rules of law, affecting liability and as established by the courts of the state, are the same as those which obtain under the federal statute, or are less favorable to the party against whom the verdict was given.

Plaintiff's counsel insists defendant should not be heard to say no recovery can be had under the federal act, because the court, at defendant's request, instructed against a verdict on the second count, which declared on a common-law liability. Maybe there would be force to this contention if defendant had insisted below the question of its liability was governed by the federal law; but the position taken by defendant was that there was no case under either law, and so it requested a charge that plaintiff was not entitled to recover on the first count, and another charge that he was not entitled to recover under the second count. The court refused the first request and gave the second—erroneously, we think.

[7-8] 3. Too much attention was given by both sides to the free pass Hughes had for himself and plaintiff. The defendant contends plaintiff was a trespasser in attempting to board a freight train, because the pass gave no right to ride on freight trains, and under the rules of the company it could not be used in that way. Neither plaintiff nor Hughes knew anything about the rules, and plaintiff did not know anything about the

terms of the pass, and, if Hughes' testimony is true, he did not; for he said similar passes always had been honored by the conductors of freight trains. In fact this very one was honored on the trip from Savannah to McAlester. There is no merit in the contention that plaintiff was attempting to trespass.

The free pass was admissible as an item of evidence to prove plaintiff was under Hughes' authority, inasmuch as it read in favor of Hughes and "1 man," and had been turned over to him. Being in Hughes' custody all the time, so that if separated from him plaintiff would have been deprived of its benefit, and maybe without means of any kind to take him to Savannah, it bore upon the issue of plaintiff's contributory negligence and assumption of the risk. It was treated in the second instruction given for plaintiff in a manner to magnify, in the eyes of the jury, its importance, and confuse them regarding the issues to which it was relevant. Wherefore the instruction was a comment on one part of the evidence, and adapted to give the impression that the possession of Hughes made his order to plaintiff a negligent one. As we have said, the pass and his custody of it had a bearing on his authority to give the order, and on whether or not plaintiff was justified in obeying it, but did not have a bearing on the issue of the character of the order. That matter depended on the speed of the train, the experience of plaintiff, his physical condition, and the like facts. The jury's attention should not have been fixed on the pass to the degree it was in an instruction submitting the issues of whether the order of Hughes was negligently given and whether he ought to have known it was. *Smith v. Woodmen of the World*, 179 Mo. 119, 77 S. W. 862. Though this error by itself may not have been prejudicial to the extent of causing a reversal, it should be avoided on another trial.

If we are right in our judgment that the case does not come within the federal act, the issues of contributory negligence and assumption of the risk will be governed by the rules of law touching those subject that prevail in this state.

The judgment is reversed, and the cause remanded.

BLAIR, P. J., and WOODSON, J., concur.

GRAVES, J. (dissenting). I dissent in this case because the plaintiff's evidence, in my judgment, fails to make a case either at common law or under the federal act. I agree with my learned Brother in his reasoning as to there being no showing of liability under the federal act; but I am of opinion that neither Hughes nor plaintiff was about the master's business at the time of the accident. The evidence as to their reason for the trip to McAlester is entirely too shadowy to form the basis of liability. The necessity of such

a trip is not sufficiently shown. It is highly improbable that these two men could not have found food and lodging at or near their place of work. At least it is clear that plaintiff made no effort so to do and was in no position to show necessity for his trip.

Other suggestions might be made, but these will suffice. I therefore dissent.

STATE v. HARRIS. (No. 21998.)

(Supreme Court of Missouri, Division No. 2.
June 10, 1920.)

1. Incest ⚡10—Rape ⚡20—Information held sufficient.

Under Rev. St. 1909, §§ 4381, 4471, 4725, and Laws 1913, p. 218, an information charging statutory rape, and incest *held* sufficient.

2. Marriage ⚡50(1) — Witnesses ⚡52(7) — Evidence held to show common-law marriage, making woman's testimony inadmissible.

In criminal prosecution, evidence *held* to make a prima facie case of common-law marriage between accused and woman offered as witness by the state, which, being uncontroverted, rendered the witness incompetent to testify against accused's objection, under Rev. St. 1909, § 5242.

3. Rape ⚡57(1)—Evidence of prosecutrix's age sufficient to go to jury.

In trial for statutory rape, evidence *held* to make it a jury question whether the complaining witness was under 15 at time of the alleged crime.

4. Criminal law ⚡371(9)—Other acts of intercourse not admissible to show intent in statutory rape case.

In view of Const. art. 2, §§ 12, 22, in trial for statutory rape, the court erred in permitting the state to show, for the purpose of showing intent, other acts of intercourse by accused, aside from that charged in the information; intent and motive being immaterial as to statutory rape.

Williams, P. J., dissenting in part.

Appeal from Criminal Court, Greene County; Arch A. Johnson, Judge.

William Harris was convicted of rape, and appeals. Reversed and remanded.

On December 11, 1918, the prosecuting attorney of Greene county, Mo., filed in the office of the clerk of the criminal court of said county an information in two counts, charging defendant, William Harris, with the crimes of statutory rape and incest. On December 13, 1918, appellant filed a demurrer to said information, which was overruled. On December 14, 1918, defendant was arraigned, and entered a plea of not guilty as charged in the information. On December 14, 1918, the case was tried before a jury

of Greene county aforesaid, and a verdict was returned in words and figures following, to wit:

"We, the jury, find the defendant, William Harris, guilty of rape as charged in the first count of the information, and assess his punishment at imprisonment in the penitentiary for a term of ninety-nine (99) years.

"Frank Killingsworth, Foreman."

On December 17, 1918, defendant filed his motions for new trial and in arrest of judgment, which were respectively overruled on December 19, 1918. On said last-named date sentence was duly pronounced in accordance with the terms of the verdict aforesaid. *The Evidence.*

The state's evidence tends to show that the defendant in this case, William Harris, was 42 years of age, and the father of three daughters, Ruth, Lucy, and Josephine. The mother of these girls was deceased, and defendant had for about 7 or 8 years been living with one Etta Wheaton, who, under the name of Etta Harris, held herself out as his wife. She testified that she was everywhere introduced as such, and was referred to as "mother" by the children. On or about August, 1917, the defendant, Etta Wheaton, Lucy, and Josephine moved to the farm of Luther Byrum, some three or four miles southeast of Springfield, in Greene county. On this farm, besides the dwelling house, was a large two-story barn. In the lower portion was kept, besides the stock, small grain, such as oats and corn. The upper portion, or loft, was used for the storing of hay. It was in this barn that defendant committed the acts, constituting the crime for the commission of which he was charged and convicted. The daughters of defendant were accustomed to help him with his chores and were frequently with him in the barn. It was during one of these occasions that defendant had sexual intercourse with Lucy and Josephine. The latter testified on the witness stand that she was present at that time, and saw her father have intercourse with Lucy. He had her lie down upon the hay, unbuttoned his trousers, raised her clothes, got on top of her, and had connection with her. She testified further that, after the act with Lucy, he then called to her to come and lie down on the hay, and with her he also had intercourse. Defendant gave Lucy 10 cents and Josephine 5 cents, as the latter said, "for that." Josephine stated she saw defendant have intercourse with Lucy once after that, and, while she did not know how many times her father had had improper relations with Lucy, yet she knew he did so in the barn "quite a few times." Sometimes it would be upstairs, and sometimes down. Josephine, according to her testimony was 18 years of age.

Etta Wheaton testified that she had been living with the defendant about 7 years, during all of which time, she held herself out to the public as his wife, and had lived with him until very recently, until the girls came and told her stories against their father; that she last lived with defendant in Plattsburg, Mo., and while they were residing there she saw defendant early one morning get into the bed with Lucy. They were both in their nightclothes. She afterwards accused defendant of having had intercourse with his daughter, and shortly after that time he left Plattsburg. In July she heard that her husband had married another woman, Alice Weaver. She then wrote to Miss Hull, the police matron of Springfield, stating in her letter that defendant had been having sexual intercourse with Lucy. She further testified that, after the marriage of defendant, she sent Lucy, who was then living with her, to Springfield to her father for him to take care of; that she also discovered her husband in the act of intercourse with another daughter, Ruth, in Patton alley in the city of Springfield.

When Lucy was called to the stand, she stated that she was born in Monteer, Shannon county, Mo., and lived there until she was of the age of 9 years. While living in Monteer, her father had intercourse with her. From Monteer they moved to Springfield, and then to the Byrum farm in that vicinity. Here again, she states, he had intercourse with her—how many times she does not know. Her story bears out that of Josephine in nearly every particular as to the acts of intercourse committed in the barn. Lucy testified that she was 14 years of age.

On behalf of the defendant the evidence tended to show that he had been living with Etta Harris (Wheaton) for nearly 7 or 8 years, and that they were living together as husband and wife; that, while they were on the Byrum farm, he never did, at any time, have sexual or criminal relations with either Lucy or Josephine, nor did he in Plattsburg at any time have intercourse with Lucy; that the time referred to by Etta Wheaton he had merely gone to Lucy's bed, and kissed her, before starting to his work. In this he is supported by Lucy, for she testified that it was not true.

Ruth Hunter, another daughter, testified that she never did, at any time, see any improper relationship between her father and Josephine or Lucy; that neither of her sisters had at any time made any complaint to her, or in her presence, relative to any mistreatment of them by her father; that it is not true her father, at any time, ever had sexual intercourse with her.

Defendant maintains that this charge was instituted against him because of jealousy. Both Ruth and Lucy testified that, at the time Etta Wheaton learned of his marriage,

she was very angry. Ruth stated that Etta tried to get her to go to Springfield and swear out a warrant against her father; that upon her refusal to do so Etta persuaded Lucy to do so.

Mrs. Weaver, who testified in behalf of defendant, stated that Lucy came to her house shortly before the trial, and stayed overnight; that she stated to her that the charges made against the defendant, her father, by her (Lucy) were false; that Mrs. Wheaton had forced her under heavy threats, and she had been induced to make the charge by Mr. O'Day and Miss Hull. In her cross-examination, Lucy testified that she had told Mrs. Weaver the charges against her father were false. She further testified that she wrote a letter to the prosecuting attorney, and told him she did not want to testify against her father, for the reason that the charges were false.

There is some evidence that Lucy was in the habit of frequenting streets and rooming houses with men; that her reputation in this connection was bad; and William McIlheny, deputy sheriff of Greene county, testified that, when Lucy and Josephine attended school out near his place, their reputation for telling the truth was not good.

Cash Lawhead, clerk of the circuit court of Howell county, testified, that Record Book O of said court contained an entry showing that defendant had been convicted and sentenced to the penitentiary from Howell county for the breaking of jail. The defendant himself stated that he had been so convicted, and served a term of two years in the penitentiary.

Such other facts as may be necessary will be considered in the opinion. The defendant, in due time, appealed the cause to this court.

Val Mason and John H. Fairman, both of Springfield, for appellant.

Frank W. McAllister, Atty. Gen., and H. P. Ragland and J. W. Broadus, Asst. Attys. Gen., for the State.

RAILEY, C. (after stating the facts as above). [1] 1. The information, omitting caption and verification, reads as follows:

"Paul O'Day, prosecuting attorney within and for the county of Greene, in the state of Missouri, under his oath of office informs the court that William Harris, late of the county and state aforesaid, on the — day of September, A. D. 1900, at the county of Howell and state of Missouri, was then and there convicted in the circuit court of Howell county, Missouri, of the crime of breaking jail and escaping, and was sentenced to serve a term of two years in the penitentiary, and was afterwards discharged upon compliance with his sentence, and thereafter on or about the — day of September, 1917, in the county of Greene, in the state of Missouri, the said William Harris then and

there upon one Lucy Harris, a female child under the age of fifteen years, to wit, of the age of fourteen years, unlawfully and feloniously did make an assault, and her, the said Lucy Harris, then and there unlawfully and feloniously did carnally know and abuse, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the state.

"And the said Paul O'Day, prosecuting attorney within and for the county of Greene, in the state of Missouri, under his oath of office further informs the court that William Harris, late of the county and state aforesaid, on the — day of September, A. D. 1909, at the county of Howell and state of Missouri, was then and there convicted in the circuit court of Howell county, Missouri, of the crime of breaking jail and escaping, and was sentenced to serve a term of two years in the penitentiary, and was afterwards discharged upon compliance with his sentence, and thereafter on or about the — day of September, 1917, in the county of Greene, in the state of Missouri, the said William Harris being then and there the father of one Lucy Harris, and the said William Harris and Lucy Harris being then and there persons within the degree of consanguinity within which marriages are by law declared to be incestuous and void, to wit, being then and there father and daughter, did then and there unlawfully, incestuously, knowingly, feloniously, and willfully commit fornication with each other, by then and there having sexual intercourse together, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the state.

"Paul O'Day, Prosecuting Attorney."

The above information is sufficient to meet the requirements of the law. Section 4471, R. S. 1909; section 4725, R. S. 1909; Laws of 1913, p. 218; section 4381, R. S. 1909; State v. Oertel, 217 S. W. loc. cit. 66; Kelley's Crim. Law & Practice, § 935.

[2] 2. It is contended by appellant that:

"The court erred in admitting, over the objection and exception of the defendant, the testimony of Etta Harris, who was the legal wife of defendant."

This assignment presents an important inquiry in the case, and can only be determined by the evidence before us. It appears from the record that Etta Wheaton (Harris) had a case pending against her in above court, wherein she was charged with the crime of living in adultery with defendant. She was offered as a witness by the state, and her counsel objected to her competency as a witness, because any testimony that she might give may tend to incriminate herself, and because she is the wife of defendant. Defendant likewise objected to her testifying as a witness in the case, because she is the common-law wife of defendant. This last objection was overruled, and an exception duly saved by defendant. Upon examination by defendant's counsel, Etta Harris testified as follows:

"Q. You say you commenced to live with the defendant, William Harris, about 7 years ago? A. Yes, sir.

"Q. And have lived with him all the time, until recently, as his wife, haven't you? A. Yes, sir.

"Q. Been introduced as his wife? A. Everywhere.

"Q. Been known as his wife everywhere? A. Yes, sir."

On cross-examination, she testified substantially as above quoted.

Josephine Harris, witness for the state, testified on this subject as follows:

"Q. Who lived there on the Byrum place? A. Who lived there with us?

"Q. Yes, what members of your family? A. My father and sister Lucy and my stepmother.

"Q. What is your stepmother's name? A. Etta Wheaton.

"Q. You say your stepmother; do you mean to say that William Harris, your father, and Etta Wheaton, lived together as man and wife? A. They were man and wife.

"Q. That is your understanding? A. Yes, sir.

"Q. You mean to say you understand they were married? A. Yes, sir."

Defendant testified as follows:

"Q. I will ask you to state to the jury how long you lived with Etta Harris. A. Well, now, I couldn't say positively, 7 or 8 years.

"You lived in this town (Springfield) a good part of that time? A. Yes, sir.

"Q. During all that time you and Etta Harris were living together as husband and wife? A. Yes, sir; that was because I intended to marry her."

The testimony of Lucy Harris tends to corroborate that heretofore quoted, in regard to the alleged common-law marriage of defendant and Etta Harris.

There is nothing in the record tending to contradict the testimony heretofore quoted. Regardless of the law relating to marriages in other jurisdictions, we are satisfied, from the foregoing testimony, a prima facie case was made tending to show that at the time of trial defendant and Etta Harris sustained, as to each other, under the laws of this state, the relation of husband and wife. Cargile et al. v. Wood et al., 63 Mo. 501; Dyer v. Brannock, 66 Mo. 391, 400, 27 Am. Rep. 359; State v. Gonce, 79 Mo. 600; State v. Cooper, 103 Mo. 266, 15 S. W. 327; Topper v. Perry, 197 Mo. 531, 95 S. W. 203, 114 Am. St. Rep. 177; Bishop v. Brittain Inv. Co., 229 Mo. loc. cit. 728, 729, 730, 731, 129 S. W. 683, Ann. Cas. 1912A, 863; Pope v. Mo. Pac. Ry. Co., 175 S. W. loc. cit. 957; Rauch v. Metz, 212 S. W. loc. cit. 362; Imboden v. Trust Co., 111 Mo. App. 234, 86 S. W. 263; Plattner v. Plattner, 116 Mo. App. 405, 91 S. W. 457; Davis v. Stouffer, 132 Mo. App. 555, 112 S. W. 282; 18 Ruling Case Law, § 14, p. 393.

Without any evidence in the record tending to controvert the facts relating to the common-law marriage aforesaid, we are of the opinion, that the trial court committed error in permitting Etta Harris to testify as a witness in the case, over the objection of defendant. In a criminal prosecution against the husband, the wife cannot legally testify against him, over his objection. Section 5242, R. S. 1909; *State v. Evans*, 138 Mo. loc. cit. 125, 39 S. W. 462, 60 Am. St. Rep. 549.

[3] 3. It is strenuously insisted that the trial court committed error in submitting the cause to the jury, without the state proving that Lucy Harris, in September, 1917, was under the age of 15 years. Lucy Harris testified, without objection, that she was 14 years of age. Her mother was dead, and the defendant failed to testify upon this subject. The state offered the best evidence obtainable. It is claimed the testimony of Mrs. Weaver discloses that Lucy Harris was 16 years of age. This testimony was given at the trial in December, 1918. The information charges that the offense was committed in September, 1917. It was therefore a question for the jury as to whether Lucy Harris was under 15 years of age in September, 1917, when the offense is alleged to have been committed.

[4] 4. It is claimed that the trial court erred in permitting the state to show other acts of intercourse on the part of defendant, aside from that charged in the information. This testimony was not properly objected to by defendant, but in the instructions given by the court, and to the giving of which defendant objected at the time, the following appears:

"And in this connection you are further instructed that testimony of other acts of sexual intercourse by the defendant with Lucy Harris or Ruth Harris are competent only for the purpose of showing the intent with which the defendant acted on the occasion on which the defendant is charged and on trial in this case."

That is to say, this instruction means that the other acts of sexual intercourse are competent, for the purpose of fixing the intent with which the defendant had sexual intercourse with Lucy, as charged, in September, 1917. Now, if Lucy, at that time, was under 15 years of age, the intent with which the act was done is wholly immaterial, as the crime was committed, if the defendant had sexual intercourse with Lucy under such circumstances, regardless of his intent. In the recent case of *State v. Belknap*, 221 S. W. 39 not yet [officially] reported, the following assignment of error was made:

"The court erred in allowing the state to introduce evidence of many attacks, when the defendant could only be tried for one attack and one crime."

The author of this opinion, in passing upon the above assignment, said:

"This contention is without merit. The evidence of the prosecutrix, in respect to this matter, 'was given without objection.' In addition thereto, 'defendant' had her testify as to 'still other assaults' of defendant, 'not referred to in chief.'"

The above-quoted portion of the opinion is correct, and we have no fault to find with same, but as a matter of obiter dicta we further observed:

"These different assaults were admissible for the purpose of showing an intent upon the part of defendant, even if an objection had been made. *State v. Miller*, 263 Mo. l. c. 334, par. II, 172 S. W. 385, Ann. Cas. 1916A, 1099; *State v. Campbell*, 210 Mo. l. c. 233, 109 S. W. 706, 14 Ann. Cas. 403; *State v. Patrick*, 107 Mo. l. c. 155, 17 S. W. 666."

Upon a careful reconsideration of the above question, we are now of the opinion that the last quotation above mentioned does not properly declare the law under the statute, where defendant is charged with statutory rape upon a female child under 15 years of age. Under such circumstances, it is immaterial what motive may have induced the defendant to commit the act, nor what his intention was in committing the same. If he had sexual intercourse with Lucy Harris in September, 1917, and she was under 15 years of age at the time, he was guilty of statutory rape, without regard to the intent with which the act was done.

Other crimes of a similar nature are independent, for which defendant may be tried and convicted, if pleaded in separate counts of information. They can have no bearing on the question, as to whether Lucy Harris was under 15 years of age in August, 1917, nor as to whether defendant had sexual intercourse with her during said time. Hence defendant's prior or subsequent acts of sexual intercourse, whether with Lucy Harris or any other female, on principle and common fairness, should not be the subject of inquiry before the jury, unless covered by a separate count in the information, in which the state is proceeding against him in respect to such charge, as an independent crime.

5. Aside from the foregoing observations, and considered from a constitutional viewpoint, the prior and subsequent acts of sexual intercourse, heretofore referred to, ought not to be the subject of investigation, unless charged as separate and independent crimes, in separate counts of the information. Section 12 of article 2 of our Constitution provides that:

"No person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies," etc. (Italics ours.)

It is evident that the framers of our Constitution contemplated that every man was presumed to be innocent of crime until proven guilty. They contemplated that the courts should give the accused the benefit of this presumption in prosecutions for crimes. They did not contemplate that the state might charge defendant with the specific crime of statutory rape in August, 1917, and, proceeding by ambush, attempt to prove another independent crime of the same nature on the 1st day of January, 1918, having no connection with the one under consideration, which had never been pleaded in the information, and without any opportunity having been afforded the accused to meet said charge. To our mind it is plain that the framers of said section 12 intended, in cases like the one before us, that the state should set out in different counts of the information the separate, independent crimes sought to be investigated at the trial.

Section 22 of the same article of our Constitution clearly recognizes the justice of this contention, for it is there said:

"In criminal prosecutions the accused shall have the right * * * to demand the nature and cause of the accusation," etc. (Italics ours.)

Does this mean that he may be informed for the first time at the trial as to the nature and accusation against him in respect to these independent crimes not mentioned in the information? Or does it contemplate that no inquiry can be had in respect to these independent crimes, which have no bearing on the case in question, unless the information so charges, by an appropriate court, in order that defendant, in the orderly administration of justice, may be informed as to the charges which he will be called upon to meet?

We therefore conclude that, whether tested upon principle or by the provisions of our Constitution, other similar acts of intercourse, aside from the one charged in the information, which tend to show statutory rape, should not be investigated at the trial, unless covered by the information in a separate count, as constituting a separate crime. No injustice can be done the state in construing the law as above indicated, for, if the prosecuting attorney is in possession of evidence tending to show prior and subsequent acts of a similar character, he can investigate the same at the trial under separate counts of the information, without being required to elect on which count he will proceed. By pursuing the latter course, the state guarantees to the accused a constitutional trial in the open, with knowledge of the nature and accusation presented against him.

6. Pursuing the same subject still further, let us consider the concrete case presented here. The defendant is charged in the infor-

mation with having committed the crime of statutory rape by having sexual intercourse with Lucy Harris, a female child under the age of 15 years, in Greene county, Mo. It was only necessary for the state to prove at the trial that defendant had sexual intercourse with Lucy Harris in Greene county, Mo., at the time charged in the information, and that at said date she was under 15 years of age. If defendant had sexual intercourse with Lucy Harris under said circumstances, he was guilty of statutory rape at that time, regardless of the motive or intent with which he committed the same, regardless of his past character, life, and conduct, and regardless of his subsequent acts and conduct. Other acts of a similar character, either prior or subsequent to that charged in the information, are not admissible in evidence, according to our conception of the law, unless pleaded in separate counts as independent crimes, and investigated accordingly.

The conclusions heretofore announced are sustained by well-considered authorities, among which may be found the following: *State v. Spray*, 174 Mo. 669, 74 S. W. 846, and numerous cases cited; *State v. Boatright*, 182 Mo. loc. cit. 51, 81 S. W. 450; *State v. Hyde*, 234 Mo. loc. cit. 224, 225, 136 S. W. 316, Ann. Cas. 1912D, 191; *State v. Teeter*, 239 Mo. 475, 144 S. W. 445; *State v. Wellman*, 253 Mo. 302, 161 S. W. 795; *State v. Bersch*, 276 Mo. loc. cit. 414, 415, 416, 207 S. W. 809; 8 Ruling Case Law, § 194, p. 198. Authorities may be found to the contrary, but, keeping in mind the provisions of our Constitution, supra, and that crimes of the character charged here speak for themselves, regardless of the motives or intent with which they are committed, they should not be followed in this kind of a case.

7. We have considered all the questions necessary in the retrial of the cause. On account of the errors heretofore pointed out, the cause is reversed and remanded for a new trial.

MOZLEY, C., concurs.

WHITE, C., concurs, except as to paragraphs 4, 5, and 6.

PER CURIAM. The foregoing opinion of RAILEY, C., is hereby adopted as the opinion of the court.

WALKER and WILLIAMSON, JJ., concur. WILLIAMS, P. J., concurs in paragraphs 1, 2, 3, 7, and result, but dissents as to the views expressed in paragraphs 4, 5, and 6, on the ground that evidence of prior acts of sexual intercourse between the same persons is admissible, not for the purpose of proving intent, but for the purpose of proving defendant guilty of the crime with which he stands

charged, under the rule announced in *State v. Palmberg*, 199 Mo. 233, loc. cit. 250, 97 S. W. 566, 116 Am. St. Rep. 476.

STATE v. MORGAN. (No. 21928.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

1. Burglary \S 22—Omission of information to allege ownership of car broken into fatal.

Omission of information for burglary in the second degree and larceny to allege the ownership of the railroad car charged to have been entered is fatal.

2. Criminal law \S 1832(5)—Failure to allege ownership of car broken into may be raised in Supreme Court.

The objection that an information charging burglary in the second degree and larceny fails to allege the ownership of the car charged to have been broken into may be raised for the first time in the Supreme Court.

Error to Circuit Court, Jackson County;
Ralph S. Latahaw, Judge.

Oscar B. Morgan pleaded guilty to burglary, and after sentence he brings error. Reversed and remanded.

Frans E. Lindquist, of Kansas City, for plaintiff in error.

Frank W. McAllister, Atty. Gen., and Lewis Hord Cook, Sp. Asst. Atty. Gen., for the State.

WILLIAMSON, J. The appellant, Oscar B. Morgan, pleaded guilty to the charge of burglary only, in an information charging him with the crime of burglary in the second degree and larceny, and was sentenced to confinement in the state penitentiary for the term of three years. Upon that judgment he has duly sued out a writ of error.

The offense charged in the information is that appellant—

"did unlawfully, feloniously, and burglariously break into and enter a certain building, a railroad car No. 8364-M & St. L., there situate, the same being a building in which divers goods, wares, merchandise, and valuable things were then and there kept for sale and deposited, with felonious intent the said goods, wares, merchandise, and valuable things in the said building then and there being then and there unlawfully, feloniously, and burglariously to steal, take, and carry away, and hats, caps, of the value of eighteen dollars, of the value of eighteen dollars, of the goods and property of Missouri Pacific Railroad Company, a corporation, in said building then and there being found, did then and there unlawfully, feloniously, and burglariously steal, take, and carry away, against the peace and dignity of the state."

[1, 2] It will be observed that the information contains no allegation of the ownership of the railroad car therein mentioned. The state confesses that this omission is fatal. It has been so held times without number. *State v. Henschel*, 250 Mo. 263, 157 S. W. 311; *State v. Kelley*, 206 Mo. 685, 105 S. W. 606, 12 Ann. Cas. 681; *State v. Evans*, 217 S. W. 30. It would serve no useful purpose to reiterate the oft-repeated reasoning upon which such informations are held to be defective. Such an objection may be raised for the first time in this court. *State v. Henschel*, supra; *State v. Patterson*, 159 Mo. 98, 69 S. W. 1104.

This case should be reversed and remanded for further proceedings consistent with this opinion. It is so ordered.

All concur.

STATE v. STETSON et al. (No. 21907.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

1. Criminal law \S 1169(7) — Evidence that third person had pleaded guilty to crime charged against defendants held prejudicial error.

In a prosecution for robbery in the first degree brought against two defendants, testimony that a third party had pleaded guilty to the same charge held prejudicial error, in view of other evidence connecting such third party with defendants and creating a suspicion that they were all members of one group.

2. Criminal law \S 374—Evidence of other offenses held improper, in absence of preliminary identification of defendants.

In prosecution of two defendants for robbery, testimony by a state's witness that he had been held up the same night by three men driving a truck, but that he was unable to identify the defendants as the persons involved held error, since facts in connection with other crimes should not be introduced without first identifying the defendants with the crime.

Appeal from St. Louis Circuit Court; Wilson A. Taylor, Judge.

Joseph Stetson and W. F. Schantz were convicted of robbery in the first degree, and they appeal. Reversed and remanded.

Frank C. O'Malley, of St. Louis, for appellants.

Frank W. McAllister, Atty. Gen., and Clarence P. Le Mire, Asst. Atty. Gen., for the State.

WHITE, C. By information filed in the circuit court of the city of St. Louis the appellants and one John Lennon were jointly charged with robbery in the first degree. Lennon pleaded guilty. The other two defendants were put upon trial before a jury

which returned a verdict of guilty and assessed their punishments at imprisonment in the penitentiary for five years. From that judgment they appealed.

John J. Kuhn, a grocer, employed at 2701 Russell avenue in the city of St. Louis, lived at 2912 Shenandoah avenue in the south central part of the city. On the evening of the 8th of March, 1919, Kuhn's wife and two children were visiting her cousin at 4644 Newberry terrace. After Kuhn quit work that evening he walked home and started to the place where his wife was visiting, for the purpose of accompanying her and the children home. After alighting from the street car about two blocks from his destination, 4644 Newberry terrace, Kuhn started to walk that distance. This was between 11:15 and 11:45 at night. On his way he was accosted by three men, one of whom drew a gun. They held him up and robbed him of his watch and something over \$40 in money. After the highwaymen had robbed him they told him to run up the alley. Instead of that he yelled for help, and the robbers took to their heels. He followed them a short distance, and saw them get into a light automobile truck and drive away. Defendant Stetson was 18 years of age, and Schantz was 20 years of age.

About a week later the officers arrested Walter Stetson, brother of the defendant, one John Mott, and one Tony Ellerman. The last named owned a grocery and saloon and the Ford truck in which it was suspected the robbers escaped after the holdup. The defendant Joseph Stetson went to the police station for the purpose of inquiring why his brother was detained there, when Kuhn, who was present, identified him as one of the robbers. Subsequently, after other arrests were made, six all together, Kuhn "picked out" from the six the three against whom the information was filed. Evidence was offered to show that several other holdups took place by men in a Ford truck that same night. Kuhn did not recognize the truck in which the robbers fled from where he was robbed as a Ford truck at the time, but afterwards claimed to have identified the same truck when he saw it at the police station.

The defense was an alibi. Each of the defendants swore that he went to a picture show that evening, each at a different place, and was at home in bed before the hour at which the holdup took place. Each was corroborated by members of his own family. Several character witnesses were introduced in defense to show that the defendants enjoyed good reputations.

I. Error is assigned to the action of the court in permitting Kuhn, the prosecuting witness, to refer to Lennon, the codefendant, as the "fellow who pleaded guilty," and to the remarks made by the circuit attorney and

by the court in that connection. Kuhn in explaining the incident used these words:

"Those two young men (referring to the defendants) and the one that pleaded guilty held me up."

Objection was made to this remark, and the court instructed the jury to disregard the statements made by the witness. The witness, however, several times later mentioned Lennon in the same way—as the one who pleaded guilty.

The court gave no further instruction to the jury in relation to the statement, but admonished the witness not to speak of Lennon in that manner. Finally, after the witness had repeatedly referred to Lennon as the one who had pleaded guilty, the attorney for defendant made a vigorous complaint, and demanded the state should produce Lennon, when this occurred:

"The Court: I don't think so; proceed. (To which ruling of the court the defendants Stetson and Schantz then and there duly excepted.)

"Mr. Lacy: If one of the men implicated in the crime happens to plead guilty, we can't help that; and I think that these defendants are fully protected by your honor's instructions, and I think that the jurors know their duty, and that they won't consider the plea of guilty against these men; and they will not do it, I know.

"The Court: Proceed with the case.

"Mr. O'Malley: I am going to offer some testimony, but I suppose your honor will not permit it.

"The Court: Then why are you going to offer it? I presume that Lennon pleaded guilty because he was guilty. Proceed with the case." (To which ruling and statement of the court the defendants Stetson and Schantz then and there duly excepted.)

In order to appreciate the significance and effect of these statements, it is necessary to understand the relation of the boys to each other. Each of the defendants on trial admitted that he was acquainted with Lennon. It was shown that they and Lennon were associates. When John P. Roach, sergeant detective, was on the stand he testified that he had information that all "three stickups" on the night of March 8th were by men driving a Ford truck. He arrested the owner of the truck, Tony Ellerman, the defendant Stetson's brother, and one Mott, and subsequently Lennon and the other two defendants. He explained his method in this way:

"Q. How did you happen to pick up Lennon? A. Well, if you want me to explain it, I can explain it.

"Q. All right. A. I know these boys for 14 years.

"Q. What boys? A. The whole bunch of them; I walked 10 years over there.

"Q. What boys? A. Lennon and the two Stetson boys and Schantz and John O'Brien and a kid named Carrigan; and after I got this in-

formation about the truck, I knew who was driving the truck.

"Q. Who was driving it? A. Walter Stetson; and I knew right away who to figure on in doing this job.

"Q. Do you know anybody else that drives a Ford truck?"

[1] Thus we have the suspicion of an officer directed to a certain group of boys, including the three defendants. When he got information about the truck, he knew who was driving it; that is, he knew some one of the gang he had just mentioned, including Lennon, the two Stetson boys, and Schantz. He "knew right away who to figure on in doing this job." Thus the two defendants were directly connected with Lennon; manifestly the impression was made upon the jury at once that the three went together, operated together. If Lennon was guilty, of course the other defendants were guilty. They were so closely associated in the suspicion and explanation of the detective that the jury naturally would conclude that the guilt of one was evidence of the guilt of all. Under these circumstances it was highly improper to show in any way that Lennon had pleaded guilty. The court, after once instructing the jury to disregard the statement, permitted the witness to repeat the identification of Lennon as "the boy that pleaded guilty" without a sufficiently forcible reprimand to put a stop to it. Then the circuit attorney so far forgot himself as to state, "If one of the men implicated in the crime happens to plead guilty, we can't help that." This is a most damaging statement. It is an assertion by the prosecuting officer that, of the three men "implicated in the crime," two were present in court undergoing a trial. The judge of the court followed this by saying: "I presume that Lennon pleaded guilty because he was guilty." The effect was not removed when the court immediately afterwards admonished the witness Kuhn "not to tell the jury that any more." That remark rather aggravated the situation after the judge and the prosecutor both had told the jury that one of the three associates in the crime had pleaded guilty.

The entire incident was prejudicial; the jury could hardly escape being strongly influenced by it against the defendants. A reversal of the case on that account is necessary. *State v. Jackson*, 95 Mo. loc. cit. 652, 653, 8 S. W. 749; *State v. Lovan*, 245 Mo. loc. cit. 538, 151 S. W. 141; *State v. Drew*, 213 S. W. 106; *State v. Stegner*, 276 Mo. loc. cit. 440, 207 S. W. 826.

[2] II. When James Thornton, a colored man, was sworn as a witness for the state and testified that he was held up that same night, March 8th, by three men driving a Ford truck, he was unable to identify the defendants as the men who did the job. The

reception of this evidence is assigned as error. The evidence was incompetent because of the lack of identification by the witness, but the statement of the witness, describing the way he was robbed, was introduced before any objection was made, and the only facts sought to be elicited by the state after the objection was made was an attempt to have the witness identify the two boys on trial as among those who held him up. The objection was not in time to avail the defendant here as error in the trial court. On another trial the court should not allow the facts in connection with other holdups to be introduced without first identifying the defendants with the crime.

The judgment is reversed, and the cause remanded.

BAILEY, C., concurs.
MOZLEY, C., absent.

PER CURIAM. The foregoing opinion by WHITE, C., is adopted as the opinion of the court.

All concur.

STATE v. SEAY. (No. 21983.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

1. Rape \S 57(1)—Defendant's demurrers to evidence properly overruled.

In prosecution for statutory rape of a female child under 15, defendant's demurrers to evidence at the close of the state's evidence and at close of all evidence held properly overruled.

2. Criminal law \S 678(2)—Election between offenses should be required as soon as facts are developed.

The rule in regard to requiring an election between offenses shown in evidence is largely within the discretion of the trial court, and should be made as soon as the facts are sufficiently developed to warrant it.

3. Criminal law \S 678(2)—Election between offenses in rape case made within time.

In a prosecution for statutory rape of a female child under 15, election between offenses shown in evidence, made by the prosecution when required by the trial court at the close of the state's case on defendant's motion, held made within proper time.

4. Witnesses \S 274(2)—Character witnesses may be cross-examined by state.

When defendant introduces witnesses to prove good character, it is proper for state to cross-examine to test their knowledge of defendant's reputation, sources of information, and credibility; such examination being largely within discretion of court and it being permissible to inquire whether witnesses have heard certain rumors relating to defendant, though such questions are improper unless the rumors are apt to affect defendant's reputation.

5. Witnesses ¶274(2) — Cross-examination of character witnesses as to other offenses improper.

In prosecution for statutory rape of a female child under 15, action of prosecuting attorney in asking certain character witnesses for defendant on cross-examination whether they had heard that defendant was charged with the crime of rape upon other young children held improper.

Appeal from Criminal Court, Jackson County; Ralph S. Latschaw, Judge.

David M. Seay was convicted of statutory rape, and he appeals. Judgment reversed, and cause remanded.

The defendant appeals from a conviction in the circuit court of Jackson county on a charge of statutory rape committed upon one Lucy Hare, a female child under the age of 15 years. Seay was 59 years of age, a bachelor, and conducted a card-printing shop at No. 1120 Troost avenue, Kansas City. The shop was on the ground floor and contained two rooms—one in front where he transacted business and one in the rear where he slept and where, the state's evidence went to show, he maintained a cot on which the alleged offense was committed. Lucy Hare was 13 years of age and attended the Humboldt school. She, with other girls who attended that school, were frequenters of the defendant's shop. She was in the shop a number of times during a period extending from June, 1918, until December of that year. It was on one of these visits in June that the first criminal act was committed by the defendant against Lucy Hare. This recurred at intervals when she would visit the shop in company with another girl, named Virginia Turner. The last act of the kind described occurred about a week before Christmas in December, 1918. The incident is described by the prosecuting witness and by Virginia Turner, who was present all the time.

The defendant endeavored to show that the arrangement of the shop was such that he could not have committed the offense in the manner detailed, by describing the interior of the back room of his shop. This evidence, however, was contradicted by the testimony of the state's witnesses, who described the place as containing two bunks, one about seven feet above the floor, where he slept, and the other lower down composed of boxes, over which a quilt or something was spread.

J. M. Johnson and Henri L. Warren, both of Kansas City, for appellant.

Frank W. McAllister, Atty. Gen., and J. W. Broadbuss, Asst. Atty. Gen., for the State.

WHITE, C. (after stating the facts as above). [1] I. The attorney for the defend-

ant demurred to the evidence at the close of the state's evidence and again at the close of all the evidence. It is claimed that the court erred in overruling these demurrers. In regard to the facts relating to the particular offense for which the state seeks a conviction, the evidence of the prosecuting witness and of Virginia Turner was quite clear and entirely sufficient to submit the issue to the jury. The defendant, on cross-examination of the prosecuting witness, had her state that she suffered no pain at the time. This was offset by the testimony of a physician, who examined the girl on the order of the court and testified that she was a well-developed girl for her age of 13 years and that the hymen was broken at a much earlier period, not recently. The court properly overruled the demurrer to the evidence.

[2, 3] II. The prosecuting attorney, in his opening statement, related substantially what the evidence would be in relation to the different criminal acts committed by the defendant upon the prosecuting witness, and the defendant's counsel then asked the court to have the state elect upon which particular offense the state would expect a conviction, since each distinct act was a separate crime. The court overruled the motion, but at the close of the state's case did require the state to elect. The prosecutor thereupon elected to demand a conviction for the offense committed about a week before Christmas in December, 1918. The rule in regard to requiring an election in such case is largely within the discretion of the trial court. It should be made as soon as the facts are sufficiently developed to warrant it. *State v. Hughes*, 258 Mo. 264, loc. cit. 270, 167 S. W. 529; *State v. Hurley*, 242 Mo. loc. cit. 459, 146 S. W. 1154; *State v. Miller*, 263 Mo. loc. cit. 334, 172 S. W. 385, Ann. Cas. 1916A, 1099. The election in this case was made within the proper time.

III. The defendant denied specifically and generally all the criminal acts charged against him, and introduced a number of witnesses, who from the evidence appeared to be reputable citizens, to testify that he had a good reputation. It appears from intimations in the record that some time in February, 1919, the defendant was apprehended, and was then suspected of committing sundry crimes of the character charged against him in this case against numerous girls, including the prosecuting witness. When the defendant's character witnesses were on the stand testifying to his good character the prosecuting attorney proceeded to cross-examine them in this manner:

"Q. (by Mr. Curtin). If you had heard that this defendant was charged with the crime of rape upon a nine year old girl by the name of Mildred Roberts, would you then say his reputation was good?"

Objection to this question was overruled and exception saved.

"The Court: Answer the question, Doctor. Read the question. (Last question asked by Mr. Curtin read to witness by the reporter.)

"A. It is very difficult to answer that question. If it charged that, I would say that the charge is very bad for him.

"Q. (by Mr. Curtin). Very bad for him? A. Yes, sir."

The prosecutor then asked this question:

"Q. (by Mr. Curtin). If you had heard that this defendant was charged with committing rape on a girl eight years of age by the name of Alice Parrish, would you say that his reputation was good?"

Objection to this was overruled and the witness answered:

"A. I would say it is a very unfortunate charge."

A number of questions of that character were asked of several witnesses and answered over the objection and exception of the defendant, and of one witness the prosecutor asked this question:

"Q. Now, Mr. Fratcher, had you heard prior to the 27th day of February, 1919, this man was charged by eight or nine little girls of having had sexual intercourse with them, would you still say that his reputation for morality was good?"

Objection to which was overruled and exception saved.

[4] When a defendant on trial charged with a crime introduces a witness to prove good character, it is proper for the state to cross-examine such character witnesses for the purpose of testing their knowledge of the defendant's reputation, the sources of their information and their credibility. Such cross-examination is largely within the discretion of the trial court. *State v. Phillips*, 233 Mo. loc. cit. 305, 135 S. W. 4; *State v. Harris*, 209 Mo. loc. cit. 443, 108 S. W. 28. It is permissible to inquire of the character witnesses whether they have heard such and such rumors relating to the defendant, rumors of crimes or other acts which would reflect upon his character, in order to determine upon what the witness bases his judgment as to the reputation of the defendant. *State v. Brown*, 181 Mo. loc. cit. 213, 214, 79 S. W. 1111. Such questions are improper unless such rumors are afloat to affect defendant's reputation. *State v. Parker*, 172 Mo. 191, loc. cit. 207, 72 S. W. 650. The opinion in the *Parker Case* quotes from *Greenleaf*, as follows:

"In testing a witness who speaks to good character, it would expose the untrustworthiness of his testimony if he admits that rumors of misconduct are known to him; for the knowledge of such rumors may well be inconsistent with his assertion that the person's

reputation is good." *State v. Smith*, 250 Mo. loc. cit. 277, 157 S. W. 307; *State v. McLaughlin*, 149 Mo. loc. cit. 83, 50 S. W. 315.

A leading and well-considered case upon this subject is *State v. Crow*, 107 Mo. 341, loc. cit. 346-348, 17 S. W. 745.

Rumors affecting one's reputation is quite a different thing from proof of specific acts or crimes for which the defendant might be convicted. In this case the character witnesses were offered for the purpose of showing the defendant's reputation before he was charged with the crime for which he was on trial. The questions asked by the prosecuting attorney did not go to contradict any statement as to what his reputation was then. He did not ask the witnesses if rumors were current which they had heard concerning defendant's misconduct, because it appears there were no such rumors at the time. The questions were entirely argumentative, and called for opinions and conclusions. The witnesses could not have heard of the offenses named at the time to which the inquiry is directed, and the prosecutor knew it. Under the pretext of testing the credibility and information of the witnesses he sought to bring before the jury the facts that the defendant had committed a number of very serious and abominable crimes, for any one of which he could be convicted; crimes totally disconnected with the crime for which he was on trial. The question not only avoided any reference to the defendant's reputation as it was, but demanded an opinion of the witnesses on their assumed knowledge of facts instead of reported crimes.

[5] This sort of cross-examination has been universally condemned. The prosecutor overstepped his privilege. *State v. Teeter*, 239 Mo. 475, loc. cit. 485, 144 S. W. 445; *State v. Wellman*, 253 Mo. loc. cit. 315, 161 S. W. 795; *State v. Phillips*, 233 Mo. loc. cit. 305, 135 S. W. 4. It is not proper for the prosecuting attorney to state to the jury his belief in the guilt of the defendant, for the reason that the jury may conclude that his belief was acquired through information not in the evidence. *State v. Hess*, 240 Mo. loc. cit. 159, 144 S. W. 489; *State v. Webb*, 254 Mo. loc. cit. 435, 162 S. W. 622; *State v. Repley*, 213 S. W. loc. cit. 480. It is equally improper for him to tell the jury that the defendant has committed other crimes; and that he was allowed to do in asking the questions set out above. A crime of the character of the one with which defendant is charged is so abhorrent that conviction is easy; in fact the charge is almost equivalent to a conviction. So strong is the prejudice against a defendant in such case that the court must take every precaution to see that he obtains an impartial trial.

For the error committed by the trial court in allowing the cross-examination of defend-

ant's character witnesses, the judgment is reversed and the cause remanded.

RAILEY and MOZLEY, CC., concur.

PER CURIAM. The foregoing opinion by WHITE, C., is adopted as the opinion of the court.

All concur.

CITY OF ST. LOUIS v. MURTA (three cases).
(Nos. 20812-20814.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

1. Courts \S 231 (5)—Supreme Court will take jurisdiction of misdemeanors on charges brought by a "political subdivision of the state."

The Supreme Court will take jurisdiction of a prosecution instituted by the city of St. Louis charging the operation of lodging houses without permit or payment of a license tax, notwithstanding such charges are misdemeanors; the city of St. Louis being a political subdivision of the state within Const. art. 6, § 12.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Political Subdivision.]

2. Municipal corporations \S 120—City enacting ordinances will not be presumed ignorant of its charter powers or to intend to violate organic law.

In construing a city ordinance, it will not be presumed that the city was ignorant of its charter power or it deliberately intended to violate the organic law of the state or city.

3. Statutes \S 188—Doubtful words enlarged or stricken out to conform to true intent of Legislature.

Doubtful words of a statute will be enlarged, restricted, or even stricken out to make them conform to the true legislative intent when such intent is manifest by aid of sound principles of interpretation.

4. Innkeepers \S 2 — Ordinances regulating lodging houses held not invalid.

A city ordinance forbidding the operation of a lodging house wherein sleeping quarters for three or more persons are provided without payment of license tax or securing permit held not to include private homes or charitable institutions and not to be invalid as unreasonable and discriminatory.

Appeal from St. Louis Court of Criminal Correction; Chauncey J. Krueger, Judge.

Separate prosecutions by the City of St. Louis against Samuel Murta consolidated and tried on agreed statement of facts. Defendant was found guilty in each case, and he appeals. Affirmed.

There are three of these cases, and defendant was fined in each upon charges made by the city by information filed. The gravamen of the charges are that defendant operated

three lodging houses in said city without paying a license tax and securing a permit from the proper authorities of said city authorizing him to do so. The cases were consolidated and tried as one upon an agreed statement of facts before Judge Krueger in the court of criminal correction. What is here said therefore applies to each case alike. The ordinances under which the cases proceed are 28790-29555. The agreed statement of facts upon which the cases were tried, so far as necessary to quote, provides as follows:

"Sec. 1. *Lodging House—Definition.*—The term 'lodging house' where used herein shall (unless expressly otherwise indicated) be taken to mean and to include any building wherein lodging or sleeping quarters for three or more persons in any one room are provided." (Italics ours.)

"Second. That Ordinances 28790-29555 were duly enacted, and, if valid and constitutional, were in force at the times charged.

"Third. That defendant, Samuel Murta, did on May 18, 1917, and at diverse other days and times prior thereto, keep, conduct, and operate three lodging houses in said city without a license or permit issued to him by the board of public service of said city to keep any one of said three lodging houses.

"Fourth. That the defendant did not at any time apply for a permit or license to keep any of said three lodging houses as required by Ordinance 28790, and that he has not paid or offered to pay the annual fee provided for in section 6 of said ordinance."

Forest P. Tralles and Geo. O. Durham, both of St. Louis, for appellant.

Charles H. Davies and H. A. Hamilton, both of St. Louis, for respondent.

MOZLEY, C. [1] The charges preferred by the informations amount merely to misdemeanors, but we take jurisdiction of the cases because the city of St. Louis is a political subdivision of the state. Const. art. 6, § 12; *Straub v. City of St. Louis*, 175 Mo. loc. cit. 414, 75 S. W. 100.

The questions presented for determination are:

(a) Whether or not said ordinance applies to all buildings having a room where sleeping quarters are provided for three or more persons irrespective of whether such room or building is operated as a business pursuit or a commercial establishment.

(b) Whether or not said ordinance is void as being unreasonable and discriminatory and not a fair classification of the business of conducting lodging houses and not applicable alike to all engaged in such business, in that it singles out for purposes of taxation only such keepers as shall provide sleeping quarters for three or more guests in one room.

Is the ordinance in question subject to the objections made against it? Is it void because unreasonable?

Section 1 of the ordinance applies expres-

ly and solely to lodging houses wherein lodging or sleeping quarters for three or more persons in any one room are provided. This application is provided for in the ordinance (unless expressly otherwise indicated), and it is nowhere otherwise indicated therein.

But, conceding all of this to be true, does section 1 of said ordinance, when properly construed, affect its validity?

The crux of the cases is as to how said section ought to be construed. Appellant says it must be construed so as to include within its terms private homes, charitable institutions, etc., which under the charter of said city and the laws of the state are not subject to a license tax, hence rendering it void.

Respondent, contra, contends that it was not intended to include private homes, charitable institutions, etc., and, if thus construed, the true intent of the legislative department of the city will be made clear.

[2] It cannot be presumed that the city was ignorant of its charter powers or that it deliberately intended to violate the organic law of the state or city. *State ex rel. v. Sheehan*, 269 Mo. loc. cit. 427, 190 S. W. 864; *Straughan v. Meyers*, 268 Mo. loc. cit. 591, 187 S. W. 1159; *State ex rel. Anll v. Field*, 112 Mo. 554, 20 S. W. 672; *Glaser v. Rothchild*, 221 Mo. loc. cit. 211, 120 S. W. 1, 22 L. R. A. (N. S.) 1045, 17 Ann. Cas. 576; *Perry v. Strawbridge*, 209 Mo. loc. cit. 645, 108 S. W. 641, 16 L. R. A. (N. S.) 244, 123 Am. St. Rep. 510, 14 Ann. Cas. 92; 36 Cyc. 1106; *Grimes v. Reynolds*, 184 Mo. 679, 68 S. W. 588, 83 S. W. 1132; *Laclede Const. Co. v. Moss Tie Co.*, 185 Mo. loc. cit. 62, 84 S. W. 76; *State ex rel. v. Public Service Com.*, 270 Mo. loc. cit. 442, 192 S. W. 958, 198 S. W. 872.

In the case of *State ex rel. v. Sheehan*, supra, it is said by our court in banc:

"It is our duty to resolve all doubts in favor of the validity of a legislative act, we always being reluctant to declare statutes unconstitutional. We indulge the presumption that the Legislature did not intend to violate the organic law of the state."

Ex vi termini the same reluctance to declare an ordinance, duly enacted, void, and the same presumption of its validity would obtain in the instant cases.

[3] In the same case and on the same page it is further said:

"We have frequently said doubtful words of a statute will be enlarged, restricted, * * * or even stricken out in order to make them conform to the true intent of the lawmaker, when such intention is manifest by the aid of sound principles of interpretation." (Italics ours.)

In 36 Cyc. 1106, supra, it is said:

"The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the Legislature." (Italics ours.)

The principle announced in the authorities quoted from and those cited supra is the established law of this state in construing legislative acts.

We are of opinion that said ordinance is not susceptible of the interpretation contended for by appellant, since, when interpreted in harmony with the powers possessed by the legislative department of the city, no violence to or infringement upon the true meaning and intent of the lawmakers in adopting it exists. *State ex rel. v. Public Service Com.*, supra.

[4] We hold that said section does not include, and was not intended to include, private homes, charitable institutions, etc., and that it is valid and harmonizes with the title to, and context of, said ordinance.

The contention of appellant is overruled.

In the agreed statement of facts made in the lower court it is conceded that, if said section 1 of said ordinance is valid, appellant is guilty of having violated it, by operating three lodging houses in said city in defiance of the ordinance providing for the licensing and regulating of them.

No other complaint is raised, and the information, trial, judgment, and imposition of the fines appear from the record to be in all things regular. It only remains to affirm said cases, which is done.

Let it be so ordered.

BAILEY, C., not sitting.

WHITE, C., concurs.

PER CURIAM. The foregoing opinion of MOZLEY, C., is hereby adopted as the opinion of the court.

All concur.

STATE v. ADKINS. (No. 21937.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

1. Criminal law §1091(11)—Record on appeal should not be burdened with irrelevant and conjectural testimony.

Irrelevant testimony, not even remotely connecting defendant with the crime, should not have been sent up in the bill of exceptions, and neither should testimony whose relevancy depends solely on conjectures of a criminal conspiracy not shown, but it was proper to incorporate evidence tending clearly to show motive.

2. Arson §32—Criminal law §562—Proof of motive and opportunity, together with corpus delicti, do not prove guilt; evidence of threats admissible.

In a prosecution under Rev. St. 1909, § 4509, for the burning of a garage, accused's threats prior to the fire were admissible as tending to show motive, malice, and ill will against one of its owners, even though such threats were covert, indirect, and vague; but, conceding the corpus delicti established, mere showing of motive and opportunity will not

overcome the presumption of defendant's innocence and establish his guilt beyond a reasonable doubt.

3. Arson — 37(1)—Evidence held insufficient to support conviction.

In a prosecution under Rev. St. 1909, § 4509, for the burning of a garage, circumstantial evidence of the tracing of automobile tracks over public highways and through a town, where they were frequently lost, and evidence as to the engine of defendant's car being heated a few hours later, and other circumstances held insufficient to fasten the crime upon defendant.

Appeal from Circuit Court, Nodaway County; L. B. Woods, Special Judge.

Mark M. Adkins was convicted of arson in the third degree, and he appeals. Reversed.

W. C. Ellison and Wright & Ford, all of Maryville, for appellant.

Frank W. McAllister, Atty. Gen., and Henry B. Hunt, Asst. Atty. Gen., for the State.

WALKER, J. In an indictment preferred by the grand jury of Nodaway county the appellant was charged with arson in the third degree under section 4509, R. S. 1909, in that on the 19th day of April, 1918, he set fire to and burned a garage in the town of Clearmont in said county. A change of venue on the application of appellant was taken from the regular judge and Hon. L. B. Woods, judge of the Third Judicial circuit, was called in to try the case. A trial was had on the 15th day of February, 1919, and the jury found appellant guilty and assessed his punishment at four years' imprisonment in the penitentiary, from which judgment he appeals.

About 12 o'clock on the night of the fire J. E. Hornbuckle put an automobile in the garage and locked the doors of same. He then went to his home and retired. The night was heavy, damp, and chilly, and a mist was falling. Upon arising an hour later he attempted to turn on the electric light, and found that there was no current. He again retired, and a little after 3 o'clock a. m. was notified by telephone that the garage was on fire. He hurried to the scene and found a number of people there. The front windows were broken out, and the inside of the garage was enveloped in flames. There were at the time 18 automobiles, 30 barrels of oil, tools, waste, and other accessories in the garage. At the left side of the approach to the garage, at the outer edge of the sidewalk, there was a gasoline filling station. This apparatus was about 3 feet in height, stood on a base, and was fitted with a pump, crank, hose, and nozzle for pumping gasoline into automobile tanks. All of these appliances were inclosed by two heavy metal doors, which were locked on the night of and prior

to the fire. After the fire was discovered, it was found that this filling apparatus had been broken into, the left-hand door was broken, the right-hand door pried open, the crank was raised up part way, and the latch pried off. The hose was on the ground east of this station, with nozzle open, and the earth near the hose gave evidence of gasoline having been spilled upon it. After the fire was discovered, a bucket which had been used at the garage for filling automobile radiators with water was found just inside of the doors to the main entrance of the building, so situated that it would have been pushed aside, had the doors been opened. This bucket was not there when Hornbuckle drove his car into the garage the night of the fire, nor was it there when he left and closed the garage that night.

Hornbuckle notified the sheriff of the fire by telephone, and two deputies responded to the call, arriving on the scene about 7 o'clock a. m. When they arrived, the garage and its former contents were a pile of smoking ruins. Procuring a closed car, for the weather was cold and a heavy mist was falling, accompanied by three others, they proceeded in a westerly direction from Clearmont towards Elmo. Two of the party sat on the front seat, and three on the rear seat. They were in quest of automobile tracks, and their manner of observation was to look forward while the car was in motion, the nearest observable portion of the road while they were so situated being about 20 feet distant, and upon discovering tracks to get out and examine them. The first tracks discovered which they determined to follow were located north and west, and about a quarter of a mile, from where the garage had been located. The testimony of one of the deputy sheriffs (Romasser) who made this search is, in his own language, as follows:

"We got to Clearmont between 6 and 7 o'clock. It was cold and misty. When I got to the garage, I made no effort to discover any tracks; nor did I make any effort to track any one or anything up to the garage, nor to track anybody or anything in Clearmont. No trails were pointed out to me in the town. We got a Ford closed car, and five of us started out of Clearmont in a westerly direction. We crossed the railroad tracks, turned north a short distance, and then went west. We stopped the automobile at the west turn of the road, and I got out and carefully examined the tracks. I found a fresh tire cut in a circle, evidently made by an automobile turning around in the road on the previous day. The tire tracks were plainly marked in the damp dust. The south track plainly showed a diamond tread impression. The north track, while not so plain, also showed a diamond tread. We followed these tracks to Mark Adkins' (the appellant's) farm and into his garage. It never went any further than his driveway. The car I was in was glass-inclosed, and the glasses

were up, but the wind shield was partly open. I was seated in the rear seat between two other men, and the only possible way for me to see any tracks while I was thus seated was by looking between the shoulders of those two men in the front seat. I had to look at an angle that would enable me to see in a straight line the road ahead of me. I did not see any continuous trail. I didn't say that I saw the prints all the time. I could not see the track every yard of the way. I could see it every 50 yards, if the dirt was soft. I can't say that I saw it every 50 yards. I did say on a former occasion that I got out five or six times at about equal distances between Elmo and Clearmont. I can't say that it was every mile. I can't say now that we got out every mile, or every half mile, or every 100 yards. When we got as far as the eastern limits of Elmo on our trailing trip, we continued on through the town of Elmo without seeing any tire prints at all. I didn't see the track through Elmo. No one of the party got out to look for the track, or saw any track. That is absolutely correct, during the entire trip through Elmo. I expected the track to end in Elmo in a garage. With reference to the point from which we started at Clearmont on this trail, I did not look for any tracks between there and the garage back in town. I did not look to see if anybody had gotten out of the car, where I started on the trail and walked back towards the garage. I didn't look around the garage for any figure, or tool, or scrap of paper, or anything, to couple it with this track. From the track we were tracing, I couldn't tell which way the car was going, whether the track was made by a car coming from Elmo to Clearmont, or going from Clarinda down through Elmo to some other place. If the track was made by a car going towards Clarinda, it would be on the right side of the car, instead of the left. I couldn't tell whether the diamond tread we were tracing was on the right-hand tire or the left-hand tire. When we followed the tracks up into Mark Adkins' yard, they turned a little bit north, circled, and went into the garage. I went to the door and called him. He came out, and I asked him if any one had his car out last night. He said very positively, 'No, sir;' and when I asked if any one had a key to his garage, he again said positively, 'No, sir.' I said, 'I want to see your car.' He said, 'What for?' and I said, 'I am a deputy sheriff, and I thought I had a right to look at his car.' He was slow going to the garage, but opened it, and there was the machine. It was equipped on the left-hand side with a new casing diamond tread and on the right side with the same kind of a tire; the diamond tread showing very little. These were the hind wheels. I said to Mr. Adkins, 'That is the car we have been tracing from Clearmont, and I would like to see your engine.' He said, 'What for?' I opened it, and it was warm; and I said, 'Mr. Adkins, you don't mean to tell me that this car was not driven last night?' He said, 'My wife and I drove to Elmo to the picture show.'

The witness declared affirmatively upon cross-examination, in regard to the statement of the appellant as to his whereabouts the night of the fire, that there was no show at Elmo that night, and that appellant's state-

ment in that regard was nonsense. We have set out this witness' (Romasser's) testimony with some degree of particularity, because upon its probative force the state must rely to sustain this conviction.

Two of the others who participated in this track trailing testified. Their statements were not so comprehensive, direct, or definite as that of the deputy, Romasser. To illustrate: Neither of them examined the Adkins car, or could tell on which side it had a new tire, or heard the conversation between appellant and Romasser. One of these witnesses (Burch) stated that they could not tell whether the car which made the tracks they were following was going east or west; that the track on their left was a diamond tread, while that on the right was smooth. Several persons living on or near the highway leading westward towards appellant's home heard an automobile sometime between 2 and 3 o'clock the night of the fire, going rapidly westward on the road which led towards Elmo. This road, it also appears, was the principal highway between the towns of southern Iowa and the cities of St. Joseph, Maryville, and other Missouri centers of trade. As affording opportunities for the commission of the crime charged without detection, it was shown with much prolixity that the electric wires used to transmit an all-night light current from Maryville to Clearmont had been grounded, or the circuit shortened, at 12:45 o'clock on the night of the fire, at a point on the line $6\frac{1}{2}$ miles southeast of Clearmont, so as to deprive the latter place of light. Appellant lived $8\frac{1}{2}$ miles from where the current was grounded. As evidence of a motive for the commission of the crime, it was shown by the state that appellant was at that time engaged in litigation with one of the owners of the garage in regard to the ownership of an automobile, which the latter had replevined and had taken into his possession, and had same in the garage at the time of the fire, and that appellant felt very bitterly against this party on account of this transaction. The latter's testimony in this regard is as follows:

"I replevied the car, and it was taken by the sheriff under the writ and turned over to me. This was about two months before the fire. But the suit was still pending at the time of the fire. It had not been tried. The car was in the garage at the time of the fire. I had taken the rear axle out, so that it could not be run. After the car was replevied, and when the sheriff was bringing it over, Mr. Adkins rode over from Elmo with me, and he said that it beat hell he was always getting into something, and he said that he was going to fight this. He says, 'Jim, you can't beat me in this trial, and if you do I will find some way out of it.' He said that he thought it was a damned skin game, or something like that, at that time. Some time after this he came over to the garage. He said that he came over to

see if he couldn't settle with me, and he said, 'All the good the court will do is just to bring a man up to find out all about him.' I told him I wouldn't settle with him, and he said, 'Well, I may not win this trial, if it comes to trial; but, by God, it will never do you no good.'

In the view we take of the testimony for the state, it is not necessary, except to contrast it with that of the appellant, to set forth the latter at more length than is necessary to show the most striking contrarieties between the two lines of testimony. The testimony of two of the deputy sheriffs, for the state, was that there was no show or exhibition at Elmo on the night of the fire. On cross-examination it was developed that these statements were based wholly on hearsay. Further than this, 11 witnesses for the defense testified that there was a show at Elmo that night, and that the appellant was at Elmo with his family, and did not leave there for his home until almost 12 o'clock.

Three of the state's witnesses examined the tire tracks on the highway and testified as to the particular wheels on which the tires were which made the tracks they claimed to have traced to appellant's garage. Only one of these witnesses (Romasser) examined the automobile in appellant's garage, and testified that it was equipped so as to make the tracks they claimed to have traced. The other witnesses, although present, made no such examination, and so testified. One of these witnesses stated, a fact apparent without such testimony, that it was impossible, from an examination of a tire track on the highway, to determine the direction in which the machine with which it was equipped was going. Five witnesses for the defense, which included two employés of garages who assisted in putting the tires on the appellant's automobile a short time before the fire, testified that the new tire was on the opposite wheel from that testified to by the state's witnesses.

An epitome of the testimony for the state shows that the garage was burned. That the origin of the fire was incendiary was indicated by the surrounding circumstances. No evidence was adduced to show that an effort was made to trace the incendiary immediately from the garage. A quarter of a mile distant therefrom, on the public highway, tire tracks of an automobile were discovered, which were followed, with frequent obliterations and difficulties in tracing same, to appellant's home. These tracks were not found along the usually traveled and nearest road from Clearmont to the appellant's, but were on the road running from Clearmont to Elmo, and thence in a southerly direction to appellant's home. No tracks were found in the town of Elmo. Beyond this point they were again found on the road from Elmo to appellant's home. No testimony, or any circumstance, indicated the direction in which the automobile was going, the tracks of which

were being followed. There was testimony that there were many automobiles in that section at that time equipped with diamond tread tires, which was the character of one of the tires the track of which was being followed. Romasser stated that the engine of the automobile in appellant's garage was warm when he examined it a short time after 8 o'clock the morning after the fire. The fire occurred at about 3 o'clock a. m. The grounding of the electric light wire, which cut off the light to Clearmont occurred at 12:45 the night of the fire. This interference was discovered the next day to be located 5 or 6 miles south of Clearmont, and 8½ miles from appellant's residence. About 12 o'clock that night, or a little later, he and his family had just reached their home from Elmo.

Appellant manifested anger when called up and his premises were examined by the deputy sheriffs the morning after the fire. They did not inform him as to the purpose of their quest, but, on the contrary, told him they were looking for a stolen automobile. There is no evidence that appellant knew that the fire had occurred until later, when he went to Elmo. Upon being apprised of it he said:

"That accounts for that devilish sheriff getting me out of bed this morning. I suppose he is trying to put that off on me, and if that is his intention I would not give a ——— if he had been in there and burned up."

[1] The condition of this record authorizes a comment upon the course of this trial before proceeding to discuss the vital question which must determine it here. The testimony was permitted to take a wide range. Elementary rules of evidence were ignored, despite the repeated objections of counsel for the defense. Such a course does not make for an effective prosecution, and is a fruitful source of reversals, especially in criminal cases. More than half of the testimony preserved in the bill of exceptions relates to the grounding of the electric wire, a trip of appellant to a town named Skidmore, his visit to a sister in company with one of his nephews the day after the fire, and the whereabouts of the latter before and after the fire. Much other irrelevant testimony is preserved in regard to the replevin suit for an automobile between the appellant and one of the owners of the garage, which was pending at the time of this trial. Whatever may have been the purpose of all of this testimony, appellant's participation in these ulterior acts and transactions did not tend even remotely to connect him with the crime charged, and the record should not have been burdened with it, except as to such testimony as clearly tended to show motive. It may be conjectured, for the evidence does not so indicate, that some sort of a conspiracy to commit the crime was sought to be shown between the appellant and the nephew re-

ferred to: We cannot, however, determine the relevancy of testimony upon conjectures. Certainly there is nothing to show any criminal conspiracy between the two parties.

[2] If it be conceded, of which there is ground for doubt, that there was proof of the corpus delicti, by which we mean, in a case of this character, not merely the burning of the garage, but that it was burned by the willful act of some person criminally responsible therefor, and not by natural or accidental causes (*State v. Cox*, 264 Mo. loc. cit. 412, 175 S. W. 50; *State v. Jones*, 106 Mo. loc. cit. 312, 17 S. W. 366), there remains, to sustain a conviction, the necessity of proof of such incriminatory facts and circumstances as will establish a prima facie case of appellant's guilt. As preliminary to the establishment of this proof, threats made prior to the fire by the accused are permissible, as tending to show motive, malice, and ill will of the person making them against the owner of the property, even though such threats were covert, indirect, or vague. *State v. Jones*, supra; *State v. Crawford*, 99 Mo. 74, 12 S. W. 354; *State v. Melick*, 65 Iowa, 614, 22 S. W. 895. While proof of this character is admissible for the purpose stated, it furnishes, as was stated by Williams, P. J., when sitting as a commissioner—

"one link in the chain of circumstances tending to establish guilt; but mere showing of motive, uncorroborated by other facts and circumstances inconsistent with innocence, is not a sufficient prima facie showing to authorize the submission of defendant's guilt to the jury. It would be a rather unjust and dangerous rule that held that the mere showing of motive and opportunity would overcome the presumption of defendant's innocence and establish, beyond a reasonable doubt, his participation in the criminal act." *State v. Ruckman*, 253 Mo. 499, 161 S. W. 705.

[3] Are the incriminatory facts in this record of such a nature as to authorize the affirmation of this judgment and the placing of the final judicial brand of felony upon this appellant? If so, in what do they consist? First, some automobile tracks on a much traveled highway, shown to have been used by machines equipped with like tires to those used by the appellant; and, second, a warm engine, as testified to by the deputy sheriff. In all seriousness, and, we hope, with a proper regard

for the enforcement of the law and the punishment of criminals, we do not find anything of such a substantial probative character in the testimony concerning these tire tracks as to sustain this conviction. Appellant's connection with them was not even remotely shown; they began at a point distant from the scene of the fire, and were traced, if the same tracks, over a longer and more frequented route than the appellant, if fleeing from the fire, would have been required to travel in order to reach his home. There is no reasonable probability, from the evidence, that the tracks thus traced from Clearmont to Elmo were made at any time prior thereto by the appellant's machine—this on account of the frequency with which this road was used by automobiles. It is not improbable that the tracks leading from Elmo to the appellant's home were those made by his machine in taking his family and nephew home from the show the night of the fire. Further than this, there is nothing to show whether the tracks thus traced and testified to were made by a machine going to or coming from Clearmont. This whole matter, therefore, is left in the greatest uncertainty.

As to the heated engine testified to by the deputy sheriff, if the automobile had been used as the state contends by the appellant in fleeing after the fire, it is reasonably certain that he did not delay at least longer than it would require him to make the trip from Clearmont, via Elmo, to his home. This would have required no more time than an hour, or possibly less, the distance being $8\frac{1}{2}$ miles. It was 8 o'clock, or after, when Romasser stated that he found the engine warm. This was at least four hours after the machine, upon the state's theory, had been used. There is testimony to the effect that an engine will cool in an hour, or an hour and a half, sufficient for repairs to be made upon it. The evidence as to this phase of the case, therefore, is not worthy of credence.

We cannot, and we should not, with a just regard for human liberty, sustain this conviction upon the evidence presented by this record. It proves nothing. The judgment of the trial court is therefore reversed; and it is so ordered.

All concur.

STATE v. LIPPMAN. (No. 21904.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

1. Receiving stolen goods \S 9(1)—Defendant's demurrer to evidence held properly overruled.

In a prosecution for receiving stolen property, defendant's demurrer to the evidence at the conclusion of the state's testimony in chief held properly overruled, where there was substantial evidence offered by the state sufficient to warrant the jury in finding defendant guilty as charged.

2. Criminal law \S 901—Introduction of testimony waives defendant's right to be heard on demurrer to evidence at conclusion of state's case.

In a prosecution for receiving stolen property, defendant's demurrer to the evidence at the conclusion of the state's testimony in chief held properly overruled, where defendant elected to put before the jury his own testimony and that of his witnesses; he thereby waiving his right to be heard on the demurrer, as the jury were then bound to consider the case with reference to all the testimony offered on both sides.

3. Criminal law \S 565—Receiving stolen goods \S 8(3)—Evidence sustaining conviction and showing that property received was stolen within three years prior to information.

In a prosecution for receiving stolen property, held that there was substantial evidence to show that the property in controversy was stolen within three years prior to the filing of the information and to sustain a conviction.

4. Criminal law \S 823(15)—Receiving stolen goods \S 2—Instructions on reasonable doubt held sufficient; jury need not find that goods were feloniously stolen.

In a prosecution for receiving stolen property under Rev. St. 1909, \S 4554, it is not necessary to require the jury to find that the property was feloniously stolen, and instruction thereon was not erroneous for failure to require a finding of the larceny beyond reasonable doubt, when considered in connection with another instruction, correctly stating the law of reasonable doubt.

5. Criminal law \S 822(4)—Instruction not erroneous as assuming facts when construed as a whole.

In a prosecution for receiving stolen goods, an instruction held not erroneous when considered as a whole, as assuming that the property had been stolen.

6. Receiving stolen goods \S 8(4)—Mere fact of possession raises no presumption of knowledge that goods had been stolen.

In a prosecution for receiving stolen goods, it was not error to charge that the mere naked fact of the possession of property raises no presumption that defendant knew that the property had been stolen by another.

Appeal from St. Louis Circuit Court;
Charles B. Davis, Judge.

Benjamin Lippman was convicted of receiving stolen property, and he appeals. Affirmed.

On October 26, 1918, respondent filed in the St. Louis circuit court an information in two counts, charging defendant with grand larceny, and receiving stolen property, with knowledge that it had theretofore been feloniously stolen. At the close of respondent's evidence in chief, the state elected to stand on the second count of said information, which charged defendant with receiving stolen property, for that, on September 11, 1918, at the city of St. Louis, in the state of Missouri, he did buy, receive, and have one horse, one wagon, one set of single harness, and 1,200 burlap bags, all of the value of \$750, of the goods, chattels, and personal property of Max Zimmerman and Nathan Jaffie, with knowledge that the goods aforesaid had lately been feloniously stolen from said Zimmerman and Jaffie. On December 11, 1918, defendant waived formal arraignment, and entered a plea of not guilty. On the last-named date, defendant was put upon his trial, before a jury duly impaneled and sworn to try the cause. On the same day, the jury returned into court the following verdict:

"We, the jury in the above-entitled cause, find the defendant guilty of receiving stolen property, as charged in the second count of the information, and assess the punishment at imprisonment in the penitentiary for two years."

State's Evidence.

The evidence on behalf of the state tended to prove the following facts:

Max Zimmerman lived at 2520 Cora avenue, in St. Louis, Mo., and, with Nathan Jaffie, was engaged in the secondhand bag and burlap business at 2013 Morgan street, in said city, under the name of the "International Bag Company." On September 10, said Zimmerman closed his business about 6 o'clock p. m. At that time, there was a supply of bags and burlap on the second and third floors of said store building, and his horse, harness, and wagon were in the stable. The latter and said store building were connected by a yard. Before leaving said building, Zimmerman locked the doors and windows of same. On September 11, he came to his place of business about 7 o'clock a. m., and found that the entrance door was locked, the lock on the other door broken, and said door open; there being a front door on Morgan street, and four doors on the front part of the building. Upon going into his place of business, he found that a piece of glass had been cut out of the door, enabling the latter to be opened; that about 1,500 bags were gone, of about the value of \$500, and that his horse, harness, and wagon, of

about the value of \$150 or \$175, were missing. About 7:30 o'clock on the morning of September 11, he reported his loss to the Fourth District Police Station. Thereafter he saw his missing property in the stable, at the Central Police Station. He identified the property, and it was turned over to him. He saw Dunn and another man at the said police station and noticed that their clothes were dusty from the dust off the stolen bags.

Cross-examination: On cross-examination, Zimmerman testified that he remembered defendant; that he never saw appellant around or near his place of business; that defendant never worked for him, nor was he connected with their business; that he did not know O'Donnell or Dunn; that when he saw defendant at the police station the latter was dressed in ordinary trousers, a shirt, without collar or vest, and had on button shoes, which were unbuttoned.

Nathan Jaffie testified that he was a partner of Zimmerman, the International Bag Company being a partnership; that they owned the stolen property together; that they handled burlap, jute, and cotton bags; that the burlap bags presented in court were those that had been used for alfalfa meal; that he was out of town at the time of the burglary, and did not know how many bags were taken; that when he returned two days afterwards, the bags had been brought back.

Edward Feeney testified that he was a metropolitan policeman, and connected with police headquarters; that about 6:30 o'clock on the morning of September 11, he, with Officer Thomas Murphy, saw defendant, O'Donnell, and Dunn on Eighteenth street, in the city of St. Louis. At this time said officers were on the east side of the mouth of the alley near O'Fallon street. When first seen, O'Donnell and Dunn drove in from Biddle street with a horse and wagon, the latter being loaded with sacks. Dunn was driving, and they were both sitting on the front seat. They drove north on Eighteenth street from Biddle, and pulled in near Division street, on Eighteenth street, where Dunn got off the wagon, and hitched the horse to a pole on the east side of the street. O'Donnell stayed on the wagon, rolled and lighted a cigarette. Dunn walked north on Eighteenth street to O'Fallon street, and at 1819 O'Fallon he knocked at the door. A man came to the door, and, holding it halfway open, he and Dunn whispered together four or five minutes. Dunn then came down off the steps, and started back the way he had come, a distance of about 300 yards. Dunn had gone about 100 feet from the door, when defendant came out of his residence, wearing a white shirt, trousers, and with his shoes unlaced. He went towards the wagon, and caught up with Dunn. At this time, O'Donnell was still seated on the wagon, smoking

a cigarette. Defendant got on the wagon and turned over the sacks, looking at them several times. Then they had some kind of talk on the wagon. Witness and Murphy were then about 50 feet away. They all three got off the wagon. Defendant gave O'Donnell some United States currency. O'Donnell and Dunn then went to a saloon on the west side of the street, near Division street, and had been in there about three minutes, when witness and Murphy went into the saloon. As they went in, O'Donnell dropped some bills on the floor, and put his foot on them. Officer Murphy pushed him aside, and picked up two \$1 bills. The officers then placed O'Donnell and Dunn under arrest, and took them out the same side door by which they had entered the saloon. Defendant was still seated on the wagon. When he saw the officers coming, he jumped off the wagon and ran toward Eighteenth and Biddle streets, where Officers Stangler and Mitchell caught him. When Feeney and Murphy brought Dunn and O'Donnell to where appellant was, the latter refused to make a statement. Zimmerman was notified that his property was found, came to the police station, and identified the same. The officers examined the sacks on the wagon, and noticed a greenish dust on them. The same kind of dust was on appellant's shoes and trousers. No other bag concern in the city dealt in bags that had a similar dust on them. When Feeney brought the three men in for identification, Dunn said: "Well, you boys sure does give a man a rap."

Cross-examination: Feeney testified, that "rap" meant doing their duty, bringing the men up to see if there was any dust on them the same as on the bags; that appellant never said a word at any time; that the officers above mentioned started out together that morning, and he could see Stangler and Mitchell, about 100 yards away, while he was near the mouth of the alley aforesaid; that he had locked up Dunn and O'Donnell time and again; that on the night in question the officers aforesaid were out on night burglary and larceny duty, their hours being from 11 p. m. to 7 a. m.; that the bills introduced in evidence were the bills exchanged as above set forth, and that appellant took them off a roll of bills. Feeney further testified that he searched O'Donnell at the police station, and found no money on him; that he was never at appellant's home; that he did not say to appellant's wife that he had a previous appointment with him; that he did not take defendant's coat or ask for it on such visit.

Thomas P. Murphy testified that he was a police officer; that he received directions to watch defendant's house, and watched it for two consecutive nights, being so engaged on the morning of the 11th of September, 1918. Murphy's testimony corroborated that of

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Feeney, with the exception as to the time when defendant was taken into custody by Stangler and Mitchell, stating that appellant started across the street and was arrested after he had handed over the money, and before Dunn and O'Donnell went into O'Leary's saloon; that when they came out of the saloon, appellant was in charge of Stangler and Mitchell. Murphy testified that he marked the money given in evidence.

Cross-examination: Murphy testified that after the money was passed, defendant did not get back on the wagon, and did not run across the street; that he could not positively say he saw any money pass, but that it looked like green bills, looked like money; that he searched O'Donnell and Dunn at the police station, and found no money on them; that he did not go to defendant's house after the arrest and talk with his wife.

Albert Stangler testified that he was a police sergeant, and was connected with police headquarters. His testimony corroborates that of Murphy and Feeney. He also testified that when the officers came back from the saloon with Dunn and O'Donnell in their custody defendant, who was still sitting on the wagon, got off the wagon and walked rapidly south on Eighteenth street towards Biddle street where he was arrested at the corner; that Officer Mitchell was now in Omaha, Neb., where he had gone to attend the funeral of his brother.

Cross-examination: Witness said he saw appellant searched at the police station, but saw no roll of money taken from him, and could not say that he had such money.

Defendant's evidence: Jake Cramin testified that he was engaged in the burlap sack business at 1801 Biddle street, at Eighteenth and Biddle, on the morning appellant was arrested; that he came to his store that morning to open up, and saw appellant standing on the corner, waiting for a street car, the same as he had seen him every morning for two or three weeks; that appellant was not running at the time, but standing on the corner; that he saw two officers grab him.

Cross-examination: Witness said defendant had been waiting for a street car five or six minutes before the two officers came over and arrested him; that he did not see two men or the wagon, or see the wagon drive off, nor did he see the other men under arrest; that about 6 o'clock that morning, or a quarter after 6, Officer Murphy came to his door, and asked him if that was his horse and wagon in front of his place; that he answered the wagon and horse were not his, and that he did not know to whom it belonged; that defendant had on a plain coat and wore a black soft hat.

Sophie Lippman testified that she was the wife of the appellant; that they lived at 1819 O'Fallon street; that appellant got up

between 5 and 5:30 o'clock on the morning in question, and left the house at 6 o'clock or a quarter to 6; that Officer Feeney came to the house about 10 minutes after the appellant had left and said to her:

"Where is your husband?" I said, 'He is gone to work.' So he picked up a coat from a chair and he said, 'I found this outside.' I said, 'No; you didn't; you picked it up from the chair.' So he said, 'Whose is that?' I said, 'That is my husband's.' He said, 'Let's see the initials.' I said, 'All right.' He said, 'Whose initials are they?' I said, 'My husband.' He said, 'All right;' and he went away.

"Q. Did he want to take the coat? A. Yes, sir; he wanted to take it along with him, and I said, 'No, that is my husband's coat.'

"Q. And you wouldn't permit him to take the coat? A. No, sir.

"Q. That is all you know about it? A. That is all."

On cross-examination Sophie Lippman stated that her husband was a huckster, and went after his wagon every morning; that she did not remember of a man rapping on their door that morning; that appellant left the house only once that morning; that her husband had a horse and wagon, but she did not know where he kept it; that she thought appellant had on a brown suit that morning; that the coat did not match the trousers; that she did not think he wore a brown suit; that he sometimes wore it to work, but it was not the only suit he had; that he had a coat on, and wore a black hat.

Appellant testified that he was a huckster; that he lived at 1819 O'Fallon street on the morning in question, four doors from the corner of Eighteenth street on the north side; that he did not buy from Dunn or O'Donnell any sacks, horse, or wagon; that he did not give them any money for the property aforesaid; that he was going to take the street car at the corner of Eighteenth street and Biddle street, when he was arrested; that he had 10 cents in money in his possession when arrested.

On cross-examination, appellant stated that that he did not know Dunn until they brought him up after his arrest; that he never saw Dunn at his door, nor joined and walked with Dunn to the wagon; that he never looked over the sacks on the wagon, and did not talk to Dunn or O'Donnell before they were arrested; that he had been waiting six or seven minutes for a car on the Natural Bridge line, when the officers came up; that he was going a couple of miles from home to Magazine street, five blocks north of Cass avenue; that his place of business was one block south of Cass avenue; that he had to take a car to 3100 Magazine street, where he had a horse and wagon; that he had kept this horse and wagon there for about a month, but had once kept them at Twenty-Third and Biddle

streets; that he was supposed to meet his partner, Dutch Gobliger, on that occasion, who lived on the north side of Magazine street, two or three doors from the corner; that he wore no coat that morning.

Joe Gobliger testified that he lived at 3005A Magazine street; that he was the partner of appellant in the huckster business on September 11, 1918; that they were engaged in peddling watermelons with a horse and wagon.

On cross-examination, Gobliger stated that the wagon belonged to both of them; that he kept it at the stable about a block past his home on Magazine street; that they sometimes bought their produce at the Union Market and sometimes from the cars; that appellant usually came out after him in the morning, so that they could go down Cass avenue; that when they went out about 8 o'clock in the morning, he went to appellant's place of business to pick him up; that on the night before the arrest of appellant, appellant called him up, and said he would be at the Gobliger home at 6 o'clock the next morning; that he waited at the stable the next morning, but appellant did not arrive; that he went to appellant's home at about 6:30 or 7 o'clock; that appellant's wife told him her husband had been arrested; that he had been in partnership for over a month with appellant.

The instructions, and such other matters as may be deemed necessary, will be considered later.

On December 31, 1918, sentence was passed upon appellant, and judgment was duly rendered by the court, in conformity with the terms of the verdict.

Defendant, in due time, filed his motion for a new trial, which was overruled, and the cause duly appealed by him to this court.

T. J. Rowe, Jr., and Henry Rowe, both of St. Louis, for appellant.

Frank W. McAllister, Atty. Gen., and Henry B. Hunt, Asst. Atty. Gen., for the State.

RAILEY, C. (after stating the facts as above). 1. Appellant in his brief assigns 11 errors, alleged to have been committed by the trial court, and upon which he asks a reversal of the case. We will consider the assignments of error, in the order presented by appellant in his brief. His contentions are as follows:

"(1) The instruction in the nature of a demurrer to the evidence offered by defendant at the close of the state's case should have been given.

"(a) The evidence is insufficient to show the sale of the property charged in the information to have been stolen to defendant, or that the latter received same or was ever in possession of same.

"(b) The evidence is insufficient to show guilty knowledge on the part of the defendant.

"(c) The evidence fails to show the property was stolen on the day alleged in the information, or at any time within three years prior to the filing thereof, or at any ascertainable time."

[1, 2] We have set out heretofore, very fully, all the substantial evidence offered at the trial in behalf of both the state and appellant. Defendant's demurrer to the evidence at the conclusion of the state's testimony in chief was properly overruled for two reasons: First, because there was substantial evidence offered by the state sufficient to warrant the jury in finding defendant guilty as charged in the second count of information; second, because the appellant, after his demurrer to the evidence was overruled, elected to put before the jury his own testimony, and that of his witnesses. In pursuing this course, he waived his right to be heard on above demurrer, as the jury were then bound to consider the case with reference to all the testimony offered on both sides. *State v. Mann*, 217 S. W. loc. cit. 69; *Lareau v. Lareau*, 208 S. W. loc. cit. 243; *State v. Selleck*, 199 S. W. loc. cit. 130; *Riley v. O'Kelly*, 250 Mo. loc. cit. 660, 157 S. W. 566; *State v. Cummings*, 248 Mo. loc. cit. 518, 154 S. W. 725; *State v. Gow*, 235 Mo. loc. cit. 329, 138 S. W. 648; *State v. Lackey*, 230 Mo. loc. cit. 713, 132 S. W. 602; *State v. Martin*, 230 Mo. loc. cit. 700, 132 S. W. 595. No demurrer to the evidence was filed by appellant at the conclusion of all the testimony in the case; but, even if it had been, we are of the opinion that on the facts heretofore set out the trial court was justified in submitting the case to the jury.

[3] (a) It is insisted by appellant that the evidence fails to show that the property in controversy was stolen within three years prior to the filing of the information herein. Even if it were necessary to show this fact—which we need not now determine—yet there is substantial evidence tending to show that said property was stolen on September 11, 1918. Nathan Jaffie, one of the owners of said property, testified that he was out of the city the week the goods were stolen, and that he got back two days after the bags were returned. Thomas P. Murphy, the police officer, fixes the date as September 11, 1918, when defendant, O'Donnell, and Dunn were in possession of said property near the saloon, and when defendant was arrested by the other two police officers. The facts, in respect to what occurred at the time and place aforesaid are heretofore set out in detail, and need not be repeated again. Feeney testified that he was with Murphy on the morning of September 11, 1918; that he brought defendant, Dunn, and O'Donnell before Zimmerman, who identified the property. Zimmerman testified that on the night of September 10 he locked his place of business, and the next morning

found one panel of glass cut, the premises robbed of bags, and the horse gone. The horse, wagon, and about 1,500 bags were there on the night of the 10th of September, and were gone the next morning. He reported the robbery to the police about 7:30 on the morning of September 11. All this property was identified by Zimmerman, and was returned to him before his partner Jaffie returned. We are of the opinion, that there was substantial evidence before the jury, heretofore set out, tending to show that said property was stolen during the night of September 10, 1918, or during the early morning of September 11, 1918. We further hold that there was substantial evidence before the jury as to all the material facts which were necessary to sustain a conviction of defendant under the second count of information.

2. Defendant's second assignment of error reads as follows:

"Instruction No. 1 is erroneous because it does not require the jury to find and believe that the property mentioned in the information was feloniously stolen, etc., with felonious intent," etc.

As this instruction is criticized in other assignments, we herewith print the same in full:

"First. If, upon consideration of all the testimony in the case, in the light of the court's instructions, you find and believe from the evidence that, at the city of St. Louis and state of Missouri, on or about the 11th day of September, 1918, the property mentioned in the information, to wit, one horse, one wagon, one set of single harness, and 1,200 burlap bags, were stolen, taken, and carried away from Max Zimmerman and Nathan Jaffie by some person or persons other than the defendant, with the intent on the part of the thief or thieves to convert the same to his or their own use, and to permanently deprive the owners of the same without their consent, and that the property so stolen, taken, and carried away was of the value of \$30 or more, and was the property of the said Max Zimmerman and the said Nathan Jaffie, and that after said property had been by some person or persons other than the defendant so stolen, taken, and carried away, the defendant, at the city of St. Louis and state of Missouri, on the 11th day of September, 1918, or at any time within three years next before the filing of the information herein, unlawfully and fraudulently did buy and receive the said property or any part thereof, of the value of \$30 or more, into his possession, and that at the time he did so, he knew it to be stolen property, you will find the defendant guilty of receiving stolen property as charged in the second count of the information, and assess his punishment at imprisonment in the penitentiary for a term of not less than two nor more than five years. And unless you so find the facts to be, you will acquit the defendant."

[4] The second count of the information, under which this case was tried, is based

upon section 4554, R. S. 1909. The requirements of section 4535, R. S. 1909, upon which the first count was based, are not the same as those contained in section 4554, supra. Instruction 1, aforesaid, follows substantially the language of said section 4554, is based upon the evidence in the cause, and is sustained by the previous rulings of this court. *State v. Kosky*, 191 Mo. loc. cit. 5, 17, 90 S. W. 454; *State v. Richmond*, 186 Mo. loc. cit. 87, 88, 84 S. W. 880; *State v. Honig*, 78 Mo. 251. The cases cited and relied upon by appellant are based upon what is known as section 4535, R. S. 1909, relating to grand larceny. In *State v. Richmond*, 186 Mo. loc. cit. 87, 88, 84 S. W. 885, where the defendant was charged with receiving stolen goods, etc., under section 1918, R. S. 1899, which is the same as section 4554, supra, we said:

"The decisions of this court on the requisites of larceny are not applicable."

The foregoing contention of appellant is accordingly overruled.

3. It is claimed under appellant's third assignment that:

"Instruction No. 1 is erroneous because it failed to require the jury to find and believe the larceny of the property, as alleged in the information beyond a reasonable doubt, notwithstanding the separate instruction on reasonable doubt."

Instruction 3 properly declares the law in respect to reasonable doubt, and, when considered in connection with instruction 1, supra, sufficiently covered this subject. *State v. Arnett*, 210 S. W. loc. cit. 84, and cases cited (Mo.); *State v. Robinson*, 236 Mo. loc. cit. 722, 139 S. W. 140; *State v. Wertz*, 191 Mo. 569, loc. cit. 581, 90 S. W. 838.

4. Defendant's fourth assignment of error is as follows:

"Instruction No. 1 is erroneous, in that the following clause therein: 'And after said property had been by some person or persons other than the defendant so stolen, taken, and carried away'—assumes the truth of a controverted fact, to wit, that the property had been stolen."

[5] The instruction complained of is heretofore set out in full. It does not assume that the property was stolen, but required the jury to find said fact before they could convict defendant. If detached portions of an instruction could be complained of, and a reversal asked on account of the giving of same, it would result in reversing nearly all the cases which come to this court. An instruction should be considered as a whole, and, when so considered, if it properly declares the law, should be sustained.

The above contention is absolutely without merit, and is overruled. *State v. Shout*, 263 Mo. loc. cit. 375, 172 S. W. 607; *State v.*

Montgomery, 230 Mo. loc. cit. 671, 182 S. W. 232.

5. Appellant's assignment numbered 5, has been fully considered heretofore, and is likewise without merit. Section 4554, R. S. 1909; State v. Smith, 250 Mo. loc. cit. 364, 157 S. W. 319; State v. Fink, 186 Mo. loc. cit. 56-58, 84 S. W. 921; Kelley's Crim. Law, § 683.

[6] 6. Defendant's sixth assignment, reads as follows:

"It was error for the trial court to instruct the jury, as in instruction 2, that 'the mere naked fact of the possession of said property, if you find that the defendant had such possession, raises no presumption that the defendant knew that said property had been stolen by another; there being no evidence in the case authorizing same.'"

We are at a loss to understand how the giving of this instruction was detrimental to defendant. He asserts that there was no evidence in the case authorizing same. Feeney testified that defendant "got up over the wagon, and he turned the sacks over and looked them over several times. * * * This man (defendant) was seated on the wagon. When he saw us coming, he jumped off the wagon, run towards Eighteenth and Biddle." Dunn and O'Donnell were in the saloon, while defendant was in possession of the team. Feeney is corroborated as to defendant being in possession of the property while Dunn and O'Donnell had gone to the saloon. The trial court very properly instructed the jury, in respect to this matter, as follows:

"The mere naked fact of the possession of said property, if you find that the defendant had such possession, raises no presumption that the defendant knew that said property had been stolen by another."

We apprehend that if said instruction or a similar one had not been given, the defendant would be vigorously clamoring for a reversal of the case on the ground that the jury had not been instructed as to all the issues in the case. Suffice it to say, the foregoing assignment is absolutely without merit.

7. Appellant has made five assignments of error, aside from those heretofore considered, all of which have been fully examined. After carefully reading the evidence and briefs of counsel, we are satisfied that the defendant has had a fair and impartial trial; that correct instructions were given by the court; that no error affecting the rights of defendant were committed by the trial court; that defendant was convicted upon substantial evidence; and that the judgment below should be, and is, affirmed.

WHITE and MOZLEY, CC., concur.

PER CURIAM. The foregoing opinion of RAILEY, C., is hereby adopted as the opinion of the court.
All concur.

STATE v. WOLFE. (No. 21885.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

Physicians and surgeons ⇨ 11(1) — Dental board not authorized to revoke original certificate of registration of dentist and license issued thereon.

Under Laws 1917, p. 258, re-enacting section 5493 of Rev. St. 1909, the Missouri dental board had no power or authority to revoke both the original certificate of registration of a dentist and his license which had been issued thereon, and its attempt to so do was void and of no effect.

Appeal from Criminal Court, Jackson County; Ralph S. Latshaw, Judge.

Morris Russell Wolfe was convicted of practicing dentistry without being legally registered and without having license, and he appeals. Reversed, and defendant discharged.

Defendant, Morris Russell Wolfe, was informed against at the September term, 1918, of the criminal court of Jackson county on a charge of having practiced dentistry without being legally registered and without having a license authorizing him to do so. Upon his plea of not guilty, he was tried on the 7th day of the January term, 1919, and the case was taken under advisement until the 13th day of said January term, when defendant was adjudged guilty as charged and a fine was assessed against him of \$100. It was contended (and still contended) by defendant that the statute under which he was convicted violates section 30, article 2, of the state Constitution, and section 1, article 14, of the Constitution of the United States, both of which said sections provide that "no person shall be deprived of life, liberty or property without due process of law." By reason of said constitutional question the case was appealed to this court.

Frank M. Lowe, of Kansas City, for appellant.

Frank W. McAllister, Atty. Gen., and George V. Berry, Asst. Atty. Gen., for the State.

MOZLEY, C. (after stating the facts as above). The predicate upon which the prosecution is based was arrived at as a result of a hearing upon charges made against defendant before the Missouri dental board, at which hearing said board rendered the following judgment:

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"The Missouri dental board, therefore, on the facts above found and stated, and on motion duly made and seconded and carried, hereby *revokes the original certificate of registration issued to the said Morris Russell Wolfe and the license issued to him by the Missouri dental board under which he is now practicing dentistry, and from henceforth said original certificate of registration and said license to practice dentistry issued to him by this board are hereby revoked and for naught held.*" (Italics ours.)

The case in hand has been determined by our court in banc, speaking through Williamson, J., in the case of the State ex rel. Defendant Herein, Appellant, v. Missouri Dental Board, Respondent, 221 S. W. 70 (not yet [officially] reported). In this case the same constitutional question was raised as in the instant case, viz. that the law under which said board held the investigation of charges against defendant and the law under which he was prosecuted were in violation of the due process provision, article 2, section 30, of the state Constitution, and violative of section 1, article 14, of the Constitution of the United States, in relation to the same subject. The court in banc deemed it unnecessary to pass on said constitutional question, but it did hold that under section 5493 of Rev. St. 1909, as re-enacted by Acts 1917, p. 258, the Missouri dental board had no power or authority to revoke defendant's original certificate of registration and his license which had been issued thereon, and that the attempt of said board to do so was void and of no effect. Since this opinion was handed down it is due to the Attorney General's office to say it agrees that the case will have to be reversed.

We think that it should be thus disposed of, and accordingly reverse the judgment of the lower court and discharge the defendant.

RAILEY and WHITE, CC., concur.

PER CURIAM. The foregoing opinion of MOZLEY, C., is hereby adopted as the opinion of the court.

All concur.

STATE v. HARTMAN. (No. 21863.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

1. Courts \S 231(23)—Constitutional question must be preserved by bill of exceptions.

Where a special appeal has been allowed by a judge of the Supreme Court from the juvenile division of the county court on the ground that a constitutional question was presented in the trial court's failure to give full credit to the public acts of a sister state, the action of the trial court in that respect, as well as a motion to dismiss, being matters of exception, can only be preserved for review in a bill of exceptions.

2. Courts \S 485—Statute providing for transfer of appeals improperly taken does not include special appeals.

Rev. St. 1909, \S 3938, providing that, after a case is sent from a lower court on appeal or writ of error to wrong Court of Appeals or the Supreme Court, such court must forward the transcript to the clerk of the proper Court of Appeals, is limited to appeals granted by the trial court, and does not include special appeals granted by appellate judges under section 2043.

3. Appeal and error \S 359—Statute authorizing appellate judge to grant special appeal does not authorize grant of appeal to another appellate court.

Rev. St. 1909, \S 2043, providing that any judge of the Supreme Court or of either of the Courts of Appeal, respectively, in cases appealable to such courts, upon inspection of a copy of the record may grant an appeal by special order for that purpose, contemplates that the special appeal therein mentioned can be granted only by some judge of the court to which the case is appealable, and the judge of one appellate court has no power to grant a special appeal to some appellate court of which he is not a member.

Appeal from Circuit Court, Jackson County; Allen C. Southern, Judge.

Proceedings by the State under the juvenile court acting to adjudge Aerial Hartman a neglected child. From a judgment declaring such child to be neglected, and disposing of its custody, Luella Hartman appeals. Appeal dismissed.

This is an appeal from the judgment of the juvenile division of the circuit court of Jackson county. A special appeal in this case was granted by one of the judges of this court on May 29, 1919, acting under the authority conferred by section 2043, R. S. 1909. Said statute, among other things, provides as follows:

"Any judge of the Supreme Court or either of the Courts of Appeals, respectively, in cases appealable to said courts, upon inspection of a copy of the record, may grant an appeal by special order for that purpose at any time within one year next after the rendition of the final judgment or decision in the cause," etc.

From appellant's abstract of the record it appears that this is a suit under the Juvenile Court Act (Laws 1911, p. 177 et seq.), and was originally instituted in the juvenile division of the circuit court of Jackson county by the filing therein of a petition which in substance alleged that Aerial Hartman was a neglected child under the age of 17 years, etc., and that she was suffering from the cruelty and depravity of her father. A hearing was had upon this petition, at which hearing the father and also the grandmother (the present appellant) appeared in the cause in person and by attorney.

After a hearing duly had the court entered a judgment. This judgment in substance recites that the court finds that said Aerial Hartman is a neglected child within the meaning of the statutes of the state, and that the said father and grandmother are not proper persons to have the custody of said child. The child is made a ward of the juvenile court of Jackson county. The court further finds that one Gothard E. Henry and his wife are fit and proper persons to have custody of said child for the present, and remands said child to their custody until the further order of the court.

Frans E. Lindquist, of Kansas City, for appellant.
Frank W. McAllister, Atty. Gen., and Henry B. Hunt, Asst. Atty. Gen., for the State.

WILLIAMS, P. J. (after stating the facts as above). I. It was undoubtedly the theory of the learned (now departed) Brother who granted this appeal that a constitutional question was involved which would confer jurisdiction of this appeal upon this court. But an examination of the record now presented for our review fails to present such a question, or in fact any question which would confer jurisdiction upon this court.

Appellant in her brief alleges that the court violated section 1 of article 4 of the Constitution of the United States, in that the court failed to give full faith and credit to the public acts, records, and judicial proceedings of the state of Kansas.

[1] It does not appear that a bill of exceptions were ever made out or filed in the case. There is no bill of exceptions contained in the record before us. The action of the trial court in determining the faith and credit due the alleged proceedings of a court of another state, as well as the motion to dismiss filed in the trial court, were matters of exception, and could only be preserved for our review by being properly preserved in a bill of exceptions. So far as the present record discloses this was not done. It therefore follows that the constitutional question now urged in the brief has not been preserved in such a manner as will confer jurisdiction of this appeal upon this court. "Constitutional questions must not only be timely and properly raised, but, to confer jurisdiction on this court, they must be preserved for review." *Louisiana v. Lang*, 251 Mo. 664, loc. cit. 666, 158 S. W. 1, 2.

II. It is suggested by the learned Attorney General that this cause should be transferred to the Kansas City Court of Appeals under the provisions of section 3938, R. S. 1909, which provides that—

"In the event of any case being sent from a lower court on appeal or writ of error to the wrong Court of Appeals or the Supreme Court, it shall be the duty of the court to which the

case has thus been sent, immediately on such fact coming to its attention, to direct its clerk to forward the transcript therein, with the order of transfer, to the clerk of the proper Court of Appeals," etc.

[2] After carefully considering the language of the above statute, we are of the opinion that the word "appeal" as therein used should be limited in its meaning to an appeal granted by the trial court, and that it does not include special appeals granted by appellate judges under section 2043, R. S. 1909.

[3] We think section 2043, supra, when properly construed, means that the special appeal therein mentioned can be granted only by some judge of the court to which the case is appealable; and that under that statute a judge of one appellate court would have no power or authority to grant a special appeal to some appellate court of which he was not a member. If that be the correct construction (and we think it is), then the Kansas City Court of Appeals has acquired no right to review this case upon the special appeal granted by one of the judges of this court. That being true, the transfer statute (section 3938, supra) can have no application.

It would therefore appear that upon the present record no appellate court has jurisdiction to review this case upon the special appeal heretofore granted. Such being the case, it follows that the special appeal heretofore granted herein should be dismissed.

It is so ordered.
All concur.

DECK et al. v. WOFFORD et al.
(No. 20878.)

(Supreme Court of Missouri, Division No. 1
June 2, 1920.)

1. Judgment \S 713(1)—Opinion in former action not binding as to point not passed upon.

Former opinion in a case between the same parties involving the title to the same land is not binding upon a point not passed upon therein.

2. Executors and administrators \S 175—Right to quarantine relates to mansion on land at husband's death.

The husband must have a mansion at his death, upon his land, in order that widow's quarantine may apply thereto and it is not sufficient that the husband owned the land and the widow had dower therein and subsequently erected a mansion house, and where the mansion was destroyed, remodeling a remaining smokehouse into a dwelling will not suffice.

3. Adverse possession \S 52—Acceptance of deed for dower interest from widow held not to suspend limitations as against prior owner's heirs.

Where defendant's father and predecessor in title went into possession of land, which

his grantor possessed under warranty deed, the subsequent taking by defendant's father of a deed from the widow of a prior owner for her dower interest only did not have the effect to suspend the statute of limitations from running against plaintiffs, heirs of such prior owner.

4. Adverse possession §114(1) — Evidence held to show title by adverse possession.

In an ejectment action, facts found and which the evidence tended to prove held to show that title in the land in question was vested in the defendant, when suit was brought, by adverse possession under the statute of limitations, as pleaded in the answer.

Appeal from Circuit Court, Dent County;
L. B. Woodside, Judge.

Suit in ejectment by Sarah Clementine Deck and others against Ella Wofford and others. Judgment for defendants, new trial denied, and plaintiffs appeal. Affirmed.

Wm. P. Elmer, of Salem, for appellants.

G. O. Dalton and S. R. Miner, both of Salem, for respondents.

SMALL, C. I. This is a suit in ejectment by the plaintiffs, who are the heirs of John B. Smith, deceased, against the defendants, Ella Wofford and husband, John Wofford, to recover possession, rents, and profits and damages for withholding possession of a farm in said Dent county. The answer, in addition to a general denial, claims title by adverse possession under the 30-year and 10-year statutes of limitations.

The reply denied the new matter in the answer, and pleaded *res adjudicata*, in that the matters and things in issue had been determined in favor of the plaintiffs in this case in a cause between the parties theretofore brought by defendants against the plaintiffs in said court, and appealed and decided by the Supreme Court.

At the trial, the plaintiffs introduced in evidence the petition, answer, and reply in the former case, also the decree of the circuit court therein, and the mandate of this court. Said former suit was brought to the April term of said circuit court by Ella Wofford, as plaintiff, against Mary A. Smith, the widow (since deceased) and Sarah Clementine Deck, and the other heirs of John B. Smith, deceased, as defendants. It was a suit to quiet title to the property in question, in which the plaintiff (Ella Wofford) claimed title by adverse possession under the 30-year statute of limitations. The defendants (plaintiffs in this case) appeared in that case, and filed answer denying plaintiffs' title and claiming title as heirs and widow of said John B. Smith. The testimony was heard and the cause was tried on its merits. The circuit court found a verdict, and entered judgment for the plaintiff Ella Wofford.

The defendants appealed to this court. We reversed the judgment of the circuit court on the ground that the statute of limitations, the only question involved in the case, had not run against the defendants, heirs of said Smith, remanded the case to proceed according to the views expressed in our opinion, and our mandate was to that effect. When the cause was returned to the circuit court, it was dismissed by the plaintiff Ella Wofford. Thereupon on June 20, 1917, this suit was brought.

Our opinion in the former case is reported in the 183 S. W. 603. The opinion was by Bond, J., and, including the statement of facts, was as follows:

"This is an action filed by Ella Wofford, the plaintiff, to quiet title to 160 acres of land situated in Dent county, Mo.

"In the year 1856, John B. Smith acquired from the government title to 160 acres of land in Dent county, Mo., upon which he lived with his family until the outbreak of the Civil War. During the war the buildings on the land, except a smokehouse, were destroyed by soldiers, and Smith and his family went over to his uncle's home some distance off. In the following spring they moved again, this time over to one William Sevier's place, about one-half mile away, at which place his widow resided when he was killed in 1864, during the last year of the war.

"About a year after the husband's death his widow, Mary A. Smith, with her family moved back upon the land in question, and stayed there about one year, occupying a smokehouse, the only building remaining on the land, as her residence, at the end of which time she went to Tennessee to live.

"On July 4, 1866, letters testamentary were granted on the estate of the husband, and on October 23, 1872, an order of sale was made, which stated that Thomas W. Howe, the administrator, was to sell the property at a private sale on or before the second Monday in January, 1872, otherwise at a public sale as directed. The land was sold April 3d at a private sale to William Master, which was contrary to the directions of the order of sale. The order of sale misdescribed the lands in suit by reciting that the land was situated in township 34, instead of 33.

"On November 28, 1873, William Master by a warranty deed conveyed the land in controversy to John B. Miller, the father of the present plaintiff. In 1876 Mary A. Smith, the widow of John B. Smith, came back from Tennessee, and wanted to sell to Miller her interest as dower in the place, which interest Miller at first refused to buy, but after her application to the court, to set off her dower, he paid her \$100, in consideration of which she gave him a quitclaim deed, conveying her dower in terms. Though some steps were taken preparatory to the setting off of the widow's interest, no part of the land, so far as the evidence shows, was actually surveyed and set aside as her part; and, after the purchase by Miller, all proceedings in the matter came to an end.

"From that time on Mr. Miller continues with his daughter, the present plaintiff, in the quiet and undisturbed possession of the land up until his death, which occurred about 8 years prior to the filing of this suit. Thereafter the land was held by the plaintiff and her husband under a deed from the father, John B. Miller.

"The defendants in this case are the heirs of John B. Smith, and claim a fee-simple title to the estate, subject to the dower interest of Mary A. Smith.

"The case was tried at the April term of the circuit court of Dent county. A jury was waived by the parties, and the case was submitted to the court for determination, who decreed that plaintiff was the owner in fee simple of the land in controversy.

"II. There is only one question, and that of law, in this case. It is conceded that the plaintiff has not title to the land, unless one created by the statute of limitations while it was held by her father and herself. This for the reason that her father, who deeded the land to the plaintiff, himself held under mesne conveyances from the purchaser at a void sale of the land by the administrator of J. B. Smith, whose title emanated directly from the government, and the defendants are the wife and children of the patentee. Unless, therefore, the defendants, who are the heirs of the patentee of the land, have parted with their title by grant or legal divestiture (neither of which happened) or have lost it by lapse of time and per force the statute of limitations, the decree below for the plaintiff was erroneous.

"On the 27th of November, 1878, the father of the plaintiff for \$100 secured a quitclaim deed, describing the land and reciting, viz.: 'The interest herein conveyed being the dower interest of said Mary Smith in and to said lands as the widow of J. B. Smith, deceased,' which was duly executed by the dowress, Mrs. Smith. Before this happened Mrs. Smith had taken steps for the laying off of her dower, all of which were abandoned upon the sale; hence the effect of her deed was simply to convey her unassigned dower in the lands. Neither she nor her grantees could make their possession adverse to the heirs while the dower estate in the lands were unadmeasured or unassigned. *Melton v. Fitch*, 125 Mo. loc. cit. 290, 28 S. W. 612, and cases cited. * * * For until her death the heirs were not entitled to possession, and could not have ejectment for the land, since no dower was ever set apart therein for the widow, who was alive, and testified at the trial.

"The learned trial court seemed to think that this case was ruled by some of the views expressed in *McClurg v. Turner*, 74 Mo. 45, but that case was wholly different from the present. There the only issue involved related to the quarantine right of a widow to occupy the mansion house and lands belonging thereto, until the assignment of dower under the statute (R. S. 1909, § 386), a statutory privilege distinct from and prior to the right of dower. It was ruled under the particular facts of that case, showing that there was no mansion house on the land at the time of the death of the husband, that his widow could not defend by invoking the quarantine statute against an ejectment by the purchaser of the

land under a valid judgment against her husband, for her statutory right was predicated upon the existence of a mansion house. Moreover, it appeared that the widow had bought the land from a third party, who claimed adversely to the husband. These two aspects of the case only were adverted to in the opinion, and it conceded that the distinct dower rights of the widow would not be affected. The case therefore is wholly without bearing on the defenses in this case that the lands in dispute were acquired by plaintiff's father by a conveyance to him of the dower estate of defendant's mother. That such estates, as well as rights of quarantine, are jealously guarded is ably stated by *Sherwood, J.*, in *Gentry v. Gentry*, 122 Mo. 202, 26 S. W. 1090.

"It is apparent from this glance at the point in judgment in *McClurg v. Turner*, supra, that it does not touch the issue here as to the right of a purchaser (or his grantee, the plaintiff) from the dowress to hold the lands subject thereto adversely to the heirs during the life of the widow.

"That this cannot be done is the settled law of this state. Yet it is the only point presented for review, for plaintiff's father has not been dead 10 years before this suit; hence, if she were claiming in her own rights and not as his grantee, no estate could as yet be created by the statute of limitations. * * *

The facts in evidence in this case were the same as those indicated in our opinion in the former case, with the additional testimony in this case that in 1867 William Masters was in possession, claiming to have purchased the land at tax sale, and so remained until November 28, 1873, when he conveyed the land to John B. Miller, by a warranty deed, as stated by Judge Bond in our former opinion, and that said Miller remained in possession from the time he obtained his warranty deed from Masters until 1904, after which the defendant in this case, Ella Wofford, his daughter, under a deed from him was in possession and claimed to own the property, and that her possession continued from that time until the filing of this suit.

In this case, the court below made the following finding of fact:

"While there is some discrepancy between the testimony of Mrs. Mary A. Smith and Reburn Burris as to where the family was living at the time of the death of John B. Smith, yet it appears to me from her testimony that, while she was 85 years old, yet her mind seems reasonably clear as to the material facts in the case, and where they were living at the time of her husband's death and also in corroboration of her testimony as to the fact as to where she lived at the time of her son's death, and I find that her testimony in regard to these matters is correct and true, and that John B. Smith and family lived on this place as their home at the beginning of the war; that he left and went into the Confederate Army, and was killed during the last year of the war, which would be in the year 1864; that some time during the war the soldiers burned the house, and she left and went to Sinkin, and lived there one winter, which was probably

the winter of 1863 and 1864, and from there she moved about half a mile to William Sevier's, and was living at Sevier's when her husband was killed, and stayed there that summer, and then moved back to the neighborhood of Wick Smith's place, and lived there one winter, and the next summer moved back to the old place, fixed up the smokehouse and lived in it that summer, and the winter following her son James died, and the next spring they moved from there up to widow Chandler's, about a half mile away, and lived there that summer, and in the fall moved on Current river to Thomas Smith's, and remained there until about Christmas, when her brother came for her and her children and took them back to Tennessee.

"That at the time of the death of John R. Smith, neither he nor his family were living on the place in controversy, and there was no dwelling house on the place, and nothing but an old smokehouse, which a year or two afterwards she fixed up and moved into with her children, stayed awhile, and then moved away from the farm."

In the former case there was no finding of fact by the trial court. In this case the court gave the following instruction, to which the plaintiffs excepted:

"The court declares the law to be that the mere right of dower, existing in a widow, does not stop or prevent the running of the statutes of limitations in favor of a stranger who is claiming the title to the same, and it is only when the right of quarantine exists, together with the right of dower, that limitation will not run against the heirs. The right of quarantine exists only when the widow is living in the mansion house at the time of the death of her husband.

"This construction was put upon the statute in the case of McClurg v. Turner, 74 Mo. on page 46, in the opinion of which Judge Henry uses the following language: 'R. S. § 2205. The language of the section implies the occupancy of the premises by the husband at his death. Until dower be assigned, the widow may remain in. This language would be wholly inapplicable to a possession and occupancy of the premises by the widow which commenced after the husband's death. It is not a dower right, but a right given by the statute, to one who has a dower right. The possession she is entitled to * * * is of the mansion house of her husband and plantation, until her dower be assigned.'

"I am unable to find where the ruling in this case has ever been modified or criticized, and under the rule laid down by Judge Henry, unless they were living on the place at the time of Smith's death, limitations would begin to run when Masters took possession of the premises."

The court sitting as a jury, found a verdict, and rendered judgment in favor of the defendants. After unsuccessfully moving for a new trial, the plaintiffs appealed to this court.

II. Our conclusion, when the cause was here before, that the statute of limitations

had not run against the plaintiffs in this case, who were the defendants in that, was seemingly based solely upon the assumption of fact that John B. Miller went into possession, and held and claimed the land simply as the grantee of the dower interest of Mary A. Smith, which she attempted to convey to him by her deed of the 27th of November, 1878, and as said dower had never been admeasured, and the widow was still living, there was no adverse possession against the heirs of John B. Smith, and therefore whether or not there was a mansion house on the property at the time of his death was not necessary to determine and was not determined.

[1] III. The substance of the instruction given in this case, and now complained of by appellants, is that, unless Smith's family was "living on the place" at the time of Smith's death, limitations would begin to run against his heirs, when Masters took possession of the premises. The court found as a fact that at the time Smith died his family were not living on the premises, because the mansion house had been burned down and they had moved away. There is no statement in the finding of fact when Masters took possession, but there was evidence that it was before his conveyance by warranty deed to John B. Miller, which was on November 28, 1873.

The lower court, therefore, on the trial of this case, after it was remanded by us, decided in favor of the defendant Ella Wofford, because it found as a fact that there was no mansion house on the property when Smith was killed, and therefore the widow had no right of quarantine, and the statute of limitations consequently commenced to run against Smith's heirs in favor of Ella Wofford's predecessors in title and possession long prior to the date Mary A. Smith transferred her dower to John B. Miller, and thereafter continued to run in favor of said Miller and his grantee, Ella Wofford. We did not pass upon that question when the case was here before. Consequently our former opinion is not binding upon that point. Keith v. Keith, 97 Mo. loc. cit. 231, 10 S. W. 597; Mangold v. Bacon, 237 Mo. loc. cit. 514, 141 S. W. 650.

[2] IV. The quotation from McClurg v. Turner, 74 Mo. 45, in the instruction given by the court in this case, shows that under the statute in relation to the widow's quarantine there must be a mansion house of the husband at the time of his death, upon or belonging to the land in which such quarantine is claimed. If there is no such mansion house at that time, there is no quarantine. It is not sufficient that the land belonged to the husband at the time of his death, and the widow had dower therein and a mansion house was subsequently erected thereon by the widow. In this construction of the statute we concur.

In the case at bar, the mansion house in which Mary A. Smith's husband had resided burned down some time before his death, and his wife and family had left the place. Neither he nor his family lived there at the time of his death. Mere temporary absence of the husband from home or the mansion house at the time of his death would not be held to deprive the widow of her right of quarantine, but, if before the death of the husband the mansion house is destroyed by fire or sword or flood or cyclone or otherwise, and is not rebuilt or in existence at the time of his death, it cannot be said to be his mansion house at the time of his death, and hence the widow would have no quarantine therein or in the plantation or messuages belonging thereto, for the obvious reason that there would be none such in existence.

V. In this case, however, it is contended by appellants' learned counsel that the smokehouse was not destroyed, and that after Mr. Smith's death, his family returned and lived in the smokehouse, which they refitted sufficiently to be habitable, and that subsequently it was "built onto" by Ella Wofford, or her predecessors in title, and used as a dwelling or mansion house. But we hold that a smokehouse or granary or a stable or other out house on the property at and before the husband's death, but never used as a dwelling by the husband or his family or any other persons in his lifetime, is not a mansion house of the husband at the time of his death within the meaning of the statute, although it may afterwards be repaired or made habitable and used as a residence by his widow and family. The building of a mansion house or transformation of smokehouse into a mansion house on the property by the widow after her husband's death would not be a mansion house of the husband at the time of his death. *McClurg v. Turner*, supra; *Givens v. Ott*, 222 Mo. 395, 121 S. W. 23.

We hold, therefore, that under the finding of facts and the evidence in this case there was no mansion house upon or connected with the property in question, when Mr. Smith died, and therefore his widow had no right of quarantine, but simply her right of dower therein.

[3] VI. There being evidence that Ella Wofford's father, John B. Miller, her predecessor in title in 1873, went into possession and claimed to own the property under warranty deed from Masters, who was then in possession claiming title, the subsequent taking of a deed from Mary A. Smith by said John B. Miller in 1878 of her dower interest only, did not have the effect to suspend the statute of limitations from running against the plaintiffs in this case, the heirs of John B. Smith. *Mather v. Walsh*, 107 Mo. 121, 17 S. W. 755.

The land in question not being at the time

of her husband's death in any way connected with his mansion house, Mary A. Smith had no right of possession as against the heirs if her husband, but they were entitled to the possession thereof, and her conveyance in 1878 of her dower right did not confer upon her grantee, John B. Miller, the right to the possession of said land. If said Miller, at the time he took such conveyance, was in adverse possession, under color of title, and thereafter continued in such possession, claiming the ownership of the property, and not simply Mrs. Smith's right of dower, his possession was adverse to the heirs of John B. Smith, and the statute of limitations ran against them. Indeed, in 1878, a transfer by a widow of her unassigned dower rights in property not connected with her husband's mansion house at the time of his death was a nullity, and conveyed nothing to the grantee, unless he was the terre-tenant, in which event such transfer operated simply as a release of dower. This subject was fully considered in *Sell v. McAnaw*, 138 Mo. loc. cit. 273, 274, 39 S. W. 779, 780, where this court, per Macfarlane, J., said:

"There is no evidence whatever that the disputed land was a part of the plantation on which was situated the mansion house of the deceased husband. The home of Crohan at his death was in another county, and this land was not used in any manner in connection with it. The widow of Crohan was not therefore entitled to the possession and use of it until her dower was assigned.

"Section 2206 (R. S. 1879) only gave her the right to remain in and enjoy the mansion house of her husband, and the 'messuages and plantation thereto belonging' until the assignment of her dower. It gives her no right to the possession of all the land of her deceased husband in which she had a dower right. Her conveyance of the land did not therefore confer upon her grantee the right to possession. She could convey no greater right than she herself possessed.

"(3) Whatever interest Crohan had in the land descended to his heirs subject to the widow's right of dower. If he was entitled to the possession, and as between the parties to this suit who claim under him we must assume that he was, the right on his death vested in his heirs.

"Until the revision of 1889 (section 4514), a widow could not, at law, before assignment, alienate her dower right by conveyance or assignment to one holding no interest in the land. She could release her claim of dower to the terre-tenant so as to bar herself, but she could invest no other person with the legal title thereto, until it had been assigned. 2 Scr. on Dower, § 42; 5 Cyclo. of Law, 906, and cases cited in each; *Brawford v. Wolfe*, 103 Mo. 400.

"It follows that the deed from the widow to Smith passed no legal right of title in the land to the grantee. Defendants in the use they made of the land can only be treated as trespassers, unless they have thereby acquired the title thereto by adverse possession.

"(4) It cannot be said that the acts of ownership exercised over the land by defendants were permissive, and not adverse to the claim of the heirs. The widow had no right she could confer upon her grantee. The deed conferred no right to possession, or to go upon the land and cut and remove timber therefrom. Defendants' acts of ownership were consequently hostile to the rights of plaintiffs."

In *Givens v. Ott*, 222 Mo. 395, 121 S. W. 23, while this court was evenly divided on the question whether there was a mansion house in that case within the meaning of the statute, there was no division on the proposition laid down in the opinion of Woodson, J., that, if there was no mansion house connected with the property, there was no quarantine and no right to possession on the part of the widow simply by reason of her unassigned dower, and that in such case, if the widow takes possession, under a deed from a third party giving her color of title to land in which she has such unassigned dower but no right of quarantine, the statute of limitations runs in her favor against the heirs from the date of such deed.

[4] We hold, therefore, that under the facts found and which the evidence tended to prove, in the case at bar the title to the land in question was vested in the defendant Ella Wofford at the time this suit was brought by adverse possession under the statutes of limitations pleaded in her answer.

There was no error in the rulings of the court below, and its judgment is affirmed.

BROWN and RAGLAND, CO., concur.

PER CURIAM. The foregoing opinion of SMALL, C., is adopted as the opinion of the court.

All concur except WOODSON, J., absent.

GOODE, J., concurs in separate opinion, in which BLAIR, P. J., concurs.

GOODE, J. I concur in the result of this case for the reason that there was evidence to support the finding of the court below; that neither John B. Smith nor his family was living on the premises in controversy when he died.

BLAIR, P. J., concurs herein.

STATE v. CANTON. (No. 21918.)

(Supreme Court of Missouri, Division No. 2
June 4, 1920.)

1. Homicide §114—Instruction denying availability of self-defense, if defendant voluntarily engaged in difficulty, held erroneous.

An instruction that, if defendant "voluntarily and of his own free will engaged in"

the difficulty, self-defense was not available, is erroneous, since, if defendant voluntarily engaged in the fight in self-defense, or if, without inducing the quarrel, he was assaulted, and voluntarily defended himself, and necessarily killed his assailant to save himself from death or great bodily harm, his self-defense was complete.

2. Criminal law §829(1) — Refusal of instructions upon matters covered by others not error.

In a criminal case, it is not error to refuse instructions on matters sufficiently covered by other instructions given.

3. Homicide §389(4)—Evidence held to require instruction on manslaughter in fourth degree.

In a murder prosecution, evidence concerning an assault made upon defendant by deceased held to require an instruction on manslaughter in the fourth degree, which the court erroneously failed to give.

4. Homicide §78—Facts showing manslaughter in the second degree.

If defendant was assaulted by deceased, and struck the fatal blow with a club deceased had dropped, without design to inflict death and in a heat of passion, he would be guilty of manslaughter in the second degree, under Rev. St. 1909, § 4460.

Appeal from Circuit Court, Boone County; David H. Harris, Judge.

Reed Canton was convicted of murder in the second degree, and he appeals. Reversed and remanded.

Frank W. McAllister, Atty. Gen., and Lewis Hord Cook, Sp. Asst. Atty. Gen., for the State.

WHITE, C. Information was filed in the Boone county circuit court, charging defendant with murder in the first degree, in that he killed one O. B. Diggs. The defendant, Reed Canton, was a colored boy 19 years of age, and was a first cousin to O. B. Diggs, the boy who was killed. The homicide took place Saturday night, April 12, 1919.

At that time an entertainment and supper for returned soldiers was held by the colored people at Sugar Grove church. Some exercises were performed in the church, and supper was served in a lodge hall a short distance away. About midnight, while a number of persons were in the hall, busy over the supper, the Diggs boy came rushing into the hall with a rock in his hand, laboring under some excitement, and exclaiming that he was not going to let anybody run over him. One witness testified that he was outside when the "rucus" began, and that Canton chased Diggs into the hall. Almost immediately Reed "came busting in the door," swearing and exclaiming that he was going to kill Diggs. Rev. O. F. Nelson, who seemed to have charge of the ceremonies, took hold of

Canton and pushed him out of the door. Canton immediately knocked on the door with a stick of wood and asked to come in. Nelson told him he could not come in unless he would behave himself, which he promised to do. He then came in with a knife in his hand, which Nelson induced him to close and put back in his pocket. Presently Diggs disappeared from the room, and Canton soon followed him. The evidence up to that point is pretty consistent, and clearly shows about what happened inside the hall.

In a short time the two were engaged in a fight outside the hall. One witness saw them fighting, and "kind of jumping around one another," and Diggs had a stick of some kind in his hand. When on the outside, whether Canton attacked Diggs or Diggs attacked Canton is not clear from the evidence. There was evidence tending to show that as soon as Canton appeared outside Diggs struck him with a stone and staggered him up against the wall and then rushed upon Canton. At some time during the difficulty, the evidence tends to show, Diggs cut Canton's arm with a knife and assaulted him with a stick. Whether he threw the stick at him, or struck at him in such way as to let the stick slip from his hand, is not clear; at any rate Canton seized this same stick, which was a 2 x 4 scantling about three feet long, and dealt a blow which crushed Diggs' skull. Diggs was taken to the home of his grandfather, two miles away, where he died about 8 o'clock the next morning.

The boys had been friends; they were raised together. It was shown that each of them had made violent threats to kill the other. Canton explained that Diggs threatened him, and he threatened back, without meaning it at all. It also seems, from the way the threats are stated by some of the witnesses, that, although they entertained ill will toward each other, neither of them intended literally to carry out his destructive threat. About a week before the homicide the boys had a quarrel at a dance, at which time they exchanged the amenities of mutual threats. At that time Diggs said he was going to break off his knife in Canton before he left the party. On the night of the homicide, after Canton had struck Diggs down, some one said, "Now, you see what you have done," and he replied, "I have done what I wanted to do," and immediately left without waiting to see the effect of his blow.

Several witnesses were introduced by the defendant to prove that the defendant possessed a good character as a quiet and peaceable citizen, and that Diggs had a bad reputation as being quarrelsome. On the other hand, the state introduced several witnesses to prove the reverse of these conclusions. The jury returned a verdict of guilty of murder in the second degree, and assessed defendant's punishment at imprisonment in the penitentiary for a term of 10 years.

222 S.W.—29

[1] I. Error is assigned, in the motion for new trial, to instruction No. 5, given by the court on its own motion, embodying the court's theory of self-defense. This instruction, after stating in a general way the theory on which they might acquit the defendant on the ground of self-defense, uses this expression:

"The right of self-defense does not imply the right of attack, and it will not avail in any case where the difficulty is sought for and induced by the party by any willful act of his, or *where he voluntarily and of his own free will enters into it.*"

The instruction then proceeds to apply the principle to this case, as follows:

"So, if you believe from the evidence in this case that the defendant, Canton, voluntarily sought or invited the difficulty in which Diggs lost his life, or that he (defendant) provoked or commenced or brought it on by any willful act of his own, or that he *voluntarily and of his own free will engaged in it*, then, in that case, you are not authorized to acquit him on the ground of self-defense; and this is true, no matter how violent defendant's passion became, or how hard soever he was pressed, or how imminent his peril became, during the progress of the affray. In determining who provoked or commenced the difficulty, or made the first assault, you may and should take into consideration all the facts and circumstances in evidence before you."

This instruction denies to the defendant the right of self-defense, and makes self-defense unavailable to him if he "voluntarily and of his own free will engaged in" the difficulty, without regard to what motive induced him to engage in it, or at what stage of the proceeding his action became voluntary. If he engaged in a difficulty with a felonious purpose, of course, he could not be acquitted on the ground of self-defense; but if he engaged in it voluntarily, for some unlawful purpose short of an intention to commit a felony, it might, under the circumstances, reduce his offense to manslaughter. If he voluntarily engaged in it in pure self-defense—that is, if without inducing the quarrel he was assaulted, and he "voluntarily" defended himself, and in such defense necessarily killed his assailant in order to save himself from death or great bodily harm—his self-defense was complete. *State v. Eastham*, 240 Mo. loc. cit. 250, 251, 144 S. W. 492; *State v. Rapp*, 142 Mo. 447, 44 S. W. 270; *State v. Partlow*, 90 Mo. 608, 4 S. W. 14, 59 Am. Rep. 31; *State v. Feeley*, 194 Mo. 321, 92 S. W. 663, 3 L. R. A. (N. S.) 351, 112 Am. St. Rep. 511; *State v. Burns*, 213 S. W. loc. cit. 116, 117; *State v. Hopkins*, 213 S. W. 126, loc. cit. 128; *State v. Reeves*, 195 S. W. loc. cit. 1029. In each of the above cases it is very distinctly held that an instruction of the kind set out above takes away the defendant's right of self-defense altogether.

[2-4] II. Error is assigned also in the motion for new trial to the action of the court in refusing several instructions asked by the defendant. All these are covered by the instructions given by the court, except an instruction on manslaughter in the fourth degree. It is necessary to determine whether such an instruction should be given on a retrial of the case under the evidence as presented. One gathers from the reading of the evidence that Canton was the aggressor and Diggs was endeavoring to keep out of his way. Although Diggs loaded himself with a stone, a knife, and a club, it may fairly be concluded that all that display was mere bluff, a bravado induced by fear rather than by criminal intent; possibly that was the view taken of the evidence by the jury. Yet there is positive evidence of his using those weapons, and the jury should have been instructed on the significance of such demonstrations.

The boys both had indulged in extravagant threats. This, however, should not be taken too seriously. When Diggs threatened to break his knife off in Canton, a week before the affray, and when Canton chased Diggs in the hall and said that he would kill him, these expressions might have been negro "big talk," that meant much less than the murderous purpose the words would signify. The people in the hall, who interfered between the boys evidently did not take them seriously. They took no steps which would be necessary, were the two boys understood to be intent upon killing each other. "Brother Nelson" and the others merely requested Canton to promise that he would behave. Their attention was not even diverted from the management of the festival on which they were engaged. They apparently almost lost sight of the boys immediately after their first entrance into the hall until the fight occurred outside.

What was the extent of Canton's criminal purpose, if any? He rushed into the hall after some "rucus" with Diggs. Diggs had a rock in his hand, but Canton had nothing—had no weapon of any kind at that time. This may have been a mere boyish scrap, without extreme anger, which involved a felonious purpose. Canton was put out, and immediately knocked on the door and secured admittance, entering with the knife in his hand. On the persuasion of "Brother Nel-

son," he quite submissively put up his knife and promised to behave himself. So far as outward manifestation went, his combative impulse had subsided. The next thing which occurred after that was when both boys had slipped out of doors; Diggs going first. There is evidence tending to show that immediately Diggs made a rush at Canton, hit him with a stone, assaulted him with a knife, and struck at him with a club. Just the precise sequence of these events is not clear. There is evidence tending to show that all these acts were performed before Canton made any further hostile demonstration; then he picked up the stick or club, which had slipped from Diggs' hand, and struck Diggs down with it.

One might reasonably conclude from this state of things that Canton struck the fatal blow with the cruel and unusual instrument he used, without design to inflict death. In that case he would be guilty of manslaughter in the second degree under section 4460. State v. Luke, 104 Mo. 563, 16 S. W. 242; State v. Jennings, 184 Mo. 277, 35 S. W. 614; State v. Wilson, 98 Mo. 440, 11 S. W. 985. However, there was no error assigned in the motion for new trial that the court did not fully instruct, or failed to instruct on manslaughter in the second degree.

It is possible to infer from the evidence that Canton really intended to "behave" when he put up his knife at the request of the preacher, cooled down, and intended to carry the difficulty no further; that when he went out of doors he was assaulted, without any additional aggressive action on his part by Diggs; and that he struck Diggs down in a sudden heat of passion aroused by that assault. In that case an instruction on manslaughter in the fourth degree should have been given.

The appellant has filed no brief in this court, but the errors above noted are the only ones deserving consideration mentioned in the motion for new trial.

The judgment is reversed, and the cause remanded.

RAILEY and MOZLEY, CC., concur.

PER CURIAM. The foregoing opinion by WHITE, C., is adopted as the opinion of the court.

All the Judges concur: WALKER, in result.

MOONEYHAM v. MYNATT et al.
(No. 20596.)(Supreme Court of Missouri, Division No. 1.
June 2, 1920.)**1. Appeal and error** \S 1011(1)—Findings on conflicting evidence conclusive.

In suit to quiet title, where the case is one at law and is tried without a jury, the findings of trial court on conflicting evidence is conclusive on appeal.

2. Judgment \S 671—Unknown heirs represented by counsel bound by finding as to heirs.

In suit to quiet title under Rev. St. 1909, \S 2535, against unknown heirs of certain persons, where court under section 1776 appointed counsel to represent heirs, if any, who did not appear, who filed answer for any such heirs, but did not appeal from the judgment, court's finding as to who were the only heirs was binding on any such unknown heirs.

3. Appeal and error \S 877(2) — Defendants, not heirs of decedent, cannot complain of finding as to his heirs.

In suit to quiet title under Rev. St. 1909, \S 2535, against unknown heirs of certain persons, where court under section 1776 appointed counsel to represent heirs, if any, who did not appear, who filed answer for any such heirs, but did not appeal from the judgment, defendants, other than heirs of such persons, claiming land by adverse possession, could not complain of court's findings as to who were the only heirs of such persons.

Appeal from Circuit Court, Jasper County; Joseph D. Perkins, Judge.

Suit by R. A. Mooneyham against Fannie Mynatt and others. Judgment for defendant, Stubblefield, and the other defendants appeal. Affirmed.

J. H. & W. E. Bailey, of Carthage, for appellants.

John H. Crain, of Ft. Scott, Kan., for respondent Stubblefield.

BLAIR, P. J. This is a suit under section 2535, R. S. 1909, to quiet title to Jasper county land. After the answers were in the original plaintiff withdrew, and the case proceeded to judgment upon the conflicting claims of parties defendant. Appellants are the heirs of A. J. Osborn, who, they contend, acquired title by adverse possession. Respondent and his sister are nephew and niece of George and John Prigmore, who had the record title and died without issue. Respondent had acquired his sister's interest by deed. Respondent had appeared and answered in response to notice to the unknown heirs of George and John Prigmore. The case was at law, and was tried without a jury. No declarations of law were asked or given. The principal question presented is whether there is any correct legal theory, supported by substantial evidence, justifying the judgment.

ment. *Thompson v. Stilwell*, 253 Mo. loc. cit. 94, 161 S. W. 681.

[1] There was evidence tending to prove that A. J. Osborn had possession of the land for the requisite period, and some evidence that he claimed ownership of it. There was other evidence tending to prove that Osborn took possession of the land to care for it for the benefit of the heirs of George and John Prigmore and in recognition of their title. The trial court settled the conflict against appellants, and its finding, in the circumstances, is conclusive. *Thompson v. Stilwell*, supra, 253 Mo. loc. cit. 96, 161 S. W. 681.

[2, 3] It is contended that evidence offered to prove that respondent and his sister are the only surviving heirs of George and John Prigmore is not sufficient to justify the court's finding that they were so. The suit was brought against the unknown heirs of George and John Prigmore. The trial court appointed counsel (section 1776, R. S. 1909) to represent such of these, if any, as did not appear. Answer was filed for them. It is not suggested there was any defect in the notice. The issue whether respondent and his sister were the only heirs was tried, and the trial court sustained respondent's contention. No appeal by the unknown heirs was taken. This finding binds them. Appellants are in no position to question it.

The judgment is affirmed.

All concur, except **WOODSON, J.**, absent.

ANDERSON v. COLLINS.(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)**1. Wills** \S 58(2)—Oral agreements to devise must be clearly established.

Oral agreements to devise land must be established by clear and convincing proof; loose remarks and statements of legal conclusions not sufficing under the law to establish such contracts.

2. Wills \S 58(2)—Evidence held insufficient to prove oral agreement to devise.

Evidence held insufficient to show any oral contract by an aged invalid to devise to plaintiff in return for care by plaintiff and his wife certain realty subsequently deeded by the invalid to defendant.

3. Quieting title \S 51—Court properly entered judgment for defendant, who showed best title.

In an action to quiet title, under Rev. St. 1909, \S 2535, the court properly entered judgment for defendant, who showed the best title as between the parties, plaintiff claiming under an oral contract to devise not sufficiently established, and defendant claiming under a warranty deed from the alleged contractor with plaintiff.

Appeal from Circuit Court, Pemiscot County; Sterling H. McCarty, Judge.

Suit by Richard Anderson against W. M. Collins. From decree for defendant, plaintiff appeals. Affirmed.

On August 11, 1917, plaintiff filed in the circuit court of Pemiscot county, Mo., a petition in two counts. The first is a proceeding in equity in which it is alleged that in November, 1915, he made a contract with William Harris, who was then the owner of lot 1 in block 18 in Hunter's addition to the city of Caruthersville, in Pemiscot county, Mo., by the terms of which plaintiff was to maintain, take care of, and support said William Harris during his natural life, and in consideration thereof said Harris promised plaintiff to will him the house and lot where Harris resided and all other property owned by said Harris at the time of his death; that, pursuant to said contract, plaintiff and his wife moved to the Harris property aforesaid on November 29, 1915, and from that date until the _____ day of June, 1916, he maintained, took care of, and supported said William Harris; that on November 29, 1915, said Harris executed a will devising and bequeathing to plaintiff all his property, both real and personal; that on the _____ day of June, 1916, said Harris died, and his will aforesaid was probated in Pemiscot county aforesaid; that about June 1, 1916, one J. L. Smith, for the consideration of \$1, and the further consideration of \$5, to be paid by him weekly to said William Harris during his natural life, caused said Harris to execute to him a deed in writing conveying to said Smith the real estate aforesaid; that said instrument recites, as a further consideration, that said Smith was to comfortably support and maintain said Harris during his natural life; that Smith thereupon moved said Harris from the property aforesaid where he was living with plaintiff to an out-building on the premises of said Smith, at which place said Harris died within two or three weeks after said removal; that said change was made over the protest of this plaintiff; that up to the time of said removal plaintiff fully performed all of the conditions of his contract aforesaid, and would have performed the same in full but for the removal of said Harris as aforesaid; that, when plaintiff took charge of said Harris, the latter was an invalid, unable to care for himself, and when he executed said deed to Smith he was in a weak mental and physical condition, and was practically on his death-bed; that said Smith, when he received the deed from Harris aforesaid, had notice or knowledge of the contract existing between plaintiff and said Harris; that said Smith, for the purpose of cheating and defrauding plaintiff out of the benefits of his contract, induced said Harris to leave plaintiff's residence and make the deed to him, which was

a fraud on plaintiff's rights; that the deed from Harris to Smith was duly recorded in said county in Book 59, page 319; that on July 29, 1916, said Smith and wife conveyed the real estate aforesaid to defendant, W. M. Collins, whose deed is also recorded in said county in Book 59 at page 386.

Said count concludes with a prayer asking that plaintiff be declared the owner of said real estate; that defendant has no interest therein; that the deed from Harris to Smith aforesaid and from the latter and wife to defendant Collins be canceled, for naught held, and for general relief.

The second count of said petition alleges that plaintiff is the owner of the real estate aforesaid; that defendant claims some right, title, estate, and interest in and to said real estate adverse and prejudicial to plaintiff.

This count concludes with a prayer in which the court is asked to try, ascertain, and determine the rights, title, and interests of the parties, plaintiff and defendant, respectively, in and to said real estate, and to define by its judgment and decree the rights, titles, and interests of plaintiff and defendant severally in said real estate, and that, if defendant is found to have no interest in same, he be enjoined from setting up any claim to same, and for general relief.

The court, in its decree, dismissed plaintiff's bill as to the first count of petition, and under the second count decreed that defendant is the owner of said real estate and that plaintiff has no interest therein.

The evidence and rulings of the court will be considered, as far as necessary, in the opinion.

Plaintiff filed his motions for a new trial and in arrest of judgment. Both motions were overruled, and the cause was appealed by him to this court.

Phillips & Brewer, for appellant.

McKay & Medling and Ward & Reeves, for respondent.

RAILEY, C. (after stating the facts as above). I. The oral contract relied upon by appellant as a basis of recovery is heretofore set out, as disclosed by the first count of petition, and need not be repeated. This is not a suit for specific performance of the alleged oral agreement; for it appears from the record that on November 29, 1915, said Wm. Harris executed a will conveying all the real estate and personal property which he owned at the time of his death to this plaintiff, after the funeral expenses were paid. The above will, was duly probated in Pemiscot County aforesaid on October 25, 1916. The real question, therefore, presented for our consideration is whether or not such an oral contract was made between plaintiff and testator in November, 1915, as precluded the latter from conveying the real estate in controversy to J. L. Smith on June 10, 1916, by the

warranty deed to the latter recorded in said county on June 12, 1916; in other words, was such an oral contract shown at the trial as would have warranted the chancellor in specifically enforcing said agreement had said Harris, or his legal representative, refused to convey said property to plaintiff under the will aforesaid?

In the well-considered case of *Forrister v. Sullivan*, 231 Mo. loc. cit. 373, 374, 132 S. W. 730, Judge Lamm, speaking for the other division of our court, laid down the following principles which should govern in a case of this character:

"(a) The conversations relied on as proof of the contract should not be too ancient, loose, and casual.

"(b) The contract should be fair and just, not a fetching, biting, or otherwise unconscionable bargain, regard being had to the condition in life of the parties.

"(c) The terms of the contract should be so clear and definite as to free it from ambiguity and leave no doubt in certainty of terms or intentment.

"(d) The proof must show not only that some contract was made, but that the contract counted on in the bill was made.

"(e) Performance must be shown as far as practicable. It must be unequivocal. The acts relied on to show performance must in their nature be referable alone to the very contract sought to be performed; for it is only thereby, because of the benefits arising to the promisee, that his conscience and that of those claiming under him are bound. In a word, the acts relied on to show performance must point unerringly to the contract in suit and to none other. There must be an absence of doubt or equivocation throughout the whole case in pleadings and proof. From end to end it must be made out beyond a reasonable doubt and the state of the proof must bring the case within the reason of the exception to the statute, viz. that not to perform in kind, or in sort, would itself be a fraud.

"(f) The contract must be grounded on an adequate and legal consideration and it should be made clear to the mind of the chancellor that the law could not give adequate and perfect relief in damages, thereby attaining the full end and justice of the case and reaching the whole mischief; hence the interference of equity is necessary to do rounded justice.

"(g) A mere testamentary disposition to devise by will or a mere benevolent disposition to convey by deed, by way of gift or as a reward for services not plainly provoked by and bottomed on the contract in suit, will not take the case out of the statute."

[1] The principles of law enunciated in the above quotation are recognized as sound in this state. *McCune v. Graves*, 273 Mo. loc. cit. 589, 201 S. W. 894; *Hersman v. Hersman*, 253 Mo. 175, 186, 161 S. W. 800; *Walker v. Bohannon*, 243 Mo. 119, 136, 137, 147 S. W. 1024; *Oliver v. Johnson*, 238 Mo. loc. cit. 373, 142 S. W. 274; *Collins v. Harrell*, 219 Mo. 301, 118 S. W. 342, et seq. It must also be kept in mind that oral agreements of this

character must be established by clear and convincing proof. Loose remarks, and statements of legal conclusions, will not suffice under the law to establish such contracts. *State ex rel. v. Brewing Co.*, 270 Mo. loc. cit. 108, 109, 192 S. W. 1022, L. R. A. 1917D, 1023; *State ex rel. v. Railroad*, 240 Mo. loc. cit. 50, 144 S. W. 1088; *Gibson v. Railroad*, 225 Mo. loc. cit. 482, 125 S. W. 453; *Shohoney v. Railroad*, 223 Mo. loc. cit. 671, 122 S. W. 1025; *Vogeler v. Punch*, 205 Mo. loc. cit. 576, 577, 103 S. W. 1001; *Mallinckrodt Chemical Works v. Nemnich*, 169 Mo. loc. cit. 397, 69 S. W. 355; *Sidway v. Missouri Land & Live Stock Co.*, 163 Mo. loc. cit. 374, 375, 63 S. W. 705; *Pier et al. v. Heinrichoffen et al.*, 52 Mo. loc. cit. 335, 336.

Let us turn to the evidence and consider the same in respect to the alleged parol contract.

Cam Bedford, a witness for plaintiff, testified on this subject as follows:

"I remember being at his [William Harris'] house one day when Richard Anderson was there, and there was some contract made between them.

"Q. Just tell what the contract was between old man Harris and Richard Anderson. A. He [William Harris] wanted somebody to take care of him during his life, and he would will them the place. He was talking to Richard Anderson. Richard Anderson said to him, 'I will see my wife, and it will be all right.'

"Q. What was Anderson to do? A. He was only to wait on him and take care of him.

"Q. Was he to move into the house and take care of Harris? A. No, sir; he didn't say that. He [Anderson] went and saw his wife and then came back and made the contract. The contract commenced with Anderson and finished with his wife. After that time, or rather after this conversation between Harris and Anderson, I think it was the same week. Anderson and his wife moved into the house with William Harris. Anderson stayed in the house with William Harris about five or six months from the time he moved there. While Anderson and his wife were in possession of that property, they took care of Harris; it seems like they were very careful in taking care of him, keeping him clean."

This witness gives no date; does not mention who was present; does not claim to have gone with Anderson to see the latter's wife; does not claim to have heard any conversation between Anderson and his wife; and, finally, does not testify to any facts tending to show a contract between plaintiff and Harris by which the latter obligated himself to give his home and property at his death to plaintiff for supporting and taking care of him during his natural life. Aside from the bald conclusion of witness that they made a contract, which is of no value in weighing the evidence, the above testimony does not prove or tend to establish the contract heretofore set out in petition.

George Veasey, in behalf of plaintiff, tes-

tified that he had a conversation with J. L. Smith before testator moved to the home of latter. Witness testified:

"I told him [Smith] he ought not to bother Anderson and his wife, and he said he was going to buy the place. I told him I knew there was a contract between Anderson and old man Harris, and if I was him I wouldn't disturb him, and he said to me then he had a right to buy the place; that old man Harris wanted to sell it and he had a right to buy it."

On cross-examination this witness testified:

"I told Smith there was a contract between Anderson and old man Harris, and he ought not to bother him, and I also told him that Harris had willed the property to Anderson.

"Q. *You didn't tell him anything about the contract?* A. *I told him that he had willed it.*" (Italics ours.)

This witness was testifying as to a conversation he claims to have had with Smith, who is not a party to the suit, and who had parted with his interest in the property before this action was brought. Witness does not testify that he was present when any contract was attempted to be made between plaintiff and Harris. Nor does he undertake to give even the substance of any contract between said parties, much less the one alleged in petition. This evidence has no probative force in the way of establishing the alleged contract described in petition.

Richard Anderson, the plaintiff, testified in his own behalf, without objection, as follows:

"I am the plaintiff in this case. I moved into the house with old man Harris in November, 1915. I got out of possession of this house August 18, 1917. I lived in that house from the time I went there in November, 1915, until in August, 1917."

On cross-examination plaintiff testified:

"I claim this property by that will."

S. E. Juden was sworn as a witness in behalf of plaintiff, and testified without objection as follows:

"I am the sheriff of this county. I received an execution in the case of William Collins v. Richard Anderson in 1917 to dispossess Richard Anderson of the house in question. Refreshing my memory from the execution, I find

that it was dated the 16th day of August, 1917. It was about two days, I think, the second day after I received it, I went out to dispossess Anderson, and he was in possession of the house at that time. I told him I had come to put him out of the possession of the property, and requested that he get a dray and move, and he consented to do that. That was something about the 18th day of August, 1917."

We have set out fully all the testimony in the case relating to the alleged oral contract pleaded in first count of petition. While the authorities heretofore cited require clear and convincing proof that the oral contract as alleged in petition was made between plaintiff and William Harris, yet there is an entire failure of proof upon this subject. Even considering the legal conclusions testified to by some of plaintiff's witnesses, still his evidence falls far short of establishing the contract mentioned in petition, or any other contract.

[2] The trial court reached a correct conclusion in holding that plaintiff was not entitled to recover on the first count of his petition.

[3] 2. Having found against the plaintiff on the first count, it necessarily follows that the deed from William Harris to J. L. Smith conveyed the legal title to the property in controversy, and plaintiff acquired no interest in said real estate on account of the will of said Harris. The evidence, as disclosed by the record, shows that defendant Collins was in possession of said property at the date of trial under a deed from said J. L. Smith. In the second count of petition the court was asked to ascertain and determine the title to said real estate under section 2535, R. S. 1909, as between plaintiff and defendant, and to render its judgment accordingly. The court was within the law in finding for defendant upon the second count of petition. *Brooks v. Roberts* (Mo.) 195 S. W. loc. cit. 1021, and cases cited.

The judgment below is accordingly affirmed.

WHITE, C., concurs.
MOZLEY, C., absent.

PER CURIAM. The foregoing opinion of RAILEY, C., is hereby adopted as the opinion of the court.

All concur.

STATE v. SMITH. (No. 21945.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)**1. Criminal law** \Rightarrow 230—Evidence held to show that defendant was accorded a fair preliminary hearing.

Evidence held to warrant finding that defendant was accorded a fair preliminary hearing, under Rev. St. 1909, § 5056, as amended by Acts 1913, p. 225, and other statutes relating to preliminary hearing.

2. Homicide \Rightarrow 223—Defendant's testimony at coroner's inquest admissible only if voluntarily made.

In determining whether a statement of a defendant accused of murder made at the coroner's inquest is admissible in evidence against him, the test is whether the statement was voluntary.

3. Homicide \Rightarrow 223—That defendant was under arrest at time of coroner's inquest did not render testimony inadmissible.

That defendant was under arrest at the time of his testimony at coroner's inquest is not, of itself, sufficient to exclude testimony as involuntary.

4. Homicide \Rightarrow 223—Defendant's statement at coroner's inquest held inadmissible.

Where defendant, accused of committing cold-blooded murder, was brought to the coroner's inquest after having been in the custody of an officer from the moment he knew he was suspected of the crime, was entirely without advice of counsel or friend, and at coroner's inquest was surrounded by a gathering crowd of angry citizens who threatened to lynch him, his testimony during the inquest, in which he disclaimed all knowledge of the incidents connected with the alleged crime, held inadmissible; the circumstances being such as to indicate that statement at inquest was not entirely voluntary.

5. Homicide \Rightarrow 175—Testimony as to analysis of deceased's stomach admissible only on showing identity of stomach examined.

In prosecution for murder by furnishing deceased with poisoned whisky, it was necessary, in order to admit testimony showing the result of the analysis of deceased's stomach, to satisfy the court of the identity of the stomach examined with that of deceased and to prove that it was in the same condition when examined as when removed from deceased's body, by proof of circumstances such as to establish a reasonable assurance that stomach was the same and in the same condition; but it was not necessary to show that it was not accessible to anybody or that there was an entire absence of opportunity for anybody to tamper with it.

6. Homicide \Rightarrow 175—Analysis of deceased's stomach admissible in absence of circumstances indicating tampering with same.

In prosecution for murder committed by furnishing deceased with poisoned whisky, testimony as to chemical analysis of deceased's

stomach held admissible in absence of a showing of circumstances raising a suspicion as to whether it had been molested or tampered with prior to analysis, even though it had not been preserved with proper care.

7. Criminal law \Rightarrow 387—When negative testimony is admissible.

Negative evidence is admissible only if it tends to contradict positive evidence introduced by other party, or tends to exclude the existence of a fact sworn to by other party.

8. Criminal law \Rightarrow 387—That druggists immediately accessible to defendant had not sold defendant poison held inadmissible.

In prosecution for murder committed by furnishing deceased with whisky poisoned with strychnine, evidence that no druggist immediately accessible to defendant had sold him strychnine during the preceding two years was not admissible to show that defendant did not have possession of strychnine prior to alleged homicide, in absence of testimony that defendant could not have procured strychnine in any other manner.

9. Homicide \Rightarrow 160—Poison may be traced into the possession of accused.

In a case of murder by poison it is important, if not necessary, to trace poison into the possession of accused.

10. Criminal law \Rightarrow 419, 420(12)—Petition in civil action for assault inadmissible in prosecution for murder.

In prosecution for murder, where deceased had instituted an action for assault and battery which was pending at the time of the murder trial, the petition in the damage suit alleging facts showing cruel and violent assault and battery inflicted upon deceased by defendant was not admissible, being hearsay.

11. Criminal law \Rightarrow 419, 420(12)—Anonymous letter to defendant purporting to have been sent by friend inadmissible as hearsay.

In prosecution for murder committed by furnishing deceased with poisoned whisky, testimony as to anonymous letter received by defendant, purporting to have been sent by a friend, warning him that there was danger of his water being poisoned, held inadmissible to show that his whisky had been poisoned by others who had planned to poison defendant; statements in the letter being hearsay and incompetent, and being too remote to possess any probative value.

12. Homicide \Rightarrow 190(1)—Threatening letter from deceased admissible.

In murder prosecution, a threatening letter traced to deceased would have been admissible.

Appeal from Circuit Court, Wright County; C. H. Skinker, Judge.

Randle Smith was convicted of murder in the first degree, and he appeals. Reversed and remanded.

The appeal in this case is from a conviction of murder in the first degree. Defendant was charged with having murdered one

Alfred Hutsell on the 4th day of July, 1919, in Wright county, Mo., by administering strychnine to him. The defendant, Randle Smith, was a farmer about 35 years of age, living near Astoria, in the northeast part of Wright county, Mo. He was married and had two small children. The deceased, Alfred Hutsell, was unmarried, 21 years of age, and resided about a mile distant from the residence of the defendant. Some time prior to the date of the alleged homicide defendant was indicted for felonious assault upon Hutsell, and at the same time Hutsell sued him for \$10,000 damage on account of the injuries received. Hutsell went to Kansas City, where he had X-ray pictures taken of his head, which was alleged to have been injured in the assault, for the purpose of using the pictures in his civil suit and in the criminal prosecution. Both of those cases were pending July 4, 1919, on which date a picnic was held at Astoria.

The state introduced evidence to show that defendant, Hutsell, and one Ernest Rayborn, a young man 25 years of age, attended this picnic. Some time during the forenoon the defendant requested Rayborn, who was a friend of his, to get Hutsell drunk and find out the result of the X-ray examination in Kansas City. Rayborn was not averse to undertaking the enterprise, understanding, perhaps, that he would be required to drink some too. Accordingly, Smith drove off and returned in about 20 minutes with his coat on. Rayborn was in his shirt sleeves. The two went from the picnic ground down to a ford in a creek near by. Smith exhibited two Tanlac bottles full of liquid; one was paler than the other, and Rayborn suggested that there were two kinds of whisky. Smith replied, no, he had weakened one. Rayborn said he hardly ever drank weakened whisky. They hid the bottles in a pile of driftwood and returned to the picnic ground. Rayborn soon after found Hutsell, went with him to the driftwood, took out the bottle which exhibited color, and the two drank its contents. They returned to the picnic ground, loitered around for an hour and a half, and then went back to the drift for the purpose of drinking from the other bottle. They had been observed, however, by one Jim Wilhite, who followed them and came up as they drew the whisky from its hiding place. Rayborn tasted it and spat it out, saying it was very bitter; Hutsell and Wilhite, each in turn, did the same. Rayborn put the bottle back in the drift, hunted up Smith, and asked him what was the matter with the whisky. Smith explained that there was some caked Tanlac in the bottle which he could not get out and he just put the whisky in on it; he said, "There is nothing in it to hurt you." After loitering around the grounds for another hour and a half Rayborn and Hutsell went

back to the drift; each took a drink from the bottle and returned to the picnic ground. In a short while Rayborn became quite sick and sent for Smith, who manifested great reluctance to come but finally came. A conversation ensued between Rayborn and Smith in which Rayborn asked Smith what he poisoned him for, saying that Smith had put poison in the whisky that he gave him that morning. Smith denied giving him poisoned whisky.

Antidotes of grease, eggs, cream, and sweet milk were administered to Rayborn and he recovered, although he was confined to his room for about two weeks. Hutsell died a few minutes after the two returned from taking the last dram. Physicians who attended Rayborn and who were told of the symptoms shown by Hutsell said the symptoms all indicated strychnine poisoning. The stomach of Hutsell was removed from his body the next day by a physician and delivered to the prosecuting attorney, C. H. Jackson, who swore that he afterwards took it to Springfield and delivered it to a chemist, Dr. Atherton, together with the bottle containing the remainder of the pale liquor from which the last drinks had been taken. Dr. Atherton testified that a chemical analysis showed a large quantity of strychnine in the bottle; a quantity so great that very little of the liquor would be sufficient to produce death. He also found traces of strychnine in the stomach which was handed to him by the prosecuting attorney. Wilhite testified that he was made sick by the taste which he took of the liquor.

The defendant was arrested the afternoon of Hutsell's death. He was kept in custody that night and the next morning was taken to Astoria, where an inquest was held. There he was sworn and stated that he had not given Rayborn any whisky at any time and repeated the statement later in the afternoon of the same day at Manes, a short distance from Astoria, where his preliminary hearing was held before a justice of the peace.

The state showed that some threats had been made by the defendant against the deceased a year or more before the picnic. The defendant testified that he had been advised by his attorney to have some friend talk to Hutsell and learn the result of his X-ray examination in Kansas City, and that on one occasion before the picnic he requested Rayborn, who always had been his friend, to find out what he could from Hutsell in regard to the matter, and Rayborn relied that he might if he had a quart of whisky. Defendant soon afterwards purchased a quart of whisky in Mountain Grove from a man who was designated as a bootlegger. Defendant took the quart of whisky to his barn, filled the two Tanlac bottles, also another bottle which he took to his house,

leaving the Tanlac bottles in the barn; he said he never saw them again until the 4th of July, when he had a talk with Rayborn, got the whisky, and delivered it to Rayborn in the manner above described. He testified that he had never owned any strychnine, had never bought any, had never been out of Wright county and Texas county except on one occasion when he made a short visit to relatives in Arkansas. The defendant put his character in issue and offered a number of witnesses to testify that he had a good reputation for honesty, truth, and veracity, and as a law-abiding citizen. The state offered several witnesses who testified that the defendant had a bad reputation in those respects. Other facts shown in the evidence will be mentioned in considering the errors assigned by the defendant.

A. M. Curtis, J. W. Jackson, and Geo. C. Murrell, all of Hartville, for appellant.

Frank W. McAllister, Atty. Gen. (Don C. Carter, of Sturgeon, of counsel), for the State.

WHITE, C. (after stating the facts as above). I. The defendant filed a motion to quash the information on the ground that he had not been accorded a proper preliminary hearing. The trial court took evidence upon the motion.

On the 5th day of July, after the inquest was held at Astoria, the defendant testified that he was asked by the prosecuting attorney if he were ready for his preliminary trial and he said he was not; that he wanted his attorney, Mr. Ourtis. Mr. Curtis was in Colorado. Then he asked for Mr. J. W. Jackson, attorney, and Mr. Jackson was at Hartville. The prosecuting attorney advised him that it was not necessary to have an attorney: that he could go ahead and have his preliminary anyway. He made no further objection.

The prosecuting attorney, C. H. Jackson, testified that after the coroner's inquest was over the defendant came to him and told him he wanted his preliminary examination that day. The prosecutor told him he could have it that afternoon if he could get the state's witnesses. The preliminary proceeded without objection from the defendant until nearly all the witnesses for the state were examined; the defendant then said that he saw where he had made his mistake; that he ought to have had a lawyer. Both the justice and the prosecuting attorney stated that the defendant was told several times during the progress of the hearing that he could have any witnesses he desired and they would stop the proceedings until he could get them. The defendant himself did not claim to have made any further objection to proceeding with the hearing. Upon this evidence the trial court overruled the motion.

[1] The defendant did not complain that

he was not advised fully of his rights in the matter—his right to counsel; his right to have witnesses—nor did he complain of a lack of opportunity to procure witnesses. The finding of the trial court upon the evidence thus produced that the defendant was accorded a fair preliminary hearing was warranted, and the requirements of section 5056, as amended by the Acts of 1913, p. 225, and other sections relating to the preliminary hearing, were fully met.

II. The state offered to prove the statements made by the defendant at the coroner's inquest and also at the preliminary hearing. The trial court sent the jury out and took evidence for the purpose of ascertaining under what circumstances the statements were made, then excluded the statement made at the preliminary hearing, but permitted the state's witnesses to testify to what defendant said at the coroner's inquest.

The facts developed in determining the competency of the evidence showed that the defendant was arrested late in the afternoon of the day of the death of Hutsell, charged with murder. He was put in jail that night and the next morning taken to the coroner's inquest at Astoria, the exact distance from Hartville not given. At the inquest, during the progress of the investigation, the justice of the peace, U. S. Wade, who conducted the inquest, went to the defendant and asked him if he desired to testify. What was said by the defendant in answer to that is somewhat in dispute. The defendant swore that he asked the justice, "What would you do about it?" And the justice said, "You do just as you please about it." And defendant said, "I don't know what I ought to do;" but finally said he would just as well testify. The prosecuting attorney did not arrive at the coroner's inquiry until after it had begun; he and another witness, who testified to what was said by the defendant to the justice at that time, seemed uncertain as to the exact language used. At any rate, the defendant was sworn, gave his statement, and was cross-examined, mainly by the members of the jury.

It was shown that quite a crowd had gathered at the place where the inquest was held. Feeling ran high against the defendant and showed itself in remarks indicating a desire of some to lynch him. This was said by the state's witnesses. No one told the defendant that what he said at that time might be used against him at his trial. He said himself that he was ignorant of his constitutional right that he could not be compelled to make a statement against himself. The state claims that the excited crowd did not gather at the inquest, but at the preliminary in the afternoon; but the evidence of the prosecutor himself shows the crowd and angry expression "at the time of the coroner's inquest."

[2, 3] In determining whether a statement of a defendant under such circumstances is admissible in evidence against him, the test is whether the statement is voluntary. *State v. Marion*, 235 Mo. 359, loc. cit. 376, 138 S. W. 491; *State v. Blackburn*, 273 Mo. loc. cit. 482, 201 S. W. 96; *State v. Young*, 119 Mo. 495, 24 S. W. 1038; *State v. Thornton*, 245 Mo. loc. cit. 440, 150 S. W. 1048; *State v. Miller*, 264 Mo. loc. cit. 450, 175 S. W. 191. It may be gathered from those cases that in every case where a defendant is subpoenaed and appears at a coroner's inquest or a preliminary hearing and testifies, his statement is not voluntary and therefore is not admissible against him. The fact that he is under arrest, it appears, is not of itself sufficient to exclude his testimony as involuntary, but if the circumstances under which he is in custody are such as to show it was not entirely voluntary it should be excluded.

[4] Here the defendant was brought to the coroner's inquest after having been in the custody of an officer from the moment he knew he was suspected of the crime, and was entirely without advice of counsel or friend. The attorneys who represented him in cases then pending were absent: the principal one away from the state, and the other one at Hartville. He was suddenly confronted with condemning evidence of the state's witnesses; he was charged with a cold-blooded murder which included his friend Rayborn, and surrounded by a gathering crowd of angry citizens who were breathing threats against his life, and doubtless by their attitude showed their hostile feeling. Under the pressure of those circumstances he disclaimed all knowledge of the incidents connected with the alleged crime—he had not bought any whisky; had not given any to Rayborn; had not talked about it—statements which naturally would spring from a frightened man who was perplexed by the sudden emergency and the danger of immediate violence at the hands of the mob. If he should at that time confess the facts to which he testified on the trial—that he had bought the whisky and procured the agency of Rayborn in administering it to the deceased for the purpose of loosening Hutsell's tongue—he naturally feared the result. The circumstances were such as to indicate that the statement was not entirely voluntary, and not what he would have said nor what he did say after the apparent danger was removed. The admission of the evidence was error requiring a reversal of the case.

III. Dr. J. Leroy Atherton, chemist living at Springfield, testified to what he found in the contents of the human stomach and in a Tanlac bottle delivered to him by Mr. Jackson, prosecuting attorney of Wright county. This was objected to on the ground that it was not shown that the stomach of Hutsell

had been kept in the same condition in which it was taken from his body, and that it remained so at the time Dr. Atherton examined it. The evidence shows that on the 5th of July the stomach was removed from the body of Hutsell by Dr. Latimer, who placed it in a large glass jar. The jar was not fastened, but had a glass top that set down in the jar. A part of the contents of the stomach spilled out in the jar and remained in that condition. He delivered it to the prosecuting attorney, Jackson, who took it to Hartville to the ice plant, where he left it in charge of persons in control of the plant and where it remained about two days. It appears from the testimony of the two men in control that it was undisturbed, though it is possible that other persons may have seen it while it was there. On July 6th, a day or two after the death, Mr. Jackson took the jar in his automobile and drove to Mountain Grove. The jar, packed in ice in a box and covered with an old sack was placed in the front of his car. He parked his car at Mountain Grove and spent an hour or two trying a case before a justice of the peace there. He drove from there to Norwood, another station on the railroad, and remained over night with a friend, leaving the jar in that condition in the car all night. Early next morning he took the jar containing the stomach to Springfield and delivered it to Dr. Atherton. There were no suspicious circumstances indicating that the jar had been tampered with.

[5] In order to admit testimony showing the result of the analysis it was necessary to satisfy the court of the identity of the stomach examined with that of Hutsell and that it was in the same condition when examined as when removed from his body. It was not necessary that it should have been hermetically sealed so as to be inaccessible to anybody; it was not necessary to show that there was an entire absence of opportunity for anybody to tamper with it; it was only necessary to show the circumstances were such as to establish a reasonable assurance that it was the same and in the same condition.

The case of *State v. Van Tassel*, 103 Iowa, 6, 72 N. W. 497, is where the organs of a deceased were shipped by express from Nashua, Iowa, to Chicago, for analysis. The testimony of the chemist who made the analysis was held admissible in evidence.

In *People v. Bowers* (Cal.) 18 Pac. 660, jars which contained the stomach and contents of the intestines to be examined were covered like preserve jars and wrapped in paper, but were not sealed at any time, and afterwards were locked for two days in the laboratory of Cooper Medical College, to which the physician and janitor had access; it was held that the evidence as to the result of chemical analysis was admissible. The

court noted there were no circumstances tending to show that the jars had been tampered with.

Where internal organs were removed by the undertaker and placed in a galvanized iron vessel covered over with a piece of cloth, and passed through three or four different hands before reaching the chemist who made the examination at the expiration of two or three days, the evidence of the chemist was admissible. *State v. Daly*, 210 Mo. loc. cit. 675, 677, 109 S. W. 53.

In the case of *State v. Thompson*, 132 Mo. loc. cit. 321, 34 S. W. 31, where a considerable interval of time passed between the sealing of the organs in a jar and the examination afterwards by a chemist, the court notes the absence of evidence to create a suspicion that the organs were other than those preserved, and evidence showing the result of the examination was held admissible.

[6] The viscera of the deceased in this case were not preserved with that care which should characterize the conduct of an officer in such a case, and the glass jar containing the stomach was carted around in a careless sort of way; but there was no time when anything occurred to suggest a suspicion that the stomach was molested or that any one who might be interested in tampering with it knew that the prosecuting attorney had the jar in his possession when he drove to Mountain Grove and to Norwood. We think the court did not err in admitting the evidence.

IV. Defendant offered as witnesses 12 druggists to prove that each kept a record of all strychnine poisons dispensed by him, that he had examined his record as far back as January 1, 1917, and that no record showed a sale to the defendant, Randle Smith, of any quantity whatever of strychnine, and that the 12 druggists mentioned were all the druggists in Wright county and territory adjacent to the home of the defendant. This was excluded, and appellant assigns error to the ruling.

[7] Negative evidence is admissible only if it tends to contradict positive evidence introduced by the other party. 9 Cyc. of Ev. pp. 865-866. This is a very general statement of the rule, but the authorities, instead of expressing it in more definite terms, usually state simply the facts in each case to which it is applicable. If the negative statement would tend to exclude the existence of a fact sworn to by the other side, then it is admissible. For instance, in a case where negligence is asserted on a failure of the railroad company to give a signal of an approaching train, it is competent for witnesses to swear that they never heard any signal given, if they were in a position to have heard and were attentive to the circumstances which would cause them to

hear. On the other hand, if the witnesses were inattentive, or in a position where the sound of the signal would not likely attract their attention, the fact that they did not hear it would possess no probative force. *Bennett v. Met. St. Ry. Co.*, 122 Mo. App. 703, loc. cit. 709, 710, 99 S. W. 480; *Shaw v. Railroad*, 104 Mo. 648, 16 S. W. 832; *Armstrong v. Railroad*, 195 Mo. App. loc. cit. 86, 190 S. W. 944; *Butler v. Met. St. Ry. Co.*, 117 Mo. App. loc. cit. 358, 93 S. W. 877; *Quinley v. Traction Co.*, 180 Mo. App. 296, 165 S. W. 346; *Underwood v. St. L., I. M. & S. Ry. Co.*, 190 Mo. App. loc. cit. 412, 177 S. W. 724.

The case of *Norris v. Railroad*, 239 Mo. 695, loc. cit. 712, 713, 144 S. W. 783, is cited. It was an action for injuries caused to plaintiff by derailment of defendant's train on which she was a passenger. It was held competent for the defendant to prove that no other passengers were injured by the shock. This evidence, while negative, tended directly to show the shock caused by the derailment was not so severe as claimed by the plaintiff.

[8] In the present case, the evidence offered that no druggist immediately accessible to the defendant sold him any strychnine since 1917 would not tend to show that he did not have strychnine in his possession just immediately prior to the alleged homicide. If it had been further shown that the defendant could not have procured it in any other manner, the evidence would have been competent; but he might have obtained it before the date mentioned, or he might have procured it from a druggist through the instrumentality of another; he might have procured it by mail, so far as the evidence shows. The evidence would possess no probative force unless it tended to exclude opportunity on the part of the defendant to procure the poison.

[9] It is true that in case of murder by poison it is important, if not necessary, to trace poison into the possession of the accused. *State v. Hyde*, 234 Mo. loc. cit. 241, 136 S. W. 316, Ann. Cas. 1912D, 191. It is asserted by appellant that there was no evidence that Smith had strychnine in his possession prior to the alleged homicide. In this appellant is incorrect. He had the poisoned whisky and delivered it to Rayborn, with the fatal result to Hutsell. The trial court properly excluded the evidence.

[10] V. Hutsell's suit for damages on account of an alleged assault and battery was pending at the time of the trial of this case. The state offered the petition in the damage suit and it was admitted in evidence. This, appellant claims, was error. The fact that a suit of that character was pending went to the jury without objection. But the petition alleged certain facts showing a cruel and violent assault and battery in-

flicted upon Hutsell by defendant. That statement of facts was hearsay and inadmissible. Defendant in examining witnesses throughout the trial brought out some of the facts relating to the assault. It is unnecessary to go through the record and determine with care whether the petition does state facts not otherwise proven, without objection, but on another trial the court should exclude it.

[11, 12] VI. On March 24th, prior to the alleged homicide, the defendant received an anonymous letter warning him of danger which threatened him—danger of a mob and poison in his water—the writer claiming to be a friend of Smith. The letter was destroyed, but Smith showed it to two other persons who read it, one of whom was the postmaster at Astoria, Mo. Defendant offered the two witnesses to prove the contents of the letter, and offered to show by the postmaster that the paper on which the letter was written was from certain tablets of the same "nature and description" as the paper in the tablets which the postmaster had sold to the brother of the deceased. Defendant also offered to prove the contents of another threatening note which he received. The evidence was excluded, and error is assigned to the ruling. It is claimed by the appellant that there was a conspiracy to do him harm, and the evidence should have gone to the jury as tending to show some one else had discovered his whisky hidden in his barn and poisoned it, and thus prove that he did not intentionally give poisoned whisky to Rayborn. If it had been shown by competent evidence that the defendant had some definite enemy who made threats against him and there was a possibility that such enemy had discovered the whisky in his barn and poisoned it, such evidence probably would have been admissible. The statements in the letters from an anonymous friend that the defendant was threatened with poison were pure hearsay and incompetent. If defendant had received a threatening letter which would have been traced to the deceased it would have been admissible, but the vague warning by an unknown person of an uncertain danger from an uncertain source was too remote to possess any probative force. The evidence was properly excluded.

VII. The court gave several instructions covering all features of the case. To several of these the defendant objected and submitted complete instructions of his own which the court refused. Error is assigned to the refusal. Instructions given by the court were expressed in the briefest and most colorless terms, so that they were not as explicit as they might have been. It was brevity at the expense of clearness. While the instructions possibly complied with the law,

they might very properly have been a little more favorable to the defendant. For instance, the instruction on reasonable doubt did not require the reasonable doubt which would justify an acquittal to arise from a consideration of all the evidence in the case. *State v. Christian*, 253 Mo. 397, 161 S. W. 736. The instructions nowhere, except in the one relating to the presumption of innocence, direct a verdict of not guilty in case of the failure to find the facts constituting the guilt of the defendant. In the instruction relating to circumstantial evidence it would have been entirely proper for the court to have added that on a failure to find the circumstances of the character mentioned the jury should find the defendant not guilty. The instructions nowhere place the burden of proof upon the state in direct terms; it only appears inferentially in two or three of the instructions. The instructions asked by the defendant and refused were fuller and more explicit in those respects, and some of them might very properly have been given by the court, in fairness to the defendant.

The judgment is reversed, and the cause remanded.

RAILEY and MOZLEY, CC., concur.

PER CURIAM. The foregoing opinion by WHITE, C., is adopted as the opinion of the court.

All the Judges concur; WALKER, J., in result.

STATE V. COSTELLO. (No. 21934.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

1. Criminal law §1064(7)—Where not preserved by motion for new trial, rulings on instructions cannot be reviewed.

Where the motion for new trial failed to assign error to the giving or refusing of instructions, assignments of error, complaining of instructions, cannot be reviewed.

2. Criminal law §1064(6)—Error in cross-examination cannot be reviewed, where not presented by motion for new trial.

Alleged error in permitting the prosecuting attorney to cross-examine defendant as to matters not testified to in chief cannot be reviewed, where the motion for new trial did not mention the cross-examination or improper conduct of prosecutor.

3. Criminal law §1043(2)—Objections insufficient to raise question of unfair cross-examination.

An objection to the introduction of evidence in order to warrant a review must be pertinent and specific, so as to enable court to intelligently rule, consequently a mere statement or objection to the cross-examination,

coupled with the further objection that the matter was immaterial, is not sufficiently specific to cover the conduct of the prosecuting attorney in conducting an unfair cross-examination.

4. Criminal law §720(5)—Statement of prosecuting attorney arguing an objection not improper.

Statement by the prosecutor in arguing an objection that the witness stated he had not seen one B. recently, and that it was desired to show the witness had seen him recently, is not objectionable; the prosecutor being entitled to so test the credibility of the witness.

Appeal from St. Louis Circuit Court; G. A. Wurdeman, Judge.

Tony Costello was convicted of robbery in the first degree, and he appeals. Affirmed.

T. J. Rowe, Jr., of St. Louis, for appellant.

Frank W. McAllister, Atty. Gen., and Lewis Hord Cook, Sp. Asst. Atty. Gen., for the State.

WHITE, C. The appeal is from a conviction of robbery in the first degree. The information charges that the appellant, Tony Costello, and Edward Ridgely, on or about the 18th day of April, 1919, in St. Louis county, made an assault upon one David Koeler, and by putting him in fear, and by force and violence to his person, took from him and in his presence the sum of \$50.80, lawful money of the United States.

Koeler was secretary of St. Peter's Cemetery located in Wellston, St. Louis county. He kept the records and handled the money of the cemetery company. In the afternoon of April 18, 1919, while he was in his office waiting on some customers, Costello and Ridgely came into the office and waited around among the customers. They walked out of the office and sat down on a bench outside the door. After the last customer had gone they came in, and Costello asked Koeler if he might use the telephone. A counter in the office was surmounted by a wire screen, and behind this counter was Koeler's desk and telephone. Costello came behind the screen for the purpose of using the telephone. Koeler soon noticed that his visitors were making no attempt to use the telephone, he looked up, and saw a pistol pointed at him through the screen by Ridgely. He immediately yelled for help. Costello began to beat him over the head with his fists, and Ridgely came around and hammered him with a revolver. The robbers then opened the money drawer and took \$50.80, and ran down the road towards a machine, got into it and drove away. The witness was badly beaten up. Other witnesses corroborated Koeler in the facts to

which he testified regarding the appearance and the running away of the men, and identified Costello and Ridgely as two men that were about the office before the assault. One witness identified the defendant as one of the two running away after the assault.

The defense was an alibi. Costello swore he was at Lang's saloon on Franklin avenue, the day of the robbery, from 11:30 a. m. until 4 o'clock in the afternoon, when he was arrested there. He was playing horseshoes in Lang's back yard with Ridgely and one Baumer. He is corroborated in this particular by the evidence of Lang and other witnesses.

[1] I. The appellant claims there was error in the giving by the court of several instructions. The motion for new trial does not assign any error to the giving or refusing of instructions, and does not mention instructions in any manner. Therefore we are precluded from reviewing that assignment.

In justice to the attorney for appellant it should be said that he was not defendant's attorney in the circuit court, "and consequently is not responsible for the manner and form in which exceptions to the rulings of the trial court were saved."

[2] II. It is complained that the court committed error in permitting the prosecuting attorney, over defendant's objection, to cross-examine the defendant as to matters not testified to in chief by the defendant. Several pages of the defendant's cross-examination are set out, to which this objection is applied. We are precluded from reviewing this testimony and the error assigned, because no mention is made of that objection in the motion for new trial. The motion nowhere mentions the cross-examination of the defendant or the alleged improper or unfair conduct of the prosecuting attorney in cross-examining him.

[3] III. Objection is properly assigned in the motion for new trial to the cross-examination of the witnesses by the defendant. On these cross-examinations the state's attorney endeavored to show that one Baumer, with whom the defendant was playing horseshoes in Lang's back yard, had been convicted of some crime and was in jail. The objection of defendant's counsel at the time appears in the record in this fashion: "I object to this line of examination." At other times the objections were thus: "I object to that as immaterial." "Objected to as immaterial." The objections were overruled, exceptions saved, and the trial proceeded. No objection in any more definite or specific form was made to any questions asked on cross-examination. An objection to the introduction of evidence, in order to warrant a review, must be pertinent and specific, in order to enable the court intel-

ligerly to rule upon the same. *State v. Hamilton*, 263 Mo. 298, 172 S. W. 593; *State v. Miller*, 264 Mo. 441, loc. cit. 449, 175 S. W. 191. The objection that the testimony was immaterial, even if that was sufficiently specific, would not cover the improper conduct of the prosecuting attorney in conducting an unfair cross-examination.

[4] IV. On one point defendant's counsel was specific. The state's attorney in arguing an objection of the prosecuting attorney made this remark regarding Baumer:

"This man says he has not seen Baumer for a long time and I want to show that he has seen him recently."

This was objected to, and the objection overruled. Witness then answered that he (witness) had not been down there. Defendant's attorney:

"I ask that the jury be instructed to disregard the statement of the prosecuting attorney in reference to Baumer."

This objection was overruled, and exception duly saved. The statement of the prosecuting attorney in relation to Baumer was entirely proper. He had a right to cross-examine the witness and test his credibility by showing that he had misstated a fact about having seen Baumer. The statement was not in the least objectionable.

There being no error in the record, the judgment is affirmed.

RAILEY, C., concurs.
MOZLEY, C., absent.

PER CURIAM. The foregoing opinion by WHITE, C., is adopted as the opinion of the court.

All the Judges concur.

KIRKLAND v. BIXBY et al. (No. 21212.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1920.)

1. Appeal and error §758(3)—Rule as to sufficiency of assignment of error in brief stated.

Appellant's brief, though it contains no formal collective assignment of error in any given part thereof, is sufficient where appellant separately assigns error specifically in distinct sub-heads of his points and authorities; such a brief being a substantial compliance with the statutes and with court rule No. 15 (198 S. W. vi).

2. Appeal and error §758(3)—Use of word "erred" not necessary in making assignment of error in brief.

It is unnecessary, in making assignments of error in brief, to say that the court "erred" in doing so and so; it being sufficient if it is made

plain by the language used, considering record before appellate court, that error is charged.

3. Master and servant §137(4)—Section men not entitled to warnings.

Section men are not entitled to warnings of approaching trains, either by bell or whistle, except when required by the humanitarian rule.

4. Master and servant §264(5) — Pleading held not to authorize proof of custom.

In an action for the death of a section man riding on a hand car struck by train, under a petition alleging that the trainmen negligently failed to ring the bell and sound the whistle in the fog, held, that proof of the existence of a custom requiring trainmen to give warnings during foggy weather was incompetent.

5. Negligence §110 — Pleading violation of duty essential.

A petition for negligence should charge a duty and its violation to show liability.

6. Customs and usages §18—Custom of long standing to give rise to a duty should be pleaded.

If the violation of a duty arises from the failure to observe a custom of long standing, the custom should be pleaded, so as to clearly point out the duty.

7. Master and servant §258(18)—Mode of pleading custom defined.

A petition for negligence in failing to observe a railroad's custom to warn section men of trains during foggy weather should not only plead such custom, but should allege the plaintiff's knowledge thereof.

Appeal from Circuit Court, Jackson County; Clarence A. Burney, Judge.

Action by E. E. Kirkland, administrator, etc., against William K. Bixby and Edward B. Pryor, receivers of the Wabash Railroad Company. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

N. S. Brown, of St. Louis, and Sebree & Sebree and Mord M. Bogle, all of Kansas City, for appellants.

Atwood, Wickersham, Hill & Popham, of Kansas City, for respondent.

GRAVES, J. Action for damages for the alleged negligent killing of Albert Anderson in January, 1914. Defendants were the receivers of the Wabash Railroad Company, and deceased was section foreman on the line of said road at or near Randolph, Mo., near Kansas City, Mo. Anderson was killed in a collision between the hand car upon which he was going to his work and one of defendants' trains. The negligence charged in the petition, upon which trial was had, is as follows:

"Plaintiff alleges that the defendants were negligent and careless in advising said Albert Anderson that he could proceed safely to his destination, when they knew, or by the exercise of ordinary care on their part might have

known, that he could not safely so do, and in not maintaining the track, over which said hand car was about to move, in a safe condition and free from trains or cars whose movement might injure persons situated as decedent was; that defendants, by their employes in charge of said train so colliding with the hand car, were further negligent and careless in failing to ring the bell and sound the whistle at such frequent intervals, while running through the fog, as would warn the crew on said hand car of the approach of said train in time to allow the employes on said hand car to safely remove themselves and said hand car from defendants' track; that as a direct result of each and all of said negligent and careless acts of the defendants, as aforesaid, the said Albert Anderson, deceased, was killed."

Answer is (1) a general denial; (2) contributory negligence; and (3) assumption of risk. Reply was a general denial. Upon a trial before a jury in division No. 6 of the Jackson county circuit court, plaintiff had a verdict and judgment for \$10,000 and defendants have appealed.

The action was one under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), as said Anderson was foreman of a section crew, and his section covered track both west and east of Randolph. At about 7:30 on the morning of the accident he started west from Randolph with his crew on a hand car, to repair some tracks near what is known as the Milwaukee bridge, within his section. The morning was quite foggy, as they frequently were near the Missouri river. When about a mile and a half west of Randolph, the hand car was struck by an east-bound freight train, and Anderson was killed. Further details will be left to points discussed in the course of the opinion.

[1] There is a motion to dismiss the appeal for failure to comply with rule 15 of this court (198 S. W. vi), in that—

"There are no separate assignments of error as provided by the rules; and under the so-called points and authorities no specific errors are alleged such as to comply with the rules of the court."

Among other cases we are cited to Vahldick v. Vahldick, 264 Mo. loc. cit. 531, 175 S. W. 199. As applied to the facts in this case the ruling in that case does not support respondent. At page 532 of that opinion in 264 Mo. (175 S. W. 200), Faris, J., refers to the universal ruling of this court, in this language:

"It has been held that where appellant, though making no formal collective assignment of errors in any given part of his brief, yet separately assigns error specifically in distinct subheads of his points and authorities, we will accept this as a substantial compliance with the statute and our rules. Perry v. Strawbridge, 109 Mo. 621; Mugan v. Wheeler, 241 Mo. 376; Collier v. Lead Co., 208 Mo. 246."

This announces the true rule of this court, and the cases cited by our former Brother

bear him out in the pronouncement. In the particular case he held that this rule had not been met. So, too, as to other cases cited.

[2] But in the instant case the points and authorities bristle with alleged error. There is no formal assignment of errors, but when the points made clearly point out the errors nisi (as here) we have always ruled it to be sufficient. Nor is it necessary to say in the point made that the trial court "erred" in doing so and so, if it is made plain by the language used, considering the record before us, that error is charged. There is no substance in the motion to dismiss the appeal in this case, and it is overruled.

[3] II. The plaintiff's case was submitted to the jury on the sole ground that the agents in charge of the east-bound freight train were negligent in failing to sound the bell and blow the whistle at frequent intervals, upon this foggy morning. This simplifies the issues for present determination. The rule in this state requires section men to protect themselves from passing trains. In other words, the train crew, so far as section men are concerned, have the right to expect a clear track, and the humanitarian rule (when violated) is the only salvation for the unfortunate section man. This rule is not invoked in the instant case. We have written so much upon the status of the section man that we shall not attempt to reiterate, but rest content with the citation of our more recent cases. State ex rel. Lusk v. Ellison, 271 Mo. loc. cit. 468, 196 S. W. 1088; Gabal v. Railroad Co., 251 Mo. loc. cit. 268, 269, 158 S. W. 12; Woods v. Railroad, 187 S. W. 12, 13; Rashall v. Railroad, 249 Mo. loc. cit. 519, 520, 155 S. W. 426; Van Dyke v. Railroad, 230 Mo. loc. cit. 282, 130 S. W. 1; Degonia v. Railroad, 224 Mo. loc. cit. 587, 123 S. W. 807 et seq.

In the instant case the deceased, Anderson, was the section foreman. He was directing the hand car, and he was perfectly familiar with the situation. George Rigley, witness for plaintiff, among other things said:

"Q. At that time of the morning there were a good many trains passing over that particular piece of track, weren't they? A. Yes, sir.

"Q. Those trains were liable to come along at any time? A. Yes, sir.

"Q. There are a number of trains due on regular schedule time—I mean by regular schedule time trains appearing on the time-card—and a good many other trains over that part of the track had no regular time? A. Yes, sir.

"Q. You and Anderson, of course, knew that fact? A. Yes, sir.

"Q. And the Wabash have large storage yards at Randolph, just east of the depot, where they haul in their freight and leave it until such time as is necessary to deliver it over in the city? A. Yes, sir.

"Q. In other words, they break up and make up their trains over there; that is one of the principal freight yards? A. Yes, sir.

"Q. And many trains in addition to the regular trains pass over that track, switch trains carrying cars? A. Yes, sir.

"Q. You and Anderson knew that fact? A. Yes, sir.

"Q. And you people always keep out of the way of those trains, don't you? A. Yes, sir.

"Q. You were expected to do that? A. Yes, sir.

"Q. Nobody expected to look out and take care of you? A. No.

"Q. You understood it was your duty, he understood it was his duty, to keep out of the way of those trains? A. Yes, sir."

So that it is clear that there is no liability in this case, unless the "foggy" condition of the weather changed the situation. As to section men, under ordinary circumstances, the train crew had the right to expect a clear track, and were not required to give warnings, either by bell or whistle, for the benefit of the section men. By this we do not mean that the humanitarian rule, if pleaded, would not require the trainmen to give warnings, if they saw section men wholly oblivious to impending danger. This subject, however, is not in this case.

III. There was evidence tending to show that there was a custom of long standing as to the sounding of the bell and the blowing of the whistle at frequent intervals when the weather was foggy along the river, for the purpose of advising section men of the approaching trains. Whilst there is conflict in the evidence, there was sufficient to make such matter a question for the jury to determine; i. e., was there or was there not such a custom? This evidence of this custom was consistently opposed by the appellants, and it was admitted over the vigorous objections of appellants. They claimed that no such custom was pleaded, and herein is the serious question.

A full reading of the petition and the evidence shows that plaintiff failed in the case, save and except a proven custom existed to give warning during foggy weather. The question then is: Was this custom pleaded, and the evidence thereof competent? The general rule is that warnings to section men are not required. We have quoted all that is said about the fog in the petition. There is no allegation as to a custom to give warning during foggy weather. The only thing found in the petition is:

"That defendants, by their employes in charge of said train so colliding with the hand car, were further negligent and careless in failing to ring the bell and sound the whistle at such frequent intervals, while running through the fog, as would warn the crew on said hand car of the approach of said train in time to allow the employes on said hand car to safely remove themselves and said hand car from defendants' track."

[4-7] This only says that they negligently failed to ring the bell and sound the whistle

in the fog, but nowhere in the petition is it averred that there was a duty resting upon the defendants to do this by and through a long-established custom. The petition should charge a duty and its violation in order to show liability. If the violation of a duty arises from the failure to observe a custom of long standing, the custom should be pleaded, so as to clearly point out the duty. In other words, if the duty arises from a custom, or usage, the custom or usage should be pleaded, and, if not pleaded, no evidence of a custom is admissible. This petition should not only have pleaded this local custom or usage, but should have averred that deceased had knowledge of it. 12 Cyc. 1097 et seq.

As to section men the general rule of law is that they must look out for their own safety, and no warnings are required to be given them. If this general rule of law is to be changed by a local or particular usage or custom, this custom or usage must be pleaded. In *Hayden v. Grillo's Adm'r*, 42 Mo. App. loc. cit. 5, Thompson, J., said:

"It is necessary to plead a special custom, where such a custom is relied upon, to take a case out of the general rules of the law."

And this court, in *Staroske v. Publishing Co.*, 235 Mo. loc. cit. 76, 138 S. W. 38, has announced the same rule, thus:

"Nor do the allegations of the petition meet the requirements of the rule, supported by reason and the great weight of authority, that if a particular or local custom is relied upon, it must be pleaded (*Sherwood v. Savings Bank*, 131 Iowa, 1. c. 530 et seq.; *Oriental L. Co. v. Blades L. Co.*, 103 Va. 1. c. 741; *Mobile Fruit & Trading Co. v. Judy*, 91 Ill. App. 1. c. 91; *Con. Coal Co. v. Jones*, 120 Ill. App. 1. c. 146; *Hayden v. Grillo's Adm'r*, 42 Mo. App. 1. c. 5, 6), and pleaded so explicitly that it will appear not only that such local or particular custom existed, but that both parties had knowledge of it at the time the contract was made and, in addition, contracted with reference to it (*Hendricks v. Middlebrooks Co.*, 118 Ga. 1. c. 137; *Antomarchi's Ex'r v. Russell*, 63 Ala. 1. c. 361; *Wallace v. Morgan*, 23 Ind. 1. c. 402 et seq.; *Overman v. Bank*, 30 N. J. L. 1. c. 65)."

To like effect is *Nivert v. Railroad*, 232 Mo. loc. cit. 641, 135 S. W. 37, whereat it is said:

"In the absence of some rule, custom, or usage of the company applicable to the appellant, requiring it to be on the lookout for appellant and to warn him of his danger, the respondent owed him no such duty as charged in the petition; and as no such rule, custom, or usage is pleaded, we must presume that none such existed. It is the well-settled law of this state, as shown by repeated adjudications of this court, that the agents and servants in charge of railway trains owe no duty to look out for the safety of trackmen and section hands. They are presumed to be familiar with the character of their employment, the sched-

ules and time-cards of trains, when due, and the dangers incident to such employment."

The reason of the thing is with the practice that the local usage should be pleaded, if such local usage is relied upon to take the case out of the usual rules of law. In the instant case the local usage or custom was relied upon to take plaintiff's case out of the general rule of law. That local usage or custom was to the effect that in foggy weather along the Missouri river bottoms, on this road, the trainmen gave section men warning by ringing the bell and sounding the whistle at frequent intervals. This local usage or custom, if pleaded and proven, would take the case out of the general rule. Fairness demands that such usage and custom be pleaded. It is not pleaded in this case, and all that evidence tending to show such usage and custom should not have been admitted under the present petition. For this error the judgment will have to be reversed, but, in view of the evidence which was erroneously admitted, we think the case should be remanded. It may be (a matter not now ruled) that further proper steps can be taken to meet the situation.

Other matters complained of may not appear in a new trial, and need not be discussed. Suffice it to say that if there was such a usage and custom as to warnings, and a jury so found upon satisfactory evidence, plaintiff could make a case by pleading and proving such usage and custom. It is only in this way, so far as the present record shows, that negligence of defendants can be shown.

Let the judgment be reversed, and the cause remanded.

All concur, except WOODSON, J., absent.

STATE v. GALLAGHER. (No. 21926.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

1. Homicide \S 340(4)—Errors in instructions on murder in first degree immaterial where verdict was in second degree.

Errors in instructions as to murder in the first degree are immaterial, where defendant has been found guilty of murder in the second degree.

2. Criminal law \S 829(1)—Instructions covered are properly refused.

It is not error in a criminal case to refuse instructions covered by instructions already given.

3. Witnesses \S 61(1), 278 — Statute as to cross-examination of spouse held not to apply to testimony of a codefendant found guilty in separate trial.

Where decedent's wife and another were charged with the murder of decedent, and the

wife was awarded a severance and separate trial, and upon the trial of her codefendant testified without objection to her own conviction, without showing that any appeal had been taken by her, she was a competent witness for all purposes, without reference to Rev. St. 1909, \S 5242, relating to competency of husband and wife for each other, and it was proper to cross-examine her as to matters not referred to on direct examination.

4. Criminal law \S 1170½(2)—Question as to relationship between codefendants, if error, held harmless.

In a prosecution for homicide, where defendant's former wife was asked whether defendant was a relative of his codefendant and she answered that she could not say, the error, if any, was harmless.

5. Criminal law \S 722(3)—Argument of prosecuting attorney as to defendant's conduct held supported by evidence.

In a prosecution for homicide, a remark by the prosecuting attorney that defendant had destroyed the domestic relations of decedent's family, alienated the affections of the wife and daughter of deceased, and had ultimately disposed of deceased in order that he might live with his wife, held supported by evidence that the wife had said that she and defendant intended to go on a farm and live together after she procured a divorce.

6. Criminal law \S 719(3)—Prosecuting attorney may state opinion as to evidence.

While a prosecutor should not be permitted to travel outside the record and poison the minds of the jurors in respect to matters not before them, yet he has the legal right to express his own opinion as to what the evidence tends to show as long as he keeps within the record.

7. Criminal law \S 1159(2)—Verdict will not be reversed because against the greater weight of the evidence.

A verdict of guilty in a homicide case will not be reversed because it is against the greater weight of the evidence; it being the special province of the jury to pass upon the weight of the evidence.

8. Homicide \S 354—Ten years' imprisonment held not excessive.

Imprisonment in the penitentiary for ten years held not excessive, where defendant had conspired with deceased's wife to murder deceased, so that he could live with her.

Appeal from St. Louis Circuit Court; John W. Calhoun, Judge.

William Gallagher was convicted of second degree murder, and he appeals. Affirmed.

On April 10, 1917, the circuit attorney of St. Louis, Mo., filed, in the circuit court of said city, an information charging defendant William Gallagher and Mrs. Rose Parker, jointly, with murder in the first degree for the killing of one William Parker, husband of Rose Parker aforesaid, in said city, on March 10, 1917. On April 19, 1917, each of

the above-named defendants were arraigned, and each entered a plea of not guilty. On October 22, 1917, a severance and separate trial was granted defendant Rose Parker. Thereupon the state elected to try her first. On January 15, 1918, a change of venue was granted defendant William Gallagher, and said cause sent to Division 12 of said court. The trial of defendant Gallagher was commenced in the circuit court aforesaid on February 27, 1918. On February 28, 1918, the trial of defendant Gallagher was completed, and on said date the jury returned into court their verdict, as follows:

"We, the jury in the above-entitled cause, find the defendant guilty of murder in the second degree and assess the punishment at imprisonment in the penitentiary for ten years."

"John D. Fidler, Foreman."

On March 5, 1918, defendant filed his motion for a new trial, which was continued from time to time until January 27, 1919, when the same was overruled. On January 30, 1919, defendant filed his motion in arrest of judgment. On the following day said motion in arrest of judgment was overruled, and defendant duly sentenced as required by law. The facts in the case are substantially as follows:

The deceased, William Parker, had resided as 1422 Sulphur avenue, in the city of St. Louis, for about 4 years prior to his death. He was a large man, about 6 feet and 4 inches tall, weighing about 240 pounds, and was employed by parties engaged in the furniture moving business. He was paid about \$15 or \$20 per week for his services, was a steady worker, and bore a good reputation. His family, consisting of his wife and two small daughters about 11 and 13 years of age, lived with him in the little 3-room house at 1422 Sulphur avenue, aforesaid. Up to within a few months of his death he permitted said family to purchase necessary supplies at stores near by, having charge accounts at said stores, and promptly paid such bills at the end of each week.

The house in which they lived was owned by the defendant, Gallagher. They paid him \$9 per month rent for the same. Gallagher was a man about 50 years of age, and had been divorced by his wife shortly after the Parkers moved into his property at 1422 Sulphur avenue. For about 3 years prior to the shooting of Mr. Parker said Gallagher had boarded at the Parker home, which was but a block or two from his own house. During those 3 years Gallagher and Mrs. Parker were frequently seen out together on the streets of evenings and in the parks in the afternoon, and there was considerable gossip among their neighbors concerning their intimacy.

In the latter part of December, 1916, several neighbors saw Mr. Parker come home one evening and chase Gallagher out of the

house into the street, where he beat said Gallagher and drove him away. Neoma Parker, the oldest daughter, on this occasion carried Gallagher's hat and coat down the street to him after this affray. The defendant tries to explain this by stating that there was no trouble between him and Parker on that occasion; that Parker was drunk, was threatening the family and wanting more liquor, and he was merely keeping Parker from hurting some of the family and from obtaining more liquor. The daughter Neoma attempts to corroborate his story, but her testimony is worthy of but little credence.

About the 5th day of February 1917, Mrs. Parker, accompanied by Gallagher, went to the office of Assistant City Counselor Sadler and filed a complaint against Parker, charging that he frequently came home drunk and beat and abused her and the children and threatened to kill her. Gallagher displayed so much interest in the matter that Mr. Sadler inquired as to the ground for his concern, and was told that Gallagher was a cousin of Mrs. Parker. None of the neighbors had ever heard them mention this relationship before. Neoma Parker testified that Mr. Gallagher's mother and her grandmother were first cousins. Neoma also stated that her father beat and mistreated her. However, it developed that he probably punished her for taking her little sister out with her and having intercourse with some boys. She admits the illicit act, but states they were lured away by another girl.

Sadler notified Parker that he had better stay away from his home for a while, and issued a summons for him to appear and answer the charge filed against him. Parker called at Sadler's office and explained the situation to the latter, and then Sadler notified Gallagher and Mrs. Parker "to stay away from each other." They then called at his office and dismissed their complaint against Parker, and Sadler again told Gallagher to stay away from Mrs. Parker.

On the 17th of February, 1917, Mrs. Parker filed suit for divorce. On the 5th of March, Gallagher had a cot placed in the front room of the Parker home, and slept there until the night of March 10th, when Mr. Parker was killed. About 9 o'clock p. m. of the last-mentioned date, Mr. Parker came to the back door of his home and asked admittance. He entered and an altercation took place, during which a window was broken out and two pistol shots were fired. One of these shots entered Parker's back, pierced the lungs and heart, and lodged in the muscles of his chest.

The pistol with which the shooting was done was later found hidden in the yard back of the Parker home. The state offered evidence tending to show that the pistol was the property of the defendant; that defendant had been intimate with the wife of the deceased; that there had been some trouble between them; and that defendant wanted

to get Parker out of the way so that he could live with Mrs. Parker. The testimony offered for defendant tended to contradict this, and show that there was no trouble between Parker and Gallagher; that the latter was a man of good reputation; that on the night of March 10, 1917, Parker came into the house and attacked his wife, and she got hold of the pistol and shot him in self-defense.

The instructions given and refused, the rulings of the court in regard to the admission and rejection of evidence, and the complaints of defendant's counsel as to the alleged improper remarks of the prosecuting attorney in the presence of the jury will be considered in the opinion as far as may be deemed necessary.

Defendant in due time appealed the cause to this court.

Charles P. Johnson, I. A. Rollins, and Jos. G. Williams, all of St. Louis, for appellant. Frank W. McAllister, Atty. Gen., and C. P. Le Mire, Asst. Atty. Gen., for the State.

RAILEY, C. (after stating the facts as above). I. Defendant in his brief assigns 14 errors alleged to have been committed by the trial court to his prejudice, which we will consider as far as necessary in the order presented:

[1] 1. "The court erred in giving the instruction on murder in the first degree." No reason is given for challenging the validity of said instruction. It is not even set out in appellant's brief. It is numbered 2, and clearly defines murder in the first degree. As the jury found defendant guilty of murder in the second degree, it is unnecessary to consider said instruction further. *State v. Baugh*, 217 S. W. loc. cit. 280, and cases cited.

2. "The court erred in giving instruction on murder in the second degree." No mention is made in appellant's brief in respect to said instruction, aside from the foregoing assignment of error. The instruction complained of is numbered 4, and properly declares the law as to murder in the second degree. *State v. Bauerle*, 145 Mo. 18, 46 S. W. 609; *State v. Moxley*, 115 Mo. 644, 22 S. W. 575.

[2] 3. "The court erred in refusing to give the instructions offered by the defendant." The instructions thus refused are designated in the record as A, B, C, D, and E. The propositions involved therein are fully covered by instructions 5, 7, and 13, given by the court. This was a sufficient ground for refusing same. *State v. Driscoll*, 235 Mo. loc. cit. 385, 188 S. W. 527; *State v. Stackhouse*, 242 Mo. loc. cit. 448, 449, 146 S. W. 1151. Appellant has made no effort, in his brief, to defend said refused instructions. Upon a careful consideration of same, we do not think they fully and correctly stated the law in respect to the matters attempted to be

covered thereby. In our opinion, this assignment is without merit and overruled.

4. "The instruction given by the court did not properly declare the law." Appellant does not point out in his brief the instruction complained of under this head, nor have we any idea as to which one he is attempting to challenge. The above assignment is too vague and indefinite to require at our hands any extended consideration of same. *State v. McBrien*, 265 Mo. loc. cit. 594, 595, 178 S. W. 489; *State v. Rowe and Sanders*, 271 Mo. 88, 196 S. W. 7; *State v. Selleck*, 199 S. W. loc. cit. 180; *State v. Mann*, 217 S. W. loc. cit. 69. We have carefully read the instructions given by the court and find no reversible error in the giving of same.

5. "The court erred in admitting illegal, incompetent, and prejudicial testimony offered by the state." In view of the voluminous record brought to this court, appellant's counsel ought at least to have advised us as to some improper ruling on this subject. We have, however, examined the record and do not find this contention sustained thereby.

[3] 6. "The court erred in permitting Mr. Reeder to cross-examine the witness Mrs. Parker, the codefendant, as to matters that were not referred to or brought out upon the direct examination." Mrs. Parker had been tried and found guilty of manslaughter in the fourth degree. She was put upon the stand by defendant Gallagher, and her examination in chief covered a wide range. She described her domestic relations with deceased, referred to the divorce case which she had brought, and undertook to cover in substance that which occurred when her husband was killed. She was cross-examined along practically the same lines. She testified, without objection, that she was convicted for the killing of her husband. She was then permitted to testify, over defendant's objections, that she had taken no appeal. She was also asked as to the conversation which she and Gallagher had with the prosecuting attorney and, over defendant's objection, was permitted to give her version of what occurred. Mrs. Parker having been granted a severance and separate trial, and having been convicted of killing her husband, we can see no good reason for confining the prosecuting attorney, in his cross-examination of this witness, strictly to those matters referred to by her in chief. The state was attempting to show that defendant Gallagher and Mrs. Parker had previously entered into a conspiracy to take the life of Mr. Parker and live together thereafter as husband and wife. Under the circumstances of this case, we do not think the legal rights of defendant have been violated by the admission of the cross-examination of Mrs. Parker. We are of the opinion that the cross-examination of Mrs. Parker did not violate the provisions of section 5242, R. S. 1909. Having been

awarded a severance and separate trial, and having testified, without objection, to her own conviction for the death of her husband, without showing that any appeal had been taken by her, she was a competent witness for all purposes, without any reference to above section of our statute. *State v. Hunt*, 91 Mo. 491, 13 S. W. 868.

7. "The assistant circuit attorney was guilty of misconduct in asking various questions which were incompetent, and of a character to inflame the minds of the jury and cause them to be prejudiced, and so prejudiced as not to offer the defendant a fair trial." Appellant's counsel, after having made the above charge, should have at least pointed out to this court the names of the witnesses referred to, and have stated what occurred. Upon carefully reading the record, we are unable to find where injustice has been done defendant in respect to any of the above matters complained of in said assignment.

8. Assignments 8 and 9 are as follows:

"(8) The court erred in permitting Mrs. Gallagher, the former wife of the appellant, to testify."

"(9) The assistant circuit attorney was guilty of misconduct that was prejudicial in parading Mrs. Gallagher, the former wife, before the jury, and in placing her upon the witness stand."

[4] Rose Gallagher testified in rebuttal, in substance, that she was formerly the wife of defendant, but was not his wife at time of trial; that she did not know whether he was a relative of Mrs. Parker. It is unnecessary to discuss the question as to whether Mrs. Gallagher was a competent witness for some purposes after having been divorced from her husband. The state sought to prove by her that defendant was not related to Mrs. Parker. Her answer was that she could not say. There is nothing in respect to this matter which would warrant us in reversing and remanding the cause.

9. Assignments 10 and 11 read as follows:

"(10) The court erred in permitting the circuit attorney to argue the case in the manner that he did."

"(11) The assistant circuit attorney was guilty of misconduct in arguing the case to the jury, and in making various remarks during the trial of the case in the presence of the jury, and in asking questions which were prejudicial to the defendant and forcing the defendant to object to the same."

[5, 6] In reading the record, we find that various objections were made by appellant's counsel to the opening and concluding arguments of Mr. Reeder before the jury. Some of these objections were sustained by the court and others overruled. Upon a careful

examination of the record concerning the remarks objected to, we do not find that the trial court committed error in overruling said objections. The prosecutor was within the testimony in expressing his opinion that defendant, after appearing upon the scene, had destroyed the domestic relations of the Parker family, alienated the affections of the wife and daughter of deceased, and had ultimately disposed of deceased in order that he might live with his wife. James Rice testified that Mrs. Parker told him that she and defendant intended to go on a farm and live together after she got a divorce. While a prosecutor should not be permitted to travel outside the record and poison the minds of the jurors in respect to matters not before them, yet he has the legal right to express his own opinion as to what the evidence tends to show, as long as he keeps within the record. We are of the opinion that the trial court committed no error in overruling the foregoing objections.

[7] 10. "(12) The verdict of the jury is against the greater weight of the evidence." This would be no ground for reversing and remanding the cause, even if we agreed with appellant's counsel, as it was the special province of the jury to pass upon the weight of the evidence.

11. "(13) The verdict is the result of prejudice and passion on the part of the jury." We are unable to find in the record any evidence of either passion or prejudice upon the part of the jury.

[8] 12. "(14) The punishment assessed by the jury is excessive." We do not agree with counsel in respect to this matter. In our opinion, the facts presented in the record are amply sufficient to sustain the punishment inflicted by the jury.

We have carefully read the record and briefs of counsel, and have not only considered the foregoing assignments of error but, with painstaking care, have considered each of the 40 alleged errors assigned in the motion for a new trial. Taking the case as a whole, we think the defendant has had a fair and impartial trial, that no reversible error was committed against him during the progress of the trial, that there is abundant substantial evidence in the record sustaining his conviction, and that he is not entitled to a new trial.

The judgment below is accordingly affirmed.

WHITE and MOZLEY, CC., concur.

PER CURIAM. The foregoing opinion of RAILEY, C., is hereby adopted as the opinion of the court.

All concur.

GAMMAGE v. LATHAM et al. (No. 20224.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)**1. Cancellation of instruments ¶27—Right to cancellation of note and deed held not dependent on title in plaintiff absolutely or in trust.**

Where plaintiff, without consideration and as a matter of accommodation had given a note and deed of trust securing it on land, she was entitled to have the note and deed of trust canceled, regardless of the question as to whether she was the absolute owner of the land, or held it in trust for the person for whose accommodation the note and trust deed were given.

2. Trusts ¶89(1)—Evidence of resulting trust must be clear.

To establish a resulting trust as to realty, the evidence must be clear, strong, unequivocal, definite, and so positive as to leave no room for doubt in the mind of the chancellor.

3. Trusts ¶89(3)—Evidence held not to show resulting trust.

Evidence held not to show a resulting trust in property bid in at foreclosure of trust deed.

4. Trusts ¶90—No resulting trust can be declared from fraudulent transaction designed to cut off equity of redemption.

If testator had title taken in plaintiff's name, by having her bid in the property at foreclosure sale, and had her give a bogus deed of trust on the property for his benefit, to cut off the right of redemption by the mortgagor, neither testator nor his legal representatives could maintain an action in equity to have a resulting trust declared in their favor against plaintiff.

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

Action by Harriet B. K. Gammage (now Cousins) against W. T. Latham and another, as executors of D. C. Gammage, deceased, and R. J. Brown, trustee for the estate of D. C. Gammage, deceased. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions.

This action was commenced by plaintiff in the circuit court at Kansas City, Mo., on December 24, 1915. The petition alleges that on March 16, 1915, D. C. Gammage, a resident of Jackson county, Mo., departed this life testate, and by his last will, filed in the probate court of said county, at Kansas City, Mo., plaintiff and defendants, W. T. Latham and T. R. Gammage, were named as executors of said will, and in accordance therewith were, by said probate court, duly appointed to act as such; that since said time they have been, and still are, the duly qualified and acting executors of the will aforesaid; that at all the dates herein mentioned plaintiff was, and still is, the holder in fee simple of lots 3 and 4 in block C, David Walk place, an addition in and to Kansas City, Jackson coun-

ty, Mo.; that on November 23, 1914, at the special instance and request of said D. C. Gammage, deceased, she executed and delivered to the latter a pretended promissory note for \$4,000, purporting to bear interest at 6 per cent. per annum, payable semiannually, and purporting to become due and payable on November 23, 1917; that in connection with and as part of said purported transaction, and contemporaneous with the execution of said note, she also executed and delivered to said D. C. Gammage, deceased, a pretended deed of trust, purporting to convey to said R. J. Brown the above-described real estate in trust, however, to secure to said D. C. Gammage, deceased, the payment of said pretended promissory note; that the pretended deed of trust aforesaid, on November 23, 1914, was duly filed for record in the recorder's office of Jackson county, Mo., at Kansas City, in Book B 1593, at page 224; that at the time of the execution of said pretended note and deed of trust plaintiff was not indebted to said D. C. Gammage, in any sum whatever, nor did she at any time prior to the making thereof, or at any other time, receive from said D. C. Gammage, or any one for him, the principal sum, or any part thereof, named in said note, etc.; that said pretended note and deed of trust were and are without consideration, and constitute a cloud upon the title of plaintiff to the real estate aforesaid, etc.

Plaintiff prayed for a decree canceling said note and deed of trust, and divesting said Brown of his record title to said real estate, and vesting the same in plaintiff, in fee simple. She also prayed for general relief.

Defendants, W. T. Latham and T. R. Gammage, for their joint answer to said petition, admit that since about the 16th of March, 1915, they have been, and still are, executors of the last will of said D. C. Gammage, deceased. They admit that said testator died about March 16, 1915. They admit that as such executors they hold and have in their possession the \$4,000 note aforesaid, and admit that said note is secured by first lien on above-described real estate. They deny every other allegation of plaintiff's petition. They prayed to go hence without day and recover their costs.

On April 6, 1918, the case having proceeded to trial before Judge O. A. Lucas, the latter announced from the bench he thought the evidence clearly disclosed that said note and deed of trust were without consideration, but intimated to counsel for defendants that a cross-bill might be filed, asking that plaintiff be divested of the legal title to said real estate.

Defendants, W. T. Latham and Dr. T. R. Gammage, pursuant to leave of court, filed herein their joint answer and cross-bill. They pleaded therein the same facts contained in the original answer, and by way of cross-bill alleged that on November 23, 1914,

and for more than a year prior thereto, said D. C. Gammage was the owner of a \$4,000 note, executed by one M. M. Robinson to H. B. Knowles, secured by a deed of trust on the real estate in controversy; that the maker of said last-described note defaulted in the payment of same, etc. On or about November 1, 1914, said D. C. Gammage demanded of defendant W. T. Latham, the trustee in said deed of trust, that he foreclose same; that on November 21, 1914, said Latham advertised and sold said real estate under the deed of trust aforesaid.

Defendants, Latham and Gammage, allege that said D. C. Gammage was then 75 years of age, in poor health, and was physically unable to attend the foreclosure sale; that he authorized and empowered this plaintiff, who had been acting as his agent in the transaction of his business, to attend said sale and buy in said property for him; that plaintiff, in compliance with said instructions, bought in the property aforesaid for testator for the consideration of \$4,135; that said real estate was sold to plaintiff by said Latham, as trustee, for the use and benefit of said D. C. Gammage, for the price of \$4,135; that said D. C. Gammage continued sick, and died about March 16, 1915; that said Latham, as trustee, executed to this plaintiff a deed for said property, and credited the Robinson note with the net proceeds of said sale; that plaintiff paid nothing to said trustee for the real estate aforesaid; that by reason of the premises plaintiff holds said real estate in trust for the use and benefit of said D. C. Gammage.

Said answer and cross-bill, after describing the note and deed of trust mentioned in petition, contains the following:

"That the plaintiff herein executed and delivered the aforesaid note for four thousand (\$4,000) dollars, dated on or about November 23, 1914, and the said deed of trust, bearing the same date (given to secure the said note), *as a matter of accommodation and convenience to the said D. C. Gammage, deceased.*" (Italics ours.)

The answer and cross-bill then alleges that the note and deed of trust described in petition should not be canceled, etc., until plaintiff executes and delivers to said defendants, Latham and T. R. Gammage, executors, a deed conveying to them the fee-simple title to said real estate.

The answer and cross-bill concludes with a prayer, declaring that plaintiff holds the legal title to said real estate in trust, for the use and benefit of the estate of said D. C. Gammage, and that when she has executed and delivered to said executors a deed for said real estate the note and deed of trust described in petition be canceled, etc. In case plaintiff failed to execute to said executors a deed to said property, then the court was asked to divest plaintiff of the title there-

to, and vest the same in said Latham and Gammage, as executors aforesaid. They also asked for general relief. On July 20, 1916, additional evidence was heard, and the cross-bill treated as denied by plaintiff.

In order to avoid repetition, the evidence and rulings of the court during the progress of the trial will be considered, as far as necessary, in the opinion. The court found the issues for the executors, and entered a decree substantially as prayed for in the cross-bill. Plaintiff in due time filed her motion for a new trial, which was overruled, and the cause duly appealed by her to this court.

Walter W. Calvin and Alfred N. Gossett, both of Kansas City, for appellant.

Marley & Reed, of Kansas City, for respondents.

RAILEY, C. (after stating the facts as above). [1] 1. It is alleged in petition that on November 23, 1914, plaintiff, at the special instance and request of D. C. Gammage, deceased, executed and delivered to the latter a promissory note for \$4,000, and that the same was secured by a deed of trust on the real estate in controversy, the legal title to which was then in plaintiff. It is alleged in petition, and the evidence conclusively shows, that said note and deed of trust were without consideration, and given to said testator as a matter of convenience. In fact the cross-bill filed by defendants as executors practically concedes the foregoing to be true, as shown by the statement therein, to wit:

"That the plaintiff herein executed and delivered the aforesaid note for four thousand (\$4,000) dollars, dated on or about November 23, 1914, and the said deed of trust bearing the same date (given to secure the said note), *as a matter of accommodation and convenience to the said D. C. Gammage, deceased.*" (Italics ours.)

Regardless of the question as to whether plaintiff is the absolute owner of the property in controversy, or holds the same in trust for said estate, she was, and is, entitled to have said note and deed of trust canceled.

2. Treating the defendant's cross-bill as an independent action, brought by defendants, as executors and trustees under the will of D. C. Gammage, deceased, to establish a resulting trust in their favor, as against plaintiff, and to divest her of the legal title to said real estate, and waiving the question as to whether said defendants can maintain this kind of an action, we will express our views of the law and facts as though their right to maintain the same were unquestioned.

[2] It is undisputed that the legal title to the property in controversy was conveyed to plaintiff under the express direction of testator, with full knowledge upon his part as to all the facts relating to the transaction. The law is well settled in this state that in order

to establish a resulting trust as to real estate the evidence must be clear, strong, unequivocal, definite, and so positive as to leave no room for doubt in the mind of the chancellor. *Forrester et al. v. Scoville et al.*, 51 Mo. 268, 269; *Ringo v. Richardson et al.*, 53 Mo. 385; *McFarland v. La Force*, 119 Mo. 585, 25 S. W. 530, 27 S. W. 1100; *Reed v. Painter*, 129 Mo. 674, 31 S. W. 919; *Curd v. Brown*, 148 Mo. 82, 49 S. W. 990; *Brinkman v. Sunken*, 174 Mo. 709, 74 S. W. 963; *McKee v. Higbee*, 180 Mo. loc. cit. 299, 300, 79 S. W. 407; *Reed v. Sperry*, 193 Mo. 167, 91 S. W. 62; *Smith v. Smith*, 201 Mo. loc. cit. 547, 100 S. W. 579; *Easter v. Easter*, 246 Mo. 409, 151 S. W. 413; *Ferguson v. Robinson*, 258 Mo. 113, 167 S. W. 447; *Davis v. Cummins*, 195 S. W. loc. cit. 754, 755; *Thompson v. Pinnell*, 199 S. W. loc. cit. 1014; *Johnson v. Jameson*, 209 S. W. loc. cit. 924.

[3] Turning to the evidence, we find that testator loaned to M. M. Robinson, \$4,000 on June 28, 1905; that a note of said date for said amount was executed by said Robinson to this plaintiff; that a deed of trust of same date was executed by said Robinson, conveying the land in controversy to W. T. Latham, as trustee, to secure said last-named note, and that this plaintiff was designated as the beneficiary therein. The above note was indorsed by plaintiff to testator. The latter in turn indorsed the same to plaintiff, and the latter again indorsed the note to testator. The latter directed Latham, as trustee, to foreclose the above deed of trust. After the property was advertised for sale under the deed of trust, Latham says testator told him the plaintiff, his daughter, would come down and bid in the property. She bid the property in at the sale, and under the direction of testator, Latham, as trustee, conveyed the property to plaintiff, and her deed therefor was duly recorded.

Testator in his will designated plaintiff as his daughter, spoke of her as such in his conversations, traveled with her, had her transact his business for a long time, and, after plaintiff bought in said property and received a deed therefor, she and testator moved on to said property and occupied the same as their home up to the time of his death. Plaintiff was not the natural daughter, and there was no evidence offered to show that she had been adopted. She was, however, related to testator in some way, and he called her daughter and treated her accordingly.

Testator, a widower, had no children, and left an estate of about \$100,000. After providing in his will for plaintiff as his daughter, and for other relatives, he left a large portion of his estate to charitable institutions.

Aside from the foregoing, Mrs. Francis B. Jarrott, a professional nurse, who attended testator in his illness and who witnessed his will, testified to several conversations with testator, in which he mentioned plaintiff as

the owner of the property in controversy. Shortly before testator's death, he was preparing to go to Florida, and asked witness to rent the above property for plaintiff. She asked him what rent she should charge, and testator "said it belonged to Harriet (plaintiff); that it did not make any difference to him what rent she charged." He also told her he did not care to sell the property, as he intended it for Harriet. She heard him speak of it on numerous occasions as Harriet's home. On cross-examination of this witness by defendants, she testified:

"Q. I believe you say that he said that he got the place for Harriet? A. Yes.

"Q. He intended it for Harriet? A. Yes."

Leaving out of consideration the testimony of plaintiff and that of her husband, we are of the opinion that testator intended that plaintiff should become the owner of said property, and directed the trustee to convey the same to her. It was not conveyed to her through mistake, but under the positive direction of testator himself. If he did not intend her to own it, why did he not direct the trustee to convey the same to himself? He knew of his extreme age and poor health; he was dealing with the plaintiff as his own daughter, and was expecting to make his home with her on this property. There is nothing in his will to indicate that testator claimed to own this property, or that he was attempting to dispose of same in his will. In short, the defendants have failed to come up to the requirements of foregoing authorities in respect to their proof concerning the alleged resulting trust.

W. T. Latham was testator's attorney, and is named as the executor in the will. He was allowed to testify as to conversations with deceased, while the mouths of plaintiff and her husband were practically closed by the trial court in respect to same matters.

Notwithstanding the foregoing, we are of the opinion that plaintiff has established a good title to the property in controversy, and that the proof offered in support of the cross-bill is insufficient to warrant a court of equity in overturning her title.

[4] 3. Aside from the foregoing, there is another aspect of the case, which precludes these defendants from having a resulting trust declared in their favor, even if testator had intended that plaintiff should hold the title to said property for his use and benefit. Bush was entitled to redeem the property within a year from the date of Latham's foreclosure. Either testator intended to give the property to plaintiff, or he was having the title taken in her name, and a bogus deed of trust given by her on the property for his benefit, in order to cut off the right of redemption upon the part of Bush. If he had the title taken in plaintiff's name for that purpose, then neither he, nor his legal representatives, can maintain an action in equity

to have a resulting trust declared in their favor against appellant. *Sell v. West*, 125 Mo. 621, 28 S. W. 969, 46 Am. St. Rep. 508; *Creamer v. Bivert*, 214 Mo. 473, 113 S. W. 1118; *Derry v. Dielder*, 216 Mo. 176, 177, 115 S. W. 412; *Chambers v. Chambers*, 227 Mo. loc. cit. 284, 285, 127 S. W. 86, 137 Am. St. Rep. 567; *Stillwell v. Bell*, 248 Mo. 61, 154 S. W. 85; *Rowley v. Rowley*, 197 S. W. 152.

Mr. Latham testified that testator knew the beneficiary in a deed of trust could not buy in the property without giving the grantor the right to redeem within the year, "*and for that reason he had Harriet to buy it in—I mean Miss Gammage or Mrs. Cousins—because he was the holder of the note, and did not want it to appear that the beneficiary bought it in.*" After the deed of trust was given by plaintiff to testator, the latter said to Latham "*he thought it might prevent Bush from redeeming.*" (Italics ours.)

Mr. Latham, at the instance of his counsel, testified as follows:

"Q. Now what, if anything, was said at or prior to the foreclosure sale by you about the reason why you should make the trustee's deed to Harriet, the plaintiff here, rather than to Mr. Gammage? A. There wasn't anything said by me, but *Mr. Gammage the night before told me that he wanted it made that way so it could not be redeemed.*" (Italics ours.)

Joseph F. Cousins, who married plaintiff, after the death of testator, and who had transacted business for the latter, in discussing the bogus deed of trust given by plaintiff to testator, while testifying in regard to the cross-bill, without objection, said:

"Q. What did he (testator) say about having it released? A. He said he put it on there just temporary, to have it released so Mr. Bush would not come in and redeem it."

If, therefore, testator had the title taken in the name of plaintiff at the trustee's sale, and had her execute the bogus deed of trust to himself for the purpose of cutting out Bush's right of redemption under the statute, then his legal representatives are precluded from declaring a resulting trust in favor of his estate, and divesting plaintiff of the title to the real estate in controversy.

4. Considering the case as a whole, we are of the opinion that the note and deed of trust described in plaintiff's petition are without consideration, void, and should be canceled. We further hold that defendants should take nothing by their answer and cross-bill, and that plaintiff, under section 2535, R. S. 1909, should be declared the owner in fee of the real estate aforesaid.

We accordingly reverse and remand the cause, with directions to the trial court to set aside its decree and to enter a decree in favor of plaintiff in conformity to the views heretofore expressed.

WHITE and MOZLEY, CO., concur.

PER CURIAM. The foregoing opinion of RAILEY, C., is hereby adopted as the opinion of the court.

All concur.

HUNTER v. WEIL et al. (No. 20603.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1920.)

1. Adverse possession §44—Usual acts of ownership must be continuous.

Under Rev. St. 1909, § 1882, providing that usual acts of ownership shall be deemed possession of whole tract claimed, the usual acts of ownership must be exercised for a continuous period of ten years.

2. Appeal and error §1010(1)—Finding supported by substantial evidence conclusive.

Where cause was submitted to lower court, sitting as a jury, without any instructions asked or given, its determination is binding on appeal if there is any substantial evidence on which to base it.

3. Adverse possession §114(1) — Evidence held to support finding against plaintiff claiming by adverse possession.

In an action to quiet title, where plaintiff claimed by adverse possession under Rev. St. 1909, § 1882, land in possession of defendant, held, that there was substantial evidence to support finding that plaintiff was not the owner of the property sued for.

4. Property §9—Person in possession of land prima facie owner.

One in possession of land for nine years under a deed from heirs, in good faith claiming ownership, is prima facie the owner of the land as against every person other than true owner, although all heirs did not sign the deed.

5. Appeal and error §877(4)—Appellant, not having title, cannot complain that defendant was adjudged title.

In an action to quiet title, having found that plaintiff was not the owner, that the lower court may have erred in declaring that defendant in possession was the owner is not a matter of which plaintiff can complain.

6. Evidence §182—Parol evidence of letter admissible where letter is shown not to be in existence.

Witness was properly permitted to testify, over objection that the writing was the best evidence, that he wrote a letter to plaintiff, where the witness testified he did not have the letter, and plaintiff testified he never received such letter.

Appeal from Circuit Court, Pemiscot County; Sterling H. McCarty, Judge.

Suit by William Hunter against Houston Weil and another. Judgment for defendants, and plaintiff appeals. Affirmed.

R. L. Ward, of Caruthersville, for appellant.

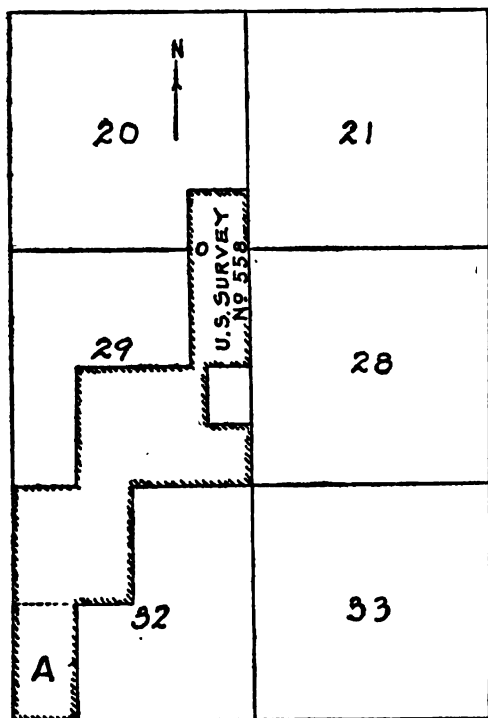
Wm. Fitch and Oliver, Raithel & Lacy, all of St. Louis, for respondents.

SMALL, C. I. Suit to quiet title with count in ejectment in usual form for 80 acres of land, to wit, W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of section 32, township 18, range 13, in said county.

The answer is a general denial, except that it admits possession of defendants. Also contains paragraph pleading ten-year statute of limitations.

The trial was by the court without a jury. No instructions were asked or given. The court found for the defendant Cunningham Land & Improvement Company; that defendant Weil had no interest, except as tenant of said company; and that plaintiff had no interest or title in the land. Judgment was rendered accordingly, and plaintiff appealed to this court.

Plaintiff had no record title, but claims ownership by adverse possession. Plaintiff claims under deed made to him October 12, 1889, by one William C. Finley, purporting to convey to him a number of tracts of land, aggregating some 700 acres, including the tract sued for. The larger portion of the land described in the Finley deed was in one irregular body extending from the 40-acre tract in the southeast corner of section 20 in a southwesterly direction through section 29 to the land in dispute, which was located in the southwest corner of section 32. The following plat, within the shaded lines, shows this irregular tract. The tract sued for is marked A.



Plaintiff does not claim that he ever fenced or cleared, deadened the timber on, or in any manner improved the land in question. It was low, wet land, and a portion of it was covered by a lake. It was not cultivated nor fit for cultivation until after the year 1901, when public and private drains were constructed after it was in possession of the defendant Cunningham Land & Development Company. The land was part of the swamp land originally conveyed by the United States to the state of Missouri, and by the state of Missouri to Pemiscot county. The county sold it to George W. Bushey on the 14th of May, 1857, who at the time paid the purchase price, but took no patent. Bushey and wife conveyed the land to Robert B. Turner by deed dated May 27, 1858, who in turn conveyed it to Wyatt Mooring by deed dated March 2, 1859. Mooring died intestate in 1874, leaving a widow and nine children surviving him, without having parted with his title. The record title was in Mooring's heirs prior to the time defendants' possession under deeds from them commenced.

Plaintiff's testimony showed that in the year 1898 his agent sold \$200 worth of cottonwood timber off of the land to the Cunningham brothers, who afterwards became the incorporators and owners of the defendant company, Cunningham Land & Improvement Company. It also tended to show that portions of the other land described in the deed from Finley in sections 20 and 29 were cleared, fenced, and cultivated by plaintiff and his tenants for more than ten years prior to 1901, when the evidence tended to show that the Cunninghams took actual possession of the land in question, cleared a portion of it, and put a small house thereon, and a fence around it, so as to include it within their inclosure of other tracts of adjoining land which they owned. The defendants' evidence further tended to show that the Cunninghams went into possession in 1901, under a contract to purchase the land from one Porter, whose wife was one of the heirs of Wyatt Mooring, and who had acquired the interest or had power to convey the interest of numerous other heirs of said Mooring. When Mooring died in 1874 or 1875, most of his children were married and had children, and some of them died and their children inherited their parents' interest. It does not appear whether all the heirs interested conveyed their title to the Cunninghams, but it does appear that a substantial part of them did. The conveyance from Porter was made to John A. Cunningham August 7, 1902. Defendants subsequently procured other deeds conveying the interest of other Mooring heirs.

The petition in this case was filed June 10, 1910. The undisputed evidence shows that John A. Cunningham and the defendant com-

pany were in actual possession and control of the land from 1901 up to and including the day suit was brought; that up to the year 1910, from and including the year 1902, they paid the taxes on the land, and would have paid the taxes in 1910 had not the plaintiff "got ahead of them" in so doing.

Defendants' evidence tended to show that in 1909 there was a division fence built between the plaintiff's property on the north and the property in question, and that the plaintiff paid half the cost of this fence and the Cunningham Company the other half; also that a few years after the Cunninghams took possession some ditches were built which drained the land in question, as well as some land adjoining the same belonging to the plaintiff, and the plaintiff paid his proportion of the expense for his other land, and the defendant company paid its proportion of the expense for the land in question. But plaintiff denies that he knowingly permitted defendants to pay any part of such expense for the division fence or ditches. There was also evidence on the part of the plaintiff that his tenants on his other land took timber for rails, fences, and firewood, from the part of plaintiff's land that was not cleared. But whether they did so from the particular land in question was not shown. Plaintiff testified generally that his tenants "used it right along." But what the plaintiff intended to say they used it for, or meant by "right along," was not stated. Plaintiff also testified that he sold timber to one Strother and one Pinion and authorized them to cut it from his land generally, including the land in question. But it does not appear that either of them ever cut any timber from the land sued for. The evidence does not show that plaintiff commenced clearing the 160 acres of land in the same section 32 immediately north of and adjoining the land in suit until about 1896, a year or two before the Cunninghams cut cottonwood timber off of the land in question. So it is not entirely clear from plaintiff's testimony that he paid the taxes every year from 1889 to 1901. He says that he always included this land in his list to the collector to pay the taxes, and he paid them every year, unless some other person "got ahead" of him and paid the taxes. Plaintiff said: "There were some years, that somebody else might have paid the taxes before I did." The tax receipts were not put in evidence, except for two or three years. Plaintiff said that he had the receipts in court for all the years since he purchased it, including the years 1902, 1903, and 1904, but it was afterwards admitted that defendant Cunningham Company paid the taxes for 1902, 1903, and 1904, and subsequent years to 1910. There was no evidence that plaintiff's predecessor, Finley, ever paid taxes or exercised any acts of ownership over this land.

The defendants, to further sustain their title, introduced a patent from Pemiscot county dated July 1, 1910, and recorded July 2, 1910. This patent recited, in the usual form, that on the 14th of May, 1857, George W. Bushey purchased and made full payment for the land, and that by mesne conveyances said Bushey sold and transferred it to Cunningham Land & Improvement Company, who was then the owner of it and was entitled to a patent therefor; that in consideration of the premises, and in conformity with law, the county of Pemiscot therefore "doth give and grant unto the said Cunningham Land & Improvement Company, and their heirs, the land above described," to wit, the land in controversy. This patent was duly executed by Joseph M. Brasher, the presiding judge of the county court, and countersigned by B. M. Tinsley, the clerk of said court.

II. It is strenuously contended by appellant that the undisputed evidence shows that prior to 1901, when Cunningham took possession, the plaintiff had acquired title by acts of ownership over the land in question, under section 1882, R. S. 1909, which is as follows:

"Possession of Part, When Possession of the Whole Tract.—The possession, under color of title, of a part of a tract or lot of land, in the name of the whole tract claimed, and exercising, during the time of such possession, the usual acts of ownership over the whole tract so claimed, shall be deemed a possession of the whole of such tract."

[1, 2] Appellant claims that his deed from Finley in 1889 gave him color of title to all the land described in said deed (which is not denied), including the land in suit, and that under the undisputed evidence he claimed title, paid the taxes, and exercised "the usual acts of ownership" over the land in question, as well as being in actual possession of other parts of the land described in the Finley deed (such actual possession of other parts is also not denied), from the year 1898 until the year 1901, at which time the Cunninghams took possession. But plaintiff's learned counsel is in error in saying that the facts with regard to plaintiff's acts of ownership over the land in suit were not disputed. The very crux of the case before the lower court was the issue whether plaintiff did exercise the usual acts of ownership over this land continuously for the statutory period of ten years prior to 1901. It would seem from the evidence that all of this land was wild, unfenced, unimproved timber land, and there is no clear evidence that any timber was removed from it prior to 1898, when the Cunninghams cut cottonwood from it under contract with the plaintiff. The statement of plaintiff's witnesses that tenants on other land included in this conveyance from Finley took timber for firewood, rails, and fence

posts from the uncleared portions did not necessarily include the land in suit. So the statement of plaintiff himself that "the tenants used it right along in connection with the other land" is too general in its nature to be of conclusive probative force. In any event, it was for the lower court to say what probative force it would attach to the testimony. The land in question was separated from the cultivated land and lands occupied by tenants by other tracts of timbered land of the plaintiff until at least the year 1896, when plaintiff first began to remove the timber from the northwest quarter of section 32, which immediately joined the land in question on the north. So that plaintiff's tenants, up to 1896, had more convenient timber land from which to procure their timber for firewood, fencing, or other purposes, and apparently no occasion nor necessity for taking it from the land in suit. As appears from the testimony, as we view it from the record, the only admitted acts of ownership which plaintiff exercised over this land was to sell cottonwood timber from it in 1898 to the Cunninghams. Under the statute plaintiff must have exercised the usual acts of ownership for a continuous period of ten years. That was a mixed question of law and fact, and the burden of proving the facts in relation thereto was upon the plaintiff. It was submitted to the lower court, sitting as a jury, without any instructions asked or given, and the determination of that question by the lower court is therefore binding upon us, if there is any substantial evidence upon which to base such a finding.

The cases cited by learned counsel, *Truitt v. Bender*, 193 S. W. 838, *Dowd v. Bond*, 199 S. W. 954, *In re Lankford's Estate*, 272 Mo. 1, 197 S. W. 147, and *Toler v. Edwards*, 249 Mo. 152, 155 S. W. 26, do not rule this case. So also as to *Nall v. Conover*, 223 Mo. 477, 122 S. W. 1039.

In *Truitt v. Bender*, *supra*, the undisputed and distinct testimony was:

"I used it just the same as I did the rest, for my timber, rail timber, board timber, firewood, anything like that just the same as I did the rest. I did this all of the time I was there, some 25 or 30 years."

The evidence in that case also showed that the adjoining 40, a part of the same 80 acres, had been in cultivation for "35 or 40 years." There was no contradictory evidence. In that case the land had never been in actual possession of any one, and was not in possession of defendant, and had been for 9 years, as in the case at bar.

In *Dowd v. Bond*, *supra*, the court held that, where neither party shows good title, but the plaintiff is in possession, the judgment should be for the party in possession, the plaintiff in that case.

Here the plaintiff never had actual possession, and the only question is whether he exercised the usual acts of ownership for the required period.

In the *Lankford Case*, *supra*, the question of domicile was involved, and it has no bearing on this case, as the testimony passed on in that case was a document, a will, and not parol testimony, as in the case before us.

Toler v. Edwards, *supra*, simply holds that, where the evidence as to the character of the possession is conflicting, this court will not interfere with the finding of the lower court, sitting as a jury.

In *Nall v. Conover*, *supra*, the lower court found that the acts relied on were established and did constitute usual acts of ownership, which is the very reverse of the finding of the lower court in this case.

We find no authority to sustain the position of plaintiff's learned counsel that under the evidence in this case, the lower court was bound, as a matter of law, to find that the plaintiff had established his title by adverse possession. The plaintiff waited for nine years, after he knew the defendants were in possession of the land and were expending their money in clearing, fencing, and draining it and paying the taxes upon it, including perhaps drainage taxes (it was in a drainage district and a public ditch had been built), before bringing his suit. While this would not have estopped him, as a matter of law, from claiming the land, it would naturally call for clear and decisive evidence by the trier of facts concerning the details of plaintiff's "usual acts of ownership" before rendering a verdict in his favor.

[3] We must therefore rule that there was substantial evidence to support the finding of the lower court that the plaintiff was not the owner of the property sued for.

[4, 5] III. Whether the deeds from the heirs of Wyatt Mooring, under which the defendant company claims embraced all of the said heirs is immaterial to consider, because the defendant company, being in possession and having been so in possession in good faith, claiming ownership under said deeds for about nine years before the suit was instituted, is *prima facie* the owner of the land, as against every person other than the true owner. Indeed, having found that plaintiff is not the owner, the fact that the lower court may have erred for any reason in declaring that defendant company was the owner is not a matter of which the plaintiff can complain. *Wheeler v. Land Co.*, 193 Mo. 291, 91 S. W. 1050; *Rutledge v. First Presbyterian Church*, 212 S. W. loc. cit. 861.

[6] IV. On cross-examination of plaintiff's witness Reynolds, he was permitted to testify (over the plaintiff's objection that the writing was the best evidence) that in 1898 he wrote a letter to the plaintiff informing him that his title to the land in question

was not good. But, as the witness testified he did not have the letter, and plaintiff, Hunter, testified he never received any such letter, the parol testimony was competent.

Finding no error in the record, the judgment of the lower court is affirmed.

BROWN and RAGLAND, CC., concur.

PER CURIAM. The foregoing opinion of SMALL, C., is adopted as the opinion of the court. All concur except WOODSON, J., absent.

REYNOLDS et ux. v. KINYON. (No. 21185.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1920.)

1. Municipal corporations §705(1)—Right of public to use streets defined.

As far as the use of a public street is concerned, the public includes young and old, without necessary reference to their physical or mental ability or their means of locomotion, the right of each to be on the street being subject to the obligation to use it with due regard to the safety and use of all.

2. Municipal corporations §706(5)—Evidence of automobile driver killing child held an admission of negligence.

In a parents' action for wrongful death of their two year old child struck by defendant's automobile while in the street, evidence by defendant, in view of Laws 1911, p. 327, § 8, subd. 2, relating to the operation of motor vehicles, held to constitute an admission of negligence directly causing the death of the child.

3. Negligence §95(3)—Negligence of visitor taking care of child not imputable to child where defendant's negligence was direct cause of death.

Where a child between two and three years old left by its parents in the care of a visitor, went into a public street and was killed by defendant's automobile, the negligence of such visitor was not imputable to the child as a defense in favor of defendant, whose negligence was the direct cause of death.

4. Witnesses §389—Evidence of person in charge of child killed by automobile held inadmissible in impeachment.

In a parents' action for the wrongful death of a child between two and three years old, killed by defendant's automobile while in the street after having been left in charge of a neighbor, evidence by policemen that such neighbor, in response to a direct question, stated that the accident was unavoidable held inadmissible in impeachment; the witness having merely denied any knowledge or recollection of such testimony.

5. Municipal corporations §705(3)—Automobile driver must exercise as to children highest degree of care prescribed by statute.

It is the duty of an automobile driver on a public street to exercise not merely ordinary

care as to children, but the highest degree of care prescribed by the statute.

Appeal from Circuit Court, St. Louis County; G. A. Wurdeman, Judge.

Action by James F. Reynolds and wife against Albert S. Kinyon for wrongful death. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

Robert H. Merryman, of St. Louis, for appellants.

Conrad Paeben, of St. Louis (James T. Roberts, of St. Louis, of counsel), for respondent.

BROWN, C. This is a suit by a father and mother for damages sustained on account of the negligent killing of their child, between two and three years old, by running over it with an automobile while driving over Vista avenue, a street in St. Louis. The sufficiency of the petition for the purposes of the case is not questioned. The answer, in addition to the usual general denial, pleads contributory negligence, in that the child, without warning of any kind, suddenly ran into the path of defendant's automobile in such manner that defendant, in the exercise of due care, could not prevent striking it, and that plaintiffs assigned the care and control of the child to one Grace Gallagher as their agent and servant, and that Grace Gallagher was inexperienced and incompetent in the care and control of children, as was known by plaintiffs; that the child had a tendency to run into the traveled part of the street and off the sidewalk, which was known to the servant, who carelessly and negligently permitted him to run off the sidewalk and into the path of defendant's automobile, which she saw, or by the exercise of ordinary care might have seen, approaching in time to have prevented it; also that the parents were negligent in the selection of an agent competent to care for and control the child. Issue was joined by replication.

There is no conflict with respect to the controlling facts. The plaintiffs were young people, and this boy was their only child. He was two years five months and three days old at the date of his death on July 1, 1915. They were in such circumstances that they kept no servant, the wife alone performing all the domestic services, as well as caring for the baby. Mrs. Grace Gallagher was a friend, whose husband, Frank Gallagher, was a soldier of the Twelfth Engineers, stationed at the Chain of Rocks, and she was going to see him that afternoon. Mrs. Reynolds was going to take a street car ride with her cousin to Meramec Highlands later in the same afternoon. The child wanted to go with Mrs. Gallagher to see the soldiers, which the mother permitted, and they left for the camp

at 2 o'clock, while Mrs. Reynolds and her cousin left at 3 o'clock. Mrs. Gallagher returned about 6:15, and went with the child to the Reynolds house, which was on the north side of Vista avenue, the third house east of Theresa avenue, and sat down on the porch with a book to wait for the return of Mrs. Reynolds. She took a book, and the child played in front of the house with other children for a while. He then went to the next door and played with the children there. After a while she called him, and he started back to her, and she glanced at her book. She says that it was no more than two minutes afterward when she looked up and saw him in the street just as the automobile struck him. The child was not large enough to step down from the curb 10 inches high, but would turn his back to the street and slide down.

The defendant himself tells the story of the accident substantially as follows: He was driving east along Vista avenue on the south side of the center of the street, which was 36 feet wide between the curbs at that place. There was no one on the street between the curbs that he saw, and no vehicle in sight. He saw people on both sides, but paid no attention to them, because he was watching the machine. He first saw the child, almost in front of the machine, running across the road. He turned the machine to the left to miss him, the machine struck him, knocked him down, and ran over him. He stopped the machine within 15 feet. Some man picked the child up and ran with it. He did not see the child at all after it was struck. On cross-examination he said that he started to turn the machine to the right. He did not see the child, because he was not watching for children.

Mrs. Kinyon said she was sitting in the seat with her husband. She testified that when she first saw the child he was pitched forward, right in front of the machine, and her husband was trying to stop the machine. None of the passengers in the machine who testified saw the child in the street until he was in front of the machine. One of them said the child was about 2½ feet high. She saw him on the sidewalk with other children as they approached. The view was clear. She did not see him again until she saw him in front of the machine.

Two witnesses who saw the accident testified for plaintiffs. Mildred Lee lived next door to the Reynolds, and saw it get down from the curb, and run across the street and saw the machine hit it. The boy ran about as fast as one would walk.

Mr. Downey lived on the south side of Vista avenue in the same block. He saw the boy run across the street to the front of the automobile, and saw it strike him. He said the child ran at the rate of about 2 miles an hour. The automobile was moving at a speed of 12 or 15 miles an hour.

On cross-examination Mrs. Gallagher was asked by defendant's counsel whether or not after the accident she told Officer Doerdelman at the Reynolds house that "the machine was not going fast at all, and the accident was unavoidable." She answered that she did not remember saying any such thing.

Officers Doerdelman and Thomas were called up by the defendant. Both testified that they went to the Reynolds house immediately after the accident to investigate. They found Mrs. Gallagher nervous and crying, and she seemed to be in quite a nervous state. They asked her if the accident "was unavoidable," and against the objection of plaintiffs they were both permitted to testify that she said it was. This ruling was duly excepted to, and is assigned as error by the plaintiffs.

The court of its own motion and against plaintiffs' objection gave the following instruction numbered 15:

"The court instructs the jury that the negligence of the servant or agent is imputable to the master or principal to prevent recovery by him for injuries to which the servant's or agent's negligence contributes, and the master or principal assumes the risk of the negligence of the employé. Therefore, if you find and believe from the evidence that on the day of the injury referred to in the evidence plaintiffs assigned the care and control of their minor son to one Grace Gallagher as their agent and servant, and that she, the said Grace Gallagher, carelessly and negligently suffered said minor child to run off the sidewalk and onto the street unattended, when she knew, or by the exercise of ordinary care, as defined in these instructions, would have known, that automobiles were frequently passing on said street, and that she, the said Grace Gallagher, carelessly and negligently suffered said minor child to run off of the sidewalk and onto the street unattended in the path of defendant's automobile, when she saw, or by the exercise of ordinary care as defined in these instructions might have seen, defendant's automobile approaching in time, by the exercise of ordinary care, to have prevented said minor from running into the street and in the path of said automobile, then the carelessness and negligence, if any, of said Grace Gallagher is the carelessness and negligence of these plaintiffs, and they cannot recover, unless you find that the defendant is liable under the other instructions given in this case.

"And in determining whether the plaintiffs contributed, by their negligent care and custody, if any, of their minor child to its injury and death, you are to consider whether or not they or their servant and agent, if any, exercised that degree of caution, care, and watchfulness over their child in keeping him off the street and out of danger which was reasonable and proper for parents in their circumstances of life."

To the giving of this instruction the plaintiffs at the time excepted.

1. This action being founded upon section 5426 of the Revised Statutes of 1909, which

provides that "whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured," the first question which arises in natural sequence is whether the act which caused the death of plaintiffs' child was negligent on the part of defendant. We will consider and dispose of this question apart from the questions relating to the contributory negligence presented by the pleadings. In doing this we will refer only to the undisputed facts.

[1] The child was killed in a street in the residential portion of the city of St. Louis devoted to the public use. The public includes the young and old, without necessary reference to physical or mental ability or their means of locomotion. The right of each to be upon the street is subject to the obligation to use it with due regard to the safety and use of all. The law expressly recognizes the dangerous character of the automobile in respect to both its speed and its weight, which particularly makes it an instrument of death to those it strikes. In this respect it recognizes also that persons on foot are liable to be found on any portion of the street. The statute (Laws 1911, p. 327) provides that—

"Upon approaching a pedestrian, who is upon the traveled part of any highway and not upon a sidewalk, and upon approaching an intersecting highway or a curve or a corner in a highway, where the operator's view is obstructed, every person operating a motor vehicle shall slow down and give a timely signal with his bell, horn or other device for signaling." Section 8, subd. 2.

This recognizes the duty to not only keep watch to ascertain the presence of pedestrians in front of his vehicle, but in case his view is so limited that he is liable to come upon them without seeing them to warn them by a sound indicating his approach. It also involves the duty, upon discovering them, to so manage his machine as not to do them harm. If he sees a man on a crutch in front of him, it is his duty to avoid him, or give him an opportunity to escape; and, if it is a child evidently too young to understand the danger, he must act accordingly. This statutory rule is firmly founded in the impulse of common humanity as well as in public safety. The duty to watch is an instinct of the normal mind. While the operator has the right to assume that persons whom he sees in his path will do their part, that right ceases when it is developed that it is a

child too young to understand the danger.

In this case the defendant was driving his vehicle upon the public street at a speed of 15 miles per hour. He says that he saw persons on the sidewalk on either side, but the traveled part of the street, so far as he knew, was absolutely empty. He could, if necessary, stop within a distance of 15 feet, and did so stop on striking the child with the front of his machine. When he was still 150 feet away it had slipped down from the curb, and started at a speed of 2 miles per hour to cross his path on the south side of the center of the street. The young woman riding in the rear seat of his machine saw it as it stood upon the curb. She did not see it while it was toddling diagonally across the street, a distance of as much as 20 feet, to the path of the machine, where he was struck and killed. In the interval defendant had driven a distance of 150 feet without lifting his eyes to the road before him. That the field of his vision was broad enough to take in the sidewalk is definitely stated by him in his testimony. He also said that somebody immediately picked up the child and ran with it across the street. We presume that this was Mr. Downey, who lived on the south side of the street and saw the accident, and was carrying the child to his home. Mr. Kinyon refrained from saying what he did at the time but it appears from the statement of one of his witnesses that he was at a police station within a few minutes, and that the two policemen were at once sent to investigate, and arrived at the Reynolds house about 6:45. It does not appear that he went across the street to inquire whether the child was dead or alive.

[2] We think the facts stated amounted to an admission on the part of the defendant of negligence directly causing the death of the child. The only explanation he gives is that he was not looking for children in the street. We can see no difference as a matter of law between the case so stated and the one that would be presented had he turned his automobile loose in the street with neither driver nor passenger at the same speed and with the same result. The victim was a child, and the defense is that he was not bound to anticipate the possible presence of a child in the street, and for this reason was not guilty of negligence in killing it. The same defense would be equally applicable to the act of turning his automobile loose, had it killed a child instead of an adult. This theory is illogical as well as inhuman. If the duty rested upon any one to keep the child from the street, it was a duty owing to the child and not to him. So far as he was concerned, he had no right to demand that it be kept out of his way any more than he had the right to demand that the aged or infirm or feeble in mind or body be kept out of his way. The common law and statute as well as humanity

imposed upon him the duty to look out for all. His negligence began with his failure to do so in time to avoid the injury, and was complete with the deathblow.

2. The real question in the case lies in instruction No. 15, given by the court of its own motion. There was no evidence that Grace Gallagher occupied the relation of agent or servant of the plaintiffs, unless the fact that she was a visitor at their home, and the child was left with her with the intention that she should take it on her visit to the Chain of Rocks that afternoon, constituted such evidence. No contractual relation existed between them, unless this circumstance created it. Nor is there any evidence that she was not thoroughly competent in the care of children, so that there is nothing in the case to justify the submission of the question of contributory negligence of the parents in leaving the child with her. It was therefore a question of law and not of fact whether or not Mrs. Gallagher was the "servant or agent" of plaintiffs, and the jury were told "that the negligence of the servant or agent is imputable to the master or principal to prevent recovery by him for injuries to which the servant's or agent's negligence contributes, and the master or principal assumes the risk of the negligence of the employé." The instruction virtually told them that the relation existed, and that if Mrs. Gallagher was negligent in permitting the child to escape to the street there could be no recovery. In determining whether this was a current proposition of law, we shall not stop to consider whether or not she owed to the child, as the instruction assumes, the duty to watch for the defendant's automobile and prevent it from running off the sidewalk and onto the street unattended, in the path of said automobile when in the exercise of ordinary care she might have seen it approaching in time to have prevented it. We mention this point because, as we interpret the language, the instruction assumes that this duty is unconditional and absolute, and we do not desire to be understood to apply that rule to the circumstances in this case. See *Cosmoyski v. Transit Co.*, 207 Mo. 263, 106 S. W. 51. We will therefore confine ourselves to the question whether or not the conduct of Mrs. Gallagher is imputable to plaintiffs in the defense of this case. As we have already said, her fault, if fault it was, consisted in permitting the child to be unattended upon the street. The fault charged against the defendant consisted in killing a child upon the street by his own active negligence in running over it with his machine. The statute which we have already quoted gives this action for wrongful death in every case where the death is caused by a wrongful act, neglect, or default of another "such as would, if death had not ensued, have entitled the party injured to maintain an action and recov-

er damages in respect thereof." The right of the injured party to recover had he survived is made, in words too plain to admit of construction, the absolute test of the right of the plaintiffs.

The defense in this case is contributory negligence. It is admitted that the child was so young as to be incapable of any act of negligence, but the defendant says that the negligence of the woman who with the consent of his parents had the control of his person at the time would be imputed to him in bar of a recovery of damages for the injury had he survived it. It is true that there can be no recovery for injuries where it appears that the person injured was guilty of contributory negligence, which is defined as being "where the injury is the result of the united, mutual, concurring, and contemporaneous negligence of the parties to the transaction." 20 R. C. L. p. 99, and cases cited. This rule is illustrated by the operation of what we sometimes call the doctrine of the last chance, which requires one operating a dangerous appliance or vehicle, who sees another in danger from its movement, or by the exercise of proper care would see him in such danger, in time to avoid striking him, and neglects to do so, to respond in damages for the injury so inflicted. This rule is applied in all cases in which the injured party is in a place of danger from his own negligence, and is founded in the principle that one who has been negligent is entitled in common humanity to all practicable protection from injury. By heedlessly placing himself in danger he does not become an outlaw and deserving of death or mutilation. For this reason it is often expressively denominated the humanitarian doctrine. In all such cases the negligence arises when the danger becomes apparent, whether seen or not.

[3] That the same principle applies in this case is evident. The act of the driver in failing to stop his machine was neither mutual, concurrent, nor contemporaneous with the act of the woman in permitting the child to escape from her. It was distinct in its character and independent and complete in itself. Had the child been a drunken man lying stupified in the path of the automobile he would have been entitled to the same protection, and it could not be said that the proprietor of the saloon who had turned him out helpless in the street, knowing his condition and inability to take care of himself, would be attributable to him to prevent a recovery. It may be that the saloon keeper might be liable in a separate action for the same injury, or that he might be solely liable in an action for turning him out in the face of a known and imminent danger, but that his act would be imputed to the victim as contributory negligence cannot be imagined. We can see nothing in the relation of Mrs. Gallagher to the child that would charge

him with the consequence of her act in favor of the wrongdoer although, if wrongful, she herself might be liable.

This same question was before this court in *Czezewska v. Benton-Bellefontaine Ry. Co.*, 121 Mo. 201, 25 S. W. 911. The court said:

"In the instructions for the plaintiff the jury are, in substance, instructed that if the child's death was caused by the negligence of the driver, while running the defendant's car and without negligence on the part of its parents the plaintiff is entitled to a verdict, and that, although they may believe that the plaintiff was guilty of negligence in permitting her infant son to escape upon the street, yet, if they find from the evidence that the death of the infant might have been avoided by the exercise of ordinary care upon the part of the driver, they will find for the plaintiff. The doctrine of these instructions as applicable to cases of infants of such tender years as to be incapable of the exercise of judgment or discretion, in actions brought by the parent for the death of the child or by the child for injuries under the statute for damages, has been sanctioned and maintained by this court in a long and unvarying line of decisions. *Boland v. Railroad*, 36 Mo. 484; *O'Flaherty v. Railroad*, 45 Mo. 70; *Morrissey v. Ferry Co.*, 43 Mo. 380; *Isabel v. Railroad*, 60 Mo. 475; *Farris v. Railroad*, 80 Mo. 325; *Donahoe v. Railroad*, 83 Mo. 543; *Reilly v. Railroad*, 94 Mo. 600; *Winters v. Railroad*, 99 Mo. 509; *Rosenkranz v. Railroad*, 108 Mo. 9."

That case was approved in *Cornoyski v. Transit Co.*, supra, and upon authority as well as principle expresses the law as it exists in this state. The only issue before the jury being negligence in running over the child after the defendant had seen, or by the use of the proper degree of care might have seen, its dangerous position, instruction No. 15, given by the court of its own motion, in so far as it imputes to the child or its parents any negligence of Mrs. Gallagher in permitting it to escape into the street, was fatally erroneous.

[4] 3. One other question deserves notice. Two policemen were permitted to testify that they went to the Reynolds house immediately after the accident, and that Mrs. Gallagher told them, in answer to a direct question, that the accident was unavoidable; the court placing its decision on the ground that it tended to impeach the witness. A careful examination of her testimony shows that she had testified to nothing which this statement, if she made it, had any tendency to dispute, nor to any contested fact. She did not testify directly or indirectly to the speed at which the vehicle was being driven, nor that she saw it until the instant of the collision, nor did she attempt to give any opinion on that subject. Nor did she state any fact except the collision as admitted by all, relating in any way to its culpability. She did

not attempt to say positively that she had not given the answer attributed to her, but denied definitely any knowledge or recollection of it, and her denial was undoubtedly honest, for, as the policemen testified, she was weeping and hysterical at the time of the inquisition. It seems to have been, if the interview occurred, an attempt to secure some admission from her in words the officer admits having put in her mouth. It was an opinion as to the legal effect of the incident which neither bound the plaintiffs nor tended to dispute her testimony on the trial. It was admitted by the court after a legal controversy calculated to enhance its effect, and with the statement by the court that was calculated to cast the stigma of "impeachment" upon the plaintiffs' case without ground therefor. It was plainly reversible error.

[5] 4. In one of the instructions given for defendant his duty is defined as the exercise of ordinary care instead of the highest degree of care prescribed by the statute. Although this was error, we have preferred to dispose of the case upon questions relating to its merits.

For the reasons stated, the judgment of the circuit court for St. Louis county is reversed, and the cause remanded.

RAGLAND and SMALL, CC., concur.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court.

BLAIR, C. J., and GRAVES, J., concur.
GOODE, J., concurs in the result.
WOODSON, J., absent.

WADE v. MEYER. (No. 16162.)

(St. Louis Court of Appeals. Missouri. Submitted on Briefs May 11, 1920. Opinion Filed June 8, 1920.)

1. Tenancy in common §28(1) — Tenants cannot collect rents from cotenants.

Generally tenants in common cannot collect rents from cotenants.

2. Tenancy in common §28(1)—Cotenants' agent in possession of premises liable for rent which he failed to collect from cotenant in possession as tenant of agent.

Where cotenants by agreement turned control of the premises over to an agent, who took possession as such agent and thereafter rented the several apartments to the cotenants, the occupancy of the cotenants was as tenants in severalty under such agent, making it agent's duty to collect rent from such tenants, and making him liable for the rental value of the apartments which he permitted some of the tenants to occupy without payment of rent.

3. Costs \$260(4)—No damages for vexatious appeal where appellant acted in good faith.

Where appellant appears to have acted in good faith, and, under a mistake as to his duty under the law in the facts, damages will not be imposed as for a vexatious appeal.

Appeal from St. Louis Circuit Court; William T. Jones, Judge.

"Not to be officially published."

Action by George E. Wade against Christian F. W. Meyer. Judgment for plaintiff, and defendant appeals. Affirmed.

August C. Hilmer and J. C. Robertson, both of St. Louis, for appellant.

Grant & Grant, of St. Louis, for respondent.

REYNOLDS, P. J. This is an action for an accounting brought by plaintiff in his own right and as assignee of his son, Claude A. Wade, against Christian F. W. Meyer—originally also against Henry and August Miller, but these latter dropped out of the case—Claude A. Wade and the Millers owning the premises as tenants in common, and the plaintiff claiming curtesy in right of his deceased wife. The property was in charge of defendant, Christian F. W. Meyer, who had rented apartments in the building to the Millers and Claude A. Wade, collecting rents from the latter but not from the Millers. This suit is for an accounting of the rentals collected or owing. The cause was tried by the court and much testimony taken. By his first account defendant Meyer admitted that there was due plaintiff, as assignee, \$151.15, but claimed that this was an error, and that there was due him only \$108.60, denying plaintiff's right to any allowance on account of his claim by the curtesy, as to which defendant claimed plaintiff was barred and estopped by his laches to any allowance on this account. The court found that plaintiff was entitled to \$402.02, including the curtesy, and entered judgment accordingly, from which defendant Meyer has duly appealed.

Although we might refuse to examine the evidence in the case by reason of the points made by appellant in his motion for a new trial, which really attack the finding as not supported by the weight of the testimony, we have read all of it and found it ample to sustain the finding and judgment.

[1, 2] Learned counsel for appellant under their points and authorities claim as their first point, that tenants in common cannot

collect rents from co-tenants. That is generally true, but the occupancy of the Millers was not as co-tenants but as tenants in severalty under Meyer, to whom all the owners had turned over the control of the premises and each of the Millers and Claude A. Wade rented their several apartments from him—none of them, however, except Wade actually paying rent—and it is for this rent due as well as that collected that the account is in great part asked.

Learned counsel for appellant further make the point that the relation of landlord and tenant must exist to sustain an action for use and occupation, and they claim that this relation did not exist between "plaintiff" (so it is printed, but meaning appellant) and the Millers. The trial court, on substantial evidence, found against appellant on this.

The third point is that respondent was guilty of laches in failing to assert his interest in the property for twenty years after it became vested and that under the circumstances of the case, appellant will be protected. The learned trial court found on this that there were here no laches which barred or estopped respondent, and it had substantial evidence to show lack of knowledge of the facts to excuse respondent.

The final point is that Meyer, the appellant, was not acting in a fiduciary capacity and is only liable, in any case, for the rents collected, and that he had no power to compel tenants in common and in actual possession to pay rent to those not occupying the premises. That is not this case. Meyer, under agreement of all the owners, was in possession as agent for all. Each of them was in possession, not as owner, but severally, as tenants of specific apartments and liable to Meyer for rents. It was his duty to collect; he did collect from Claude A. Wade but not from the Meyers. In this he was derelict in his trust and duty and made himself liable for the rental value of his tenements.

We find no error in the judgment of the trial court.

[3] Counsel for respondent asks that we impose damages as for a vexatious appeal. We decline to do that. The appellant appears to have acted in good faith, mistaken only as to his duty under the law and the facts.

The judgment of the circuit court is affirmed.

ALLEN and BECKER, JJ., concur.

EADS v. STIFEL. (No. 16155.)

(St. Louis Court of Appeals. Missouri. Argued and Submitted May 10, 1920. Opinion Filed June 8, 1920.)

1. Contracts \Leftrightarrow 124—Employment to promote candidacy for presidential nomination and for national committeeman void.

Under Rev. St. 1909, § 4401, a contract whereby plaintiff was employed for \$100 a week and expenses to devote his time and services and personal political influence to promote a candidacy for the Republican nomination for President, and the candidacy of defendant for Republican national committeeman for Missouri, was void as against public policy.

2. Contracts \Leftrightarrow 137(3)—Plaintiff cannot recover for legal services inextricably mingled with illegal.

Where legal items of services claimed by plaintiff and illegal items in promoting a candidacy for the Republican presidential nomination, and another for national committeeman for the state of Missouri, were so mingled that plaintiff could not separate them in his testimony by fixing the value for the legal services, plaintiff cannot recover for any of such services.

Appeal from St. Louis Circuit Court; Wilson A. Taylor, Judge.

Action by Henry L. Eads against Otto F. Stifel. From judgment for defendant, plaintiff appeals. Affirmed.

John B. Denvir, of St. Louis, for appellant. Schnurmacher & Rassieur and John M. Goodwin, all of St. Louis, for respondent.

REYNOLDS, P. J. This is an action by plaintiff against defendant, the petition in two counts. In the first count it is averred that on or about February 1, 1912, a certain agreement was made and entered into by and between plaintiff and defendant to the following effect:

"Plaintiff was employed to devote his time and services to promoting the candidacy of Mr. William H. Taft for nomination as President of the United States (and of Mr. Otto F. Stifel for National Committeeman for Missouri), in the various Congressional Districts of Missouri, and for said time and services was to receive one hundred dollars (\$100.00) per week, and the actual expenses incurred by him in carrying out the objects of his said employment."

Plaintiff states that he has duly performed all the conditions of the contract on his part to be performed, and rendered the services contracted to be performed as aforesaid, whereby the sum of \$1400.00 is due him from defendant for salary for such services; that defendant has paid him the expenses incurred in pursuance of the terms of contract

and on April 24th paid him the sum of \$100.00, and on June 16th, 1912, the further sum of \$50.00, leaving a balance due of \$1250 for salary. Averring demand and failure and refusal to pay, plaintiff asks judgment for that amount.

The second count is on the same transaction but on quantum meruit.

The words in brackets were stricken out of both counts on motion.

A general denial was filed and the cause tried before a jury. At the close of plaintiff's evidence the court gave a peremptory instruction for defendant. Verdict and judgment went accordingly, from which latter plaintiff, filing a motion for new trial, has duly appealed.

The contract, as testified to by plaintiff, was to the effect that defendant said he would pay plaintiff \$100.00 a week and his expenses, if he would go out and undertake the work such as he had laid out for him to do in this state; that is, use his personal influence in procuring delegates to the National Convention favorable to Mr. Taft; that plaintiff's acquaintance with every one of the districts, with the different chairmen, was just what he wanted and he wanted plaintiff to interest himself in the campaign, and plaintiff consented and told defendant he would go out and enter the work for a short time. On cross-examination plaintiff testified that the purpose for which Mr. Stifel employed him was to go around in the several counties where the counties were holding county conventions to elect delegates to the Congressional and State Conventions to see or use his influence to see that Taft delegates were elected in those counties and that ultimately the delegates sent to the convention would be for Taft. That was the ultimate result of his duty of going into each of the counties and getting men to work. Plaintiff testified that his long experience in politics in this state had given him an acquaintance throughout the state; that as he stated in his petition, his expenses had been paid. Plaintiff also testified that in connection with this work he had looked after the interest of defendant in securing delegates who would vote for him as National Committeeman. Plaintiff testified at great length as to his acquaintance throughout the state, and as to his services rendered under this contract; that he went into different parts of the state, saw different men who were prominent and active in politics and endeavored, used his acquaintance and influence, to secure delegates to the convention who were in favor of the nomination of Mr. Taft for President of the United States. Under cross-examination plaintiff was asked this question: "Mr. Stifel never asked you then for what consideration you would undertake this work, did he?" To which he answered, "I

don't think so, for the reason I didn't want to undertake the work, but he said he would give me one hundred dollars if I would do that." Plaintiff was then asked, "What work," to which he answered, "Such work as he wanted me to undertake to do in the campaign, to go into the different counties, wherever he asked me to go and to work; first, to secure delegates for Taft and at the same time to secure influence for Mr. Stifel" for National Committeeman. Plaintiff further testified that when he went into a district, he would go to people whom he thought approachable and try to interest them in the candidacy of Mr. Taft; that he would ascertain who were likely to be delegates from the county conventions and whether they were for Taft, and if not, take such steps as he could to induce them to be for him; that was generally his line of work. Asked what part of his services in the case were rendered for contests which he had assisted in conducting before the National Committee, and what part was outside of that, he said that the services were so mingled together that he could not make a difference in charge or value of the services under the several accounts. It may be said here that the evidence showed that there were contests instituted before the National Committee and plaintiff, with another lawyer, was engaged to attend to them, for which he was paid by the National Committee; but his testimony was that included in those services was his employment by the defendant, for which he was charging.

Plaintiff produced a witness, who testified that he had some correspondence with defendant, to whom he had written about the condition of political affairs in his county, and in reply defendant wrote that he had plaintiff hired and that he (plaintiff) would be in the county if he could get there; that plaintiff would come on and help in the campaign in his county.

Beyond testimony of a lawyer as to having been employed by plaintiff to institute this action, but who had thrown up the employment, which testimony was introduced for the purpose of showing why action had been delayed, the petition having been filed January 31, 1917, this was all the testimony in the case.

Without setting out the evidence in detail it is sufficient to say that the substance of plaintiff's own testimony is, that he was hired to use his influence to secure delegates favorable to the candidate supported by defendant.

Our court, in *Keating v. Hyde*, 23 Mo. App. 555, held that a promise to pay for services rendered by another as a canvasser at a primary election to secure the promisor's nomination for an office, was unlawful and void. In that case, at page 559, the court quotes section 1474, Revised Statutes 1879, which is as follows:

"If any person shall, directly or indirectly, give or procure to be given, or engage to give any money, gift or reward, or any office, place or employment upon any engagement, contract or agreement, that the person to whom, or to whose use or on whose behalf, such gift or promise shall be made, shall, by himself or any other, procure or endeavor to procure the election of any person to any office, at any election by the electors, or any public body, under the constitution or laws of this state, the person so offending shall, on conviction, be adjudged guilty of bribery, and punished by imprisonment in the penitentiary for a term not exceeding five years."

This is section 3722, Revised Statutes, 1889; section 2090, Revised Statutes, 1899; and section 4401, Revised Statutes 1909.

Our court said, in *Keating v. Hyde*, supra, that this section had been in force since the revision of 1855, and that it is sufficient for the conclusion of our court, since it clearly indicates the policy of the state. The conclusion of our court in the *Keating Case* was, that the agreement was void as against public policy. That decision has been cited approvingly by law writers, as see notes to *Exchange National Bank of Fitzgerald v. Henderson*, 139 Ga. 260, 77 S. E. 86, in 51 L. R. A. (N. S.) 551, and is amply supported by the decisions of courts of other states. These cases are so fully cited in the notes in 51 L. R. A. (N. S.) supra, and there commented upon that we do not think it necessary to reproduce them here. Among the cases sustaining this, is *Trist v. Child*, 21 Wall. 441, 22 L. Ed. 623, where the principle is recognized and it was there held that a contract to take charge of a claim before Congress, by personal solicitation by the agent, and others supposed to have personal influence in any way with members of Congress, to procure the passage of a bill—lobbying for its passage—was void.

Another case is that of *Swayze v. Hull*, 8 N. J. Law, 54, 14 Am. Dec. 399, in which it was held that a promissory note is void which was made in consideration that the promisee should give the promisor his interest in promoting his election to the office of sheriff, the note being payable after the election if the promisor was elected, and the court held that no recovery could be had upon it by the promisee against the promisor.

Another case is that of *Wilcox v. Puryear*, 12 Ky. Law Rep. 556, where it was held that a contract by which one agrees, for money or other personal profit, to use his efforts, influence, etc., to induce a majority of the voters at an election to vote for a particular candidate or for any proposition, as for a subscription by a city or county in aid of a railroad, is against public policy, and therefore void. See also *King v. Raleigh & Pamlico Sound R. R. Co.*, 47 N. C. 263, 60 S. E. 1133, 125 Am. St. Rep. 546, 15 Ann. Cas. 40.

These are but a few of a multitude of cases to like effect.

[1] Our conclusion is, that under the public policy of our state, as announced in the decision of our court in *Keating v. Hyde*, supra, and under our statute, as here quoted, and under the great weight of authority in other states, the learned trial court was correct in directing a verdict for the defendant.

[2] It is true that some of the items of services claimed, as for instance those rendered before the contest committee of the National Convention may be legal charges, but plaintiff himself says that they are mixed with the other account in such a way that he cannot separate them and does not undertake to do so in fixing a value for his services to defendant. That being so, plaintiff cannot recover for any of them. As said by the Supreme Court of the United States in *Meguire v. Corwine*, 101 U. S. 108, loc. cit. 112 (25 L. Ed. 899), quoting from *Trist v. Child*, supra, 21 Wall. loc. cit. 452, 22 L. Ed. 623, and referring to the mingling of legitimate with illegitimate charges or claims:

"But where they are blended and confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. * * * The taint lies in the stipulation for pay. Where that exists, it affects fatally, in all its parts, the entire body of the contract. In all such cases, *protior conditio defendantis*."

While the second count is on quantum meruit, the services there depended on were of like character and under like contract of employment as in the first count and fall under like condemnation.

It follows that the judgment of the circuit court is affirmed.

ALLEN and BECKER, JJ., concur.

STATE BANK OF WILLOW SPRINGS v. ELGIN. (No. 2639.)

(Springfield Court of Appeals. Missouri. June 5, 1920.)

Venue ⇨ 61—Failure to allow time to prepare application for change held error.

Where the court was insistent that a case should be tried at once and denied counsel's application for a few minutes time to prepare an application for change of venue, stating that such change of venue would be denied, the court's action was erroneous; defendant's application for time being made as soon as possible after obtaining information from his client.

Appeal from Circuit Court, Texas County; L. B. Woodside, Judge.

Action by the State Bank of Willow Springs against G. S. Elgin. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Lamar, Lamar & Lamar, of Houston, for appellant.

Barton & Impey, of Houston, and John C. Dyott, of Willow Springs, for respondent.

BRADLEY, J. The trial court declined to grant defendant a few minutes' time in which to prepare and file an affidavit and application for change of venue, and the correctness of that action is the only question here. Plaintiff in separate counts sued to recover on two promissory notes in which defendant was the named payee. He had sold the notes to plaintiff bank and had indorsed them over. The makers had not paid them, and plaintiff bank proceeded against defendant. Suit was filed returnable to the November term, 1918, of the circuit court. Defendant filed a motion to make the petition more definite and certain, alleging that the second count was indefinite in that defendant could not determine therefrom whether he was being sued as an indorser or guarantor. The motion was overruled, but the cause was continued, reason not stated, and plaintiff filed an amended petition endeavoring to meet the objections raised in the motion. This amended petition was filed on July 8, 1919, and at the August term thereafter defendant again filed his motion to make more definite and certain. The case appeared on the docket for the third day together with a number of other civil cases, 11 of which appeared on the docket ahead of this case. The criminal cases were set for the first two days. At the close of the second day the criminal docket was not disposed of, and none of the 11 cases appearing on the docket ahead of this case had been disposed of or called. On Tuesday night, the night of the second day of the term, defendant, an old man, who resides at Cabool, a town some few miles from the county seat, called his attorney and inquired if his case would be called for trial on the next day, Wednesday. His attorney advised him that in his judgment the case would not be reached, and also advised him of the condition of the docket and the pending motion.

On the next morning the court called the civil docket. When defendant's case was reached, the motion to make more definite and certain was taken up, argued, and overruled. When the motion was overruled, plaintiff's attorney stated that he desired a trial as soon as possible, and the court asked defendant's attorney if he was ready. Defendant's attorney thereupon advised the court of the conversation with his client the night before, and promised to have defendant pres-

ent as soon as possible. Before defendant's attorney had time to communicate with his client, a case was called in which said attorney was engaged until noon. At the noon hour he called his client and advised him to come at once. Defendant arrived in the courtroom about the middle of the afternoon, and at that time his attorney was engaged in a trial. When the cause then on trial was finished, the court again called this case. Defendant's attorney stepped back in the courtroom to speak to his client. The court was insistent that this cause proceed, and stated that "defendant must go to trial," and defendant, sitting in the courtroom and seeing the situation, advised his attorney that he desired a change of venue on account of the bias and prejudice of the judge, and instructed his attorney accordingly. Defendant's attorney walked back in front of the bench and informed the court that his client desired to take a change of venue on account of the bias and prejudice of the judge, and knowledge thereof had come to defendant since reaching Houston, the county seat. Defendant's attorney therefore requested a few minutes' time to prepare the affidavit for such change. The court in reply stated:

"That he thought some good faith should go with such things, and that such a change of venue would be denied, or rather no time would be granted to prepare such papers, and told counsel for plaintiff to proceed with their case."

Defendant's attorney in his affidavit filed with the motion for new trial and considered in passing on the motion stated that his request for time to prepare said affidavit was in good faith, and in response to the request of his client, and that he had no reason to question the good faith of his client. Defendant in a similar affidavit stated that he was in good faith in asking for a change of venue. Defendant's affidavit also set up his defense, and states that it is meritorious. His attorney's affidavit states that from the statements made to him by defendant he believes that defendant has a good legal defense to the cause of action. When time was denied the court inquired of defendant's attorney if he desired a jury, and said attorney advised that he did not. The trial thereupon proceeded before the court. At the close defendant's attorney called the court's attention to the fact that no answer had been filed, and the court replied that if he had asked for time in which to file an answer it would have been granted.

Defendant urges that he has not been accorded a square deal, and insists that the cause be reversed and remanded. In *Douglass v. White*, 134 Mo. 228, 34 S. W. 867, the cause was reversed and remanded because the court refused to grant a change of venue to the plaintiffs. The cause was filed returnable to the March term, 1893. At

that term the defendant appeared and filed a motion to require a cost bond, and this motion was sustained, a cost bond ordered filed in vacation, and the cause continued to the September term. Plaintiffs failed to file the cost bond, but on the second day of the September term, the day the cause was set down for hearing, defendant filed answer setting up a counterclaim. Plaintiffs then asked for a continuance, which was refused, whereupon plaintiffs asked leave to take a nonsuit, and defendant objected. The court advised plaintiffs that they could take a nonsuit as to the cause of action stated in their petition, but that the cause would stand for trial on defendant's counterclaim. Plaintiffs then declined to take a nonsuit, and asked leave to examine the answer and file reply, and said that they would go to trial if the court would give them until 1 o'clock of that day. This was just before the noon adjournment. At 1 o'clock plaintiffs' attorney in open court filed and passed to defendant's attorney an affidavit and application for a change of venue. The application being taken up, defendant objected to the granting of the change because no notice of the intended application had been given. The change of venue was denied, and the cause proceeded, resulting adversely to plaintiffs. Discussing the application in the *Douglass Case*, the Supreme Court said:

"The application in this case was filed immediately on the convening of court at 1 o'clock in the afternoon of the day, and at the hour that the cause was set down for hearing. The information and knowledge of the existence of the undue influence of defendant over the mind of the judge of the court and of the inhabitants of the county, as alleged in the application, was first obtained since the filing of plaintiff's reply to defendant's answer, just previous to the noon adjournment of the court on that day, so that it is seen that the filing of the application for the change of venue was made as soon as possible after the receipt of the information by plaintiff of the existence of the prejudices that rendered the judge of the court an improper person to hear and determine the matter of their right in this litigation."

In that case, as we see, the filing of the application was made by plaintiffs as soon as possible after obtaining the information upon which it was based. In the case at bar a request for time to prepare an application was made by defendant as soon as possible after obtaining the information upon which he proposed to base his application. The action of the court in the instant case was in fact tantamount to denying the change on application in due form, because the court stated "that such a change of venue would be denied." If defendant had in fact filed his application, the court, under the authority of *Douglass v. White*, *supra*, would have been compelled to grant it; and, if defendant

was entitled under the law to the change, the court could not deprive him of that right by refusing to grant a few minutes time in which to prepare the application. In the Douglass Case the applicants for the change had stated that they would go to trial at 1 o'clock, and at that hour appeared with an application for change of venue, and had given no notice, and it was held error not to grant it. In the Douglass Case the court further said:

"While applications of this character in so far as the question as to whether their presentation is timely, or whether the notice of the intended filing of same is sufficient, or whether the application itself is sufficient as to substance and form, are addressed to the sound discretion of the court, when these questions are settled in the affirmative of the proposition, or when from the facts of the case they should have been so settled, the duty of the court in the premises is no longer discretionary, but imperative, and the change should go in favor of the litigant asking it as a matter of right, and not as a matter of favor or discretion."

We think that the learned trial court should have granted defendant a reasonable time in which to prepare and file his application, and to deny him this right was under the circumstances unjustifiable.

The cause should therefore be reversed and remanded; and it is so ordered.

STURGIS, P. J., and FARRINGTON, J., concur.

CARROLL v. CLARKE. (No. 2659.)

(Springfield Court of Appeals. Missouri.
June 5, 1920.)

Brokers §86(3) — Evidence held to show abandonment of sale, precluding compensation.

In a broker's action against the owner of land for compensation, evidence held to show a mutual termination and abandonment of the sale attempted under the contract shown in evidence, which was not the same as that pleaded, so that plaintiff could not recover.

Appeal from Circuit Court, Howell County; E. P. Dorris, Judge.

Action by William F. Carroll against M. B. Clarke. Judgment for defendant, and plaintiff appeals. Affirmed.

William F. Carroll and T. J. Delaney, of Springfield, for appellant.

W. N. Evans, of West Plains, for respondent.

STURGIS, P. J. Appellant's abstract of the record does not set forth his petition on

which this case was tried, but states that he sues for an amount due him for work and labor performed by him at defendant's request in procuring a purchaser for certain land owned by defendant, which amount defendant had agreed to pay. According to the petition the amount sued for was not to be due plaintiff on condition that he find and produce a purchaser for this land, but was due him for the labor and efforts in that respect. The evidence does not support the contract pleaded, but shows a contract, not to pay for the labor and services in finding a buyer, but an amount to be due only in case such labor and service was crowned with success.

The plaintiff's evidence is to the effect that defendant gave him the right to sell defendant's land at a fixed price per acre, and if plaintiff sold for more than that price he was to have the excess for his commission. We think the plaintiff will and does concede that under this contract defendant had a right to insist on a cash sale, and any variation therefrom, as to giving time on part of the purchase money and the terms on which such deferred payments would be granted, if at all, was wholly at defendant's pleasure. The plaintiff claims to have found a purchaser for defendant's land in one Davidson, but the trial court found from the evidence that such proposed purchaser and plaintiff were not willing to comply with the terms of payment which defendant was willing to grant. The commission claimed by plaintiff was part of the purchase money, and defendant had a right to insist that the commission be paid and accepted by plaintiff on such terms as would in no way interfere with or prejudice the deferred payments due defendant. The purchaser wanted deferred payments of most of the purchase money, including that going to plaintiff for his commission, secured by mortgage, and defendant was willing to do this only on condition that the part going to plaintiff be made in the nature of a second mortgage, and that defendant have a preference and first lien on the land for his part. The plaintiff was not willing to do this, and wanted his commission paid pro rata with the purchase money going to defendant. While plaintiff and defendant were trying to arrange this matter, the purchaser became dissatisfied, and the plaintiff, acting for himself and the purchaser, wrote defendant a letter calling the whole deal off, and consenting that the deed and other papers which had been placed in escrow be returned to the respective parties. This was done. The plaintiff later changed his mind, and then, conceding defendant's right to priority of payment, insisted on the deal being consummated. This, however, was too late, especially in view of the fact that the purchaser was no longer willing to consummate the deal.

The evidence shows a mutual termination and abandonment of the sale.

Such is the finding of the trial court, and, being supported by the evidence, the judgment is affirmed.

FARRINGTON and BRADLEY, JJ., concur.

CHARLES RENFROW COMMISSION CO. v. W. B. NORTHRUP CO. et al.
(No. 2604.)

(Springfield Court of Appeals. Missouri. June 5, 1920.)

Banks and banking ¶127—Bank held owner of draft.

A bank held to be the absolute owner, by purchase, of a draft.

Appeal from Circuit Court, Howell County; E. P. Dorris, Judge.

Action by the Charles Renfrow Commission Company against the W. B. Northrup Company, wherein the Midland National Bank interpleaded. From judgment for plaintiff, the interpleader appeals. Reversed and remanded, with directions to enter judgment for the interpleader.

M. E. Morrow, of West Plains, for appellant.

Green & Green, of West Plains, for respondent.

BRADLEY, J. This action was commenced by attachment against defendant W. B. Northrup Company, a nonresident. Chas. Renfrow Commission Company was the trade-name adopted by Chas. Renfrow, the plaintiff. The Midland National Bank is interpleader, and the cause here is on the interplea. Plaintiff's petition against the defendant was in two counts, the first asking \$195.60 in damages for defendant's alleged failure to properly pack a shipment of potatoes in 1917; the second count asked \$106.30 on the same grounds on a shipment of potatoes in 1918. In February, 1919, plaintiff whose place of business is at West Plains, Mo., ordered a car of merchandise, kind not stated, from defendant of Minneapolis, Minn. The car was shipped to plaintiff, and a draft drawn on plaintiff by defendant, payable to the Market State Bank of Minneapolis, for the net sum of \$608.91, was attached to the bill of lading, and deposited in the said Market State Bank to the credit of defendant. The Market State Bank indorsed and delivered said draft and bill of lading to the Midland National Bank, the interpleader, and this bank in turn gave the said Market State Bank credit for the amount of the

draft. The interpleader, Midland National Bank, sent the draft with the bill of lading attached to the First National Bank of West Plains for collection. The draft was presented to plaintiff, and he paid it. Immediately after paying said draft and receiving it and the bill of lading, plaintiff attached \$400 of the proceeds of said draft in the hands of the First National Bank of West Plains as the property of the defendant W. B. Northrup Company. The Midland National Bank of Minneapolis filed an interplea, claiming the absolute ownership of the draft and likewise of the proceeds. The cause was tried to a jury, and the verdict and judgment went against the interpleader, and it appealed.

Interpleader requested a directed verdict in its favor, and this request was refused. The correctness of this ruling is, we think, the only matter for determination. The cashier of the Market State Bank, the payee named in the draft, testified by deposition that his bank bought the draft from W. B. Northrup Co., and paid this company \$608.91 by deposit to their account. That the draft was deposited on February 17, 1919, and that on same date his bank sold the draft to the Midland National Bank, the interpleader, and received for it \$608.91 by way of credit to his bank. This witness stated that he had no knowledge of any transactions or correspondence between plaintiff and defendant. The cashier of the interpleader bank testified by deposition that interpleader purchased the draft on February 17, 1919, from the Market State Bank for the sum of \$608.91. That the interpleader bank had no arrangement with the Midland State Bank to charge back this draft, or any other, any further than as indorser. That the draft in question here was indorsed. That his bank handled a great many drafts for the Midland State Bank. "When I place them to their credit they have the right to check out the money on such credit until one comes back unpaid, and then I charge it back to them."

The cashier of the First National Bank of West Plains testified that his bank received the draft and bill of lading from the interpleader bank, and that notice was given plaintiff, and that plaintiff paid the draft, and that the draft and bill of lading were delivered to him; that he remitted to the interpleader all except the \$400 attached. Defendant put in no evidence, except by a banker in West Plains, who testified as to the general custom of banks in taking drafts. This witness stated that if the drawer was insolvent banks did not generally give such drawer credit for a draft drawn until it was paid, and that in any event if the draft was not paid it was charged back to the drawer.

The court instructed that the burden of

proof was on the interpleader, and that before said interpleader would be entitled to recover it must show by the greater weight of the evidence that at the time of the levy of the attachment it was the absolute owner of the property in question. This instruction states a correct proposition, but there is absolutely no evidence in this record tending to show that the interpleader was not the absolute owner. All the evidence is that interpleader was the absolute owner, and nothing to the contrary. It is wholly unnecessary to enter into an extended discussion of the law applicable here. We think it sufficient to say that under the authority of *Ayres v. Bank*, 79 Mo. 421, 49 Am. Rep. 235; *Flannery v. Coates*, 80 Mo. 444, *Hendley v. Refining Co.*, 106 Mo. App. 20, 79 S. W. 1163; *Bank v. Milling Co.*, 163 Mo. App. 135, 145 S. W. 508; *Haas v. Fruit Co.*, 183 S. W. 676, and under the evidence disclosed by this record, the court should have directed a verdict. The cause is reversed and remanded, with directions to enter judgment for interpleader in accordance with the prayer of the interplea.

STURGIS, P. J., and FARRINGTON, J., concur.

TERRY v. ADAMS-HICKS ZINC & LEAD CORPORATION. (No. 2515.)

(Springfield Court of Appeals. Missouri.
June 5, 1920.)

Sales 439—Burden to prove breach of warranty set up as counterclaim on defendant.

In action by assignee on account for shells sold, wherein defendant buyer counterclaimed for breach of warranty that shells would crush a certain number of tons of rock, burden to prove such breach of warranty was on defendant.

Appeal from Circuit Court, Jasper County; Joseph D. Perkins, Judge.

Action by M. C. Terry against the Adams-Hicks Zinc & Lead Corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

Grover C. James, of Joplin, for appellant.

McReynolds & McReynolds and John H. Flanagan, all of Carthage, for respondent.

STURGIS, P. J. The defendant is appellant, and its one assignment of error is that the court erroneously gave an instruction placing on it the burden of proof as to its counterclaim or claim for recoupment. The plaintiff, as assignee, sued on an account for goods and merchandise sold to defendant. The merchandise sold to defendant consisted for the most part of what are termed shells

used in the defendant's mining plant as part of the machinery for crushing mineral-bearing rock. The defendant in its answer, by way of counterclaim or recoupment, alleged that these shells were sold to defendant under a warranty that such shells would each crush not less than a specified number of tons of rock, and agreeing to make reductions in the price in proportion to any failure in that respect. At the trial the defendant admitted the purchase of the shells and the correctness of plaintiff's account, less a small deduction, amounting to \$1,580.41, subject to the verdict of the jury on the recoupment claim. The jury found for plaintiff for such amount, plus interest, and against the defendant on its counterclaim.

The evidence was sharply contradictory as to whether or not the agent selling those rolls made the warranty in question. Such agent testified that he made no representation or warranty as to the rolls crushing any particular amount of rock, but only that same were well made, of good material, and would do as good work as other similar shells. There was no breach claimed of the latter warranty, and the court, by the instruction complained of, told the jury that the burden of proof was on defendant to prove that the Central Foundry Company, plaintiff's assignor of this account, warranted that the shells sold to defendant would each crush the quantity of rock as claimed by defendant.

The defendant states his position to be that, while the burden of proof was on defendant to show a warranty, yet, since plaintiff admitted that a warranty had been made, and only the character of the warranty was in question, this put the burden of proof back on plaintiff. This, however, is not, we think, a correct statement of either the law or the facts. As to this counterclaim there could not be any shifting back to plaintiff of the burden of proof, since such burden was on defendant in the beginning. The only case cited by defendant in support of his position as to the burden being on plaintiff is that of *Roth v. Continental Wire Co.*, 94 Mo. App. 236, 68 S. W. 594. That case holds no more than that, if a plaintiff sues on a contract, alleging its terms, which are that plaintiff sold defendant a particular kind or quality of merchandise, and alleges that he furnished merchandise of that kind and quality, the burden is on him to so prove. In that case the plaintiff's petition alleged that he had sold certain machines for making nails by sample, and agreed to furnish machines of like kind and quality, and alleged that he had done so. "In this condition of the pleadings," the court said that it was not sufficient for plaintiff to merely prove that he had furnished "the number of machines called for by the contract," but must show that same were of the kind and quality the contract sued on

required. The court, however, there held (syllabus):

"If the purchaser defends a suit for the purchase price for certain machines sold by sample, that they were not as warranted, the burden of proof is not on the party buying to prove that the machines were not as good and did not work as well as the sample."

In the present case plaintiff does not set out and sue on a contract by which he agreed to sell defendant certain shells capable of and which would crush 10,000 tons or some such amount of rock. He denies such contract, and instead of admitting in his petition that such was the contract, defendant so asserts by way of foundation for its counterclaim, and plaintiff denies it. The counterclaim became in reality an independent suit by defendant against plaintiff, and certainly the defendant must prove his cause of action, or such part of it as is not admitted, in order to recover. In *Ingersoll v. Bond*, 184 S. W. 903, the plaintiff sued for the price of a horse sold to defendant. The defense was that the plaintiff had warranted the horse to be sound, and that he was not so. The plaintiff admitted at the trial that he warranted the horse to be sound. The court held, however, that the burden of proof as to the breach of the warranty was on defendant. These cases are cited and support that ruling: *Branson v. Turner*, 77 Mo. 489, 495; *Garvey v. Hauck*, 85 Mo. App. 14; *Roth v. Continental Wire Co.*, 94 Mo. App. 236, 270, 68 S. W. 594; *Burns v. Nichols*, 89 Ill. 480; *Hoffman v. Hampton School Dist.*, 96 Iowa, 319, 65 N. W. 322; *Keystone Co. v. Forsyth*, 123 Mich. 626, 82 N. W. 521; *Wallace v. Douglas*, 58 W. Va. 102, 51 S. E. 869.

The judgment is affirmed.

FARRINGTON and BRADLEY, JJ., concur.

BAUERDORF v. FISHER. (No. 2557.)

(Springfield Court of Appeals. Missouri.
June 5, 1920.)

1. Sales \S 348(1)—Set-off by buyer for distribution of samples cannot extend to samples of another firm.

Where wholesalers contracted to sell wall paper to defendant, who made up sample books of their paper and also of the paper of another concern to send to his customers, and such wholesalers broke their contract by failing to deliver, defendant cannot recover on set-off for a loss sustained in making and distributing sample books made up of samples from the other concern, in such wholesaler's action for paper sold.

2. Sales \S 359(1)—Buyer must show difference between freight, if shipped as per contract, and cost as it was shipped.

In a seller's action against a buyer for the price of goods, defendant under its set-off should show with certainty the difference between the freight he would have paid, had this shipment been made in carload lots as per contract, and what it actually cost him coming in smaller shipments.

Error to Circuit Court, Jasper County; J. D. Perkins, Judge.

Suit by Charles R. Bauerdorf, trustee for Frederick Beck & Co., bankrupts, against H. B. Fisher. Judgment for plaintiff for the difference between his claim and defendant's counterclaim, and, plaintiff's motion for new trial being overruled, he brings error. Reversed and remanded.

R. M. Sheppard, of Kansas City, for plaintiff in error.

Pearson & Butts and John L. McNatt, all of Joplin, for defendant in error.

BRADLEY, J. Plaintiff, as trustee for Frederick Beck & Co., bankrupt, brought this suit to recover \$1,299.40 on account for wall paper sold defendant. Beck & Co. was a wholesale dealer in New York, and defendant was a wholesale and retail dealer in wall paper in Joplin, Mo. The answer pleads an equitable set-off, based on the alleged failure of Beck & Co. to ship the order in full and on time, and alleged damages sustained in making and distributing sample books, and for freight paid in excess of what would have been required, had Beck & Co. shipped defendant's order in carload lots. Defendant alleges that on September 14, 1915, he bought from Beck & Co. certain wall paper, and that Beck & Co. agreed to ship in carload lots not later than January 1, 1916, and also agreed to ship on or before November 15, 1915, two rolls of each pattern ordered to be used in making sample books; that Beck & Co. failed to ship in carload lots, but shipped by local freight and at a time long after it agreed to ship, and did not ship but half of the order; that defendant had made his sample books from the order from Beck & Co., and had distributed them among his customers, and that the failure of Beck & Co. to ship as agreed caused defendant to lose the outlay in making and distributing the sample books, and to lose his customers and their business. Beck & Co. was adjudged a bankrupt March 9, 1916, and defendant was notified of this fact by letter under date of March 29th. Defendant alleged the insolvency of Beck & Co. in addition to the other allegations mentioned. He asked for \$3,000 damages.

The cause was tried before the court, and resulted in a finding for plaintiff for \$1,-

299.40, and for defendant on his counterclaim in the sum of \$752, leaving a balance in favor of plaintiff of \$547.40, which, with interest, amounted to \$853.93, and for this sum judgment was rendered in favor of plaintiff. Deeming this amount inadequate, plaintiff moved for a new trial, and, being unsuccessful, brings the cause here by writ of error.

The evidence shows that defendant received the paper in due time for his sample books, from which he made up two varieties, and distributed these books among his customers and prospective customers. It is also shown that defendant was a customer of a wholesale wall paper dealer of Illinois, and that he made three varieties of sample books, displaying the wall papers of this concern, and likewise and at the same time distributed these among his customers and prospective customers. The total cost of making the five varieties of sample books was \$500, and the total cost of distributing was \$180. These two items account for \$680 of what the court allowed defendant, and just what the remaining \$72 is for does not clearly appear in the record. Plaintiff trustee says in his brief that the \$72 was for alleged excess freight. Beck & Co. shipped about half of defendant's order February 1, 1916, and defendant contends that, had Beck & Co. shipped his order in full as agreed, he would have had in stock any order received from a customer ordering from either of the two Beck & Co. sample books, but that Beck & Co. did not ship when they agreed, and did not ship but half of his order, and in some instances incomplete patterns, and that he was therefore unable in some instances to fill orders made from the Beck & Co. sample books.

The trial court sustained objections to evidence attempting to show what defendant was damaged by reason of alleged loss of profits generally, on the ground that such was too speculative and indefinite. Plaintiff trustee concedes that defendant should recover for two-fifths of the amount expended in making and distributing sample books, but urges that he should not be liable for more. Defendant contends that he should recover for the total expense of making and distributing the books and for excess freight. It appears that in distributing the sample books, one of each set was left with each customer; that is, five books were left, two displaying Beck & Co. paper, and three the paper of the Illinois company. According to defendant, the expense of making and distributing the sample books was a total loss. Defendant testified:

"We only received about half of our nice goods, and could not fill the main part of our orders. We would write them, telling them what pattern we could not show and could not fill, and tell them to tear these out of the sample books. He sometimes had another se-

lection made by his customer there, and sometimes they didn't follow instructions, and the mistake was made there. Finally this contractor would discontinue our books, and took Kansas City or Chicago books. Before the season was over, that was the outcome with practically all our customers. In this list of 30 which I have, I know these were all my customers. Q. How many of these were you able to retain after you had ordered your sample books? A. We had been several years in working up this line of customers— The Court: He asked you about those 30 men. A. We lost them all in the one year. I know of no other reason for losing them. We had been holding them before, gradually adding to them; building them up. We have been able to get back only 2 of them."

[1] The trial court evidently found that because of the dissatisfaction created among defendant's customers, due to confusion and failure to fill their orders, they sought other dealers, and that defendant's sample books availed him nothing, and there was evidence to support this conclusion. The amount defendant was out for making and distributing the sample books was definite. There was no speculation as to that. But another feature intervenes here. Can it be said that the loss for making and distributing the sample books carrying samples of the Illinois concern, was fairly within the reasonable contemplation of the parties when defendant entered into the contract ordering the wall paper? Can it be said that the damages resulting from the loss sustained by realizing no returns from the Illinois concern's sample books were fairly and reasonably within the contemplation of the parties as damages likely to follow a breach of the contract by Beck & Co? The leading case in the question here presented is *Hadley v. Baxendale*, 9 Exch. 356, which is followed by the courts of our own state and by most of the American courts. In that case the rule is announced as follows:

"Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally—i. e., according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have

had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract; for, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them."

See *Mark v. Cooperage Co.*, 204 Mo. loc. cit. 265, 103 S. W. 20; *Martin v. Lumber Co.*, 167 Mo. App. 381, 151 S. W. 984.

There is no evidence that Beck & Co. had any knowledge that defendant was dealing with the Illinois concern, or any other concern. It would therefore be unreasonable to say that loss sustained by defendant on account of making and distributing the sample books of the Illinois concern was fairly and reasonably within the contemplation of the parties when the contract was made. The special circumstance that defendant dealt with some other wall paper company, and made and distributed sample books from its samples, was "wholly unknown to the party breaking the contract," and Beck & Co., "at most, could only be supposed to have had in contemplation the amount of injury which would arise generally" from a breach of the contract. It seems clear that defendant cannot recover on his set-off for the loss sustained in making and distributing the sample books made up of samples from the Illinois concern, and we so rule.

[2] Defendant ought to recover for the loss he sustained in making and distributing the sample books of Beck & Co. There can be, and is, no question as to that; and this amount is two-fifths of \$680. Defendant should also recover for excess freight, but the record here is too indefinite and uncertain to support any finding on the freight item. On a retrial defendant should show with some degree of certainty the difference between the freight he would have paid, had his shipment been made in carload lots, and what he paid by reason of Beck & Co. failing to ship in carload lots as it agreed to do. There is nothing left about which there should be any controversy, except the freight item.

The cause is reversed and remanded.

STURGIS, P. J., and FARRINGTON, J., concur.

BECK v. COFFEEN. (No. 2684.)

(Springfield Court of Appeals. Missouri.
June 5, 1920.)

1. Appeal and error \Leftrightarrow 1062.—Verdict on conflicting evidence conclusive.

Where evidence was sharply conflicting, verdict is conclusive.

2. New trial \Leftrightarrow 102(1)—Failure of defendant to produce testimony which he could have produced not ground for new trial.

In an action for balance of purchase price of land, defendant, who asserted that the full price had been paid, is not entitled to new trial on production of depositions of a woman and her children in corroboration of his statement, where they were living with defendant at the time the alleged contract was executed, and defendant married the woman only shortly before trial.

Error to Circuit Court, Douglas County; Fred Stewart, Judge.

Action by Leonard Beck against Ben Coffeen. Judgment for plaintiff. Defendant brings error. Affirmed.

Jos. V. Pitts, of Ava, for plaintiff in error.
J. S. Clarke, of Ava, for defendant in error.

BRADLEY, J. Defendant in error, plaintiff below, sold some land in Douglas county to plaintiff in error, defendant below, and this cause is to recover \$200, with interest, as an alleged balance due on the purchase price. For convenience we will refer to the parties as styled below. Plaintiff, Beck, alleged in his petition that on January 1, 1917, he sold and transferred to defendant by warranty deed certain land, describing it; that the agreed consideration was \$1,000, and that defendant paid him \$800 in cash, and promised to pay the balance, but had failed and refused to do so. He asked judgment for the \$200, with interest, and prayed that said judgment be made a special lien upon the land for the purchase price. Defendant admitted the purchase of the land, but alleged that the recited consideration in the deed was \$2,000, but in truth and in fact the consideration was but \$800, and that he had fully paid that price. The cause was tried to a jury, and verdict and judgment went for plaintiff for the amount sued for, and defendant brings the cause here by writ of error.

[1] Plaintiff testified that the consideration was \$1,000, and that defendant offered to give a mortgage on the land to secure the balance, but that he (plaintiff) told defendant that his (defendant's) word was good enough without a mortgage, and that defendant agreed to pay the balance in June after the sale. Plaintiff introduced two other witnesses, but they did not corroborate him very much. Defendant testified that the consideration was but \$800, and that he had paid that amount, and the evidence of the two witnesses introduced by plaintiff tended somewhat to corroborate defendant. Defendant also introduced other witnesses, who in some minor particulars corroborated his version. The only evidence, however, going directly to the issue, was that of plaintiff and defendant, and the jury's verdict settled the issue of fact.

[2] In his motion for a new trial defendant complains that the verdict is against the evidence, and that he was unable to present at the trial certain material evidence, and sets out in substance what this evidence would be. At the hearing on the motion defendant offered in support thereof the deposition of the witnesses, whose evidence he says he was unable to have at the trial. These depositions are those of a woman and two of her children, who were living with defendant in Douglas county at the time of the sale, and they corroborate defendant as to the consideration he was to pay. But defendant does not claim that this was newly discovered evidence. He could hardly make this claim, however, since these witnesses were of his own household at the time he made the deal, and he does not claim that he did not know of their evidence. He made no effort to secure a continuance, but went to trial with full knowledge of the facts. Defendant was living in Iowa at the time of the trial, and so were the witnesses whose depositions he offered in support of his motion. It also appears that the woman, whose deposition was offered, and defendant, were married in Iowa on September 3, 1918, a few days before the trial. In this situation the trial court committed no error in overruling the motion for a new trial.

Plaintiff files here a motion to dismiss defendant's writ for failure to give notice required by section 2071, R. S. 1909, and defendant files his excuse for failing to give the notice; but, in view of our conclusion on the merits, it is not necessary to go into the motion and the excuse offered.

The judgment below is affirmed.

STURGIS, P. J., and FARRINGTON, J., concur.

JOHNS v. JOHNS. (No. 16133.)

(St. Louis Court of Appeals. Missouri. Submitted on Briefs May 7, 1920. Opinion Filed June 8, 1920.)

1. Husband and wife \S 278(1), 279(3)—Parties may contract as to separation and settlement of property rights; reconciliation avoids contract.

There may be a valid contract of separation and settlement of property rights between husband and wife, but a reconciliation will avoid and annul such contract.

2. Husband and wife \S 278(2)—Contract for future separation contrary to public policy.

While agreement for separation and settlement of property rights, when fair and reasonable, will be upheld by the courts, such agreements between spouses living together amicably without a present intention to separate are against public policy and invalid.

3. Husband and wife \S 279(3)—Separation agreement valid, though spouses continued to live in the same dwelling for about a week.

A separation agreement whereby the wife received \$700 cash and the household furnishings in lieu of all alimony and maintenance is valid and cannot be attacked by the wife because the spouses continued to live in same house together for a few days and occupied the same bed, pending the removal of each to different quarters; the intention to separate appearing never to have been changed.

4. Husband and wife \S 279(2)—Before woman can receive alimony she must tender amounts received under separation agreement.

Before a woman seeking divorce and alimony can have separation agreement which provided for settlement of property rights set aside and receive alimony, she must tender the amount received under the separation agreement; for such is the requirement of statute, and divorce actions are wholly statutory.

Appeal from St. Louis Circuit Court, Vital W. Garesche, Judge.

Action for divorce by Sadie Johns against George W. Johns. From so much of the decree of divorce as refused to allow alimony and suit money, plaintiff appeals. Affirmed.

James A. Ryan and Kinealy & Kinealy, all of St. Louis, for appellant.

William Hilkerbaumer and Edward J. Monti, both of St. Louis, for respondent.

REYNOLDS, P. J. Plaintiff brought her action for divorce against the defendant, on the ground of desertion continued for a period of more than one year next prior to the filing of the petition, which was on March 16, 1917. The date of the desertion is given as September 25, 1914, and alleged to have been without cause. Stating that the defendant is an able-bodied man and earns good wages, plaintiff prays alimony and suit money pending the suit and a reasonable sum by way of permanent alimony in the final decree.

The answer, after a general denial, sets up that on September 18, 1914, plaintiff and defendant entered into an agreement under which plaintiff received and accepted the sum of \$700 in cash, and other good and valuable considerations, in lieu of all claims for alimony and maintenance which had accrued or which might accrue in future. A general denial by way of reply was filed.

Hearing the cause the court awarded a divorce to plaintiff but refused to allow any alimony or suit money. Plaintiff thereupon filed a motion for new trial, attacking so much of the decree as refused to allow alimony and suit money. This being overruled, plaintiff has appealed.

The right to the divorce is not contested.

The sole question here involved is as to the action of the trial court in refusing to allow alimony, etc.

It appeared that the parties were married on March 31, 1914, and separated on September 25, 1914. A separation had been contemplated, at least by defendant, some little time prior to that date, and on September 18, 1914, they entered into an agreement of separation. It is recited in this agreement that the—

“parties find it impossible to live peaceably together as husband and wife. It is therefore hereby agreed by and between them that they will for the future live separate and apart from each other. It is further agreed that the said Sadie Johns shall have of the personal property owned by the said parties, one parlor suit, one dining room set, one bedroom set and all kitchen furniture now located in premises known as 1425 North Newstead avenue. It is further agreed that the said George W. Johns will pay any and all obligations now due on aforesaid furniture. It is further agreed that the said George W. Johns will pay unto the said Sadie Johns seven hundred (\$700.00) dollars in lieu of all alimony and maintenance. It is further agreed that neither of said parties shall have any present or further interest of any kind in the real estate belonging to the other party; and, if either shall sell any of his or her real estate, the other will, on request, unite in a deed of conveyance therefor, relinquishing his or her prospective right of curtesy or dower in such real estate. It is further agreed that if either of said parties shall hereafter institute divorce proceedings against the other, or prosecute any suit, it shall not vary the property rights of either of said parties.”

This was signed by the parties.

Plaintiff testified that a short time prior to September 25th defendant became angry with her and said that they would break up housekeeping and sell the house, which he did, and plaintiff was compelled to vacate the house because it had been sold and rented; that she had since often asked defendant to live with her, and that her mother and friends had done the same, but he refused; that defendant earned \$85 a month. Prior to this dispute there had been no serious differences between them. Plaintiff also testified that she joined in the deed to the property; that she was compelled to do so or get out and get nothing; that she received the \$700 mentioned in the agreement and part of the furniture; that the real estate sold for \$1,800. This was the only property that she knew of that her husband owned. She had been married previously. When this agreement between them was made and signed they were living together and continued to do so until September 25th, of the same year, when she moved away. Between the 18th and 25th of September they lived together as they had prior to that time. Within four or five days after the agreement was signed plaintiff left the house because the purchaser had rented it and the

party to whom it was rented wanted to move in. She testified that they signed the agreement on September 18th and that she knew she was compelled to get out of the house because it was rented, and that she and her husband maintained marital relations after the contract was signed, that is until she left on September 25th. Defendant denied this and stated that while they had lived together in the same house, and in the same room, they had had no marital relations between the 18th and 25th of September and for some time prior to that.

Defendant, called as a witness by plaintiff, testified that he is a watchman at a bank and had been employed there for about eighteen years; that his salary is about \$85 a month. On September 18, 1914, he owned a cottage on Newstead avenue in the city of St. Louis, which he then sold for \$1,800, and has no personal property left except his wearing apparel. Defendant identified his signature to the agreement and stated that it was executed September 18th. He testified that at the time this agreement was executed the house was all furnished; that he had put \$247 worth of furniture in it, which was some of the furniture mentioned in the agreement; that he delivered possession of the furniture mentioned to plaintiff and paid her the \$700 mentioned in the contract. After the agreement was signed and up to the time they separated, they ate at the same table and slept in the same bed. Plaintiff commenced getting ready to move as soon as the paper was signed. She got out of the house on September 24th. Plaintiff read the agreement in the presence of witnesses before she signed it and said it was satisfactory; that while they had occupied the premises and the same room and bed they had no marital relations and had not had for quite a while before the agreement was signed.

It appears that this agreement was acknowledged before a notary public, who testified that he had asked plaintiff if it was her free act and deed, and she said it was. This is substantially the evidence in the case.

[1-3] As held by our Supreme Court in *Rice, Stix & Co. v. Sally*, 176 Mo. 107, 75 S. W. 398, and *O'Day v. Meadows*, 194 Mo. 588, loc. cit. 614, 92 S. W. 637, 112 Am. St. Rep. 542, the validity of the contract between plaintiff and defendant, then husband and wife, is no longer an open question in our state. So the Kansas City Court of Appeals said in *Fisher v. Clopton, Adm'r, etc.*, 110 Mo. App. 663, 85 S. W. 623. It was further said in that case (110 Mo. App. loc. cit. 667, 85 S. W. 623), following *Roberts v. Hardy*, 89 Mo. App. 86, that there may be a valid contract of separation and settlement of property rights between husband and wife, but that a reconciliation would avoid and annul such contract.

In *Speiser v. Speiser*, 188 Mo. App. 328, 175 S. W. 122, it was held that agreements for separation and for settlement of property interest between a discordant husband and wife, when fair and reasonable are upheld by the courts, if made in prospect of an immediate separation; but that such agreements between parties living together amicably and without a present intention to separate, are held to be against public policy and void, since they have a tendency to promote separation and divorce. It was further held in that case that the destitute wife was entitled to suit money as a means of defending her husband's suit; but that was so held on the ground that the agreement there considered had been fraudulently obtained and was invalid because not made, as falsely stated on its face, pursuant to the separation of the parties or in contemplation of an immediate separation, but at a time when they were living together with the avowed intention of continuing to live together as husband and wife and because the contract was not fair and reasonable and undertook to divest the wife of all interest in her husband's property, of the value of \$5,000, without giving her a penny in return, even the nominal consideration of \$1 not having been paid. That case is cited by learned counsel for appellant in support of the contention that these parties lived together as husband and wife after the agreement had been entered into. They further cite in support of that contention *Roberts v. Hardy*, supra, and *Harrison v. Harrison*, a decision by the Kansas City Court of Appeals, not yet officially reported but see 211 S. W. 708. In all these cases the facts negated the idea of an actual separation or intent to do so. In the latter case especially, it appeared that after entering into the agreement of separation the parties had resumed marital relations, and that the defendant in the case had returned to plaintiff and they resumed their marital relations, so that the cause which led to the separation ceased and it followed that the property which the husband had released to the wife, by his course of conduct through seven years in letting her continue to manage and dispose of it as her own, had thereby become hers as by a gift or voluntary settlement. None of these cases meet the facts here. In the one at bar we do not think that the few days that these parties continued to occupy the same house after the signing of the agreement, at all affects the validity of

the contract made between them. Their intention to separate was never changed. Such occupancy was with no intention of resuming or continuing the marital relations, but was occasioned by the immediate and unavoidable circumstances attendant at the sale of the property and procuring of a new residence for each of them. In other words, they had not in any manner whatever resumed their marital relations with the intention of becoming reconciled to each other, and the five or six days that elapsed between the execution of the contract and the actual separation which, according to the petition and testimony of plaintiff, occurred September 25th, in no manner whatever disturbed, vitiated or avoided the contract.

[4] Another obstacle to plaintiff's right to recover alimony, etc., is to be found in the action of the plaintiff in not offering to return the money and property she received. We have stated the substance of the petition. No such offer is there made.

In a very thorough and learned consideration of the status of divorce actions under our statutes, Judge Ellison, speaking for the Kansas City Court of Appeals in *Gilsey v. Gilsey*, 193 Mo. App. 505, 201 S. W. 588, held that where the wife entered into a contract of settlement and separation in which all money and property rights and obligations were adjusted in consideration of the husband paying her a certain sum of money, she cannot then bring an action for divorce and alimony and seek to repudiate the contract without tendering back the sum received by her under the contract, holding that the action under the statutes for divorce, where there has been a valid marriage, is not an action in equity under our statute although formerly it was within the jurisdiction of the ecclesiastical courts. We have no such courts. "Jurisdiction in our courts," says Judge Ellison, "is dependent upon the statute and the action may be said to be statutory," and that "where a tender is requisite in maintaining a cause of action and none is pleaded, judgment may be rendered on the pleading." That is this case. Plaintiff makes no offer whatever to return the money which she received or the property which was turned over to her or any part of it. She is not entitled, therefore, to award of alimony or suit money in this case.

The judgment of the circuit court is affirmed.

ALLEN and BECKER, JJ., concur.

CRAIN v. McKINLEY. (No. 2574.)(Springfield Court of Appeals. Missouri.
June 5, 1920.)**1. Appeal and error ⇨994(2) — Appellate court cannot interfere with judgment of jury as to credibility of witnesses.**

The jury was the judge of weight of evidence and credibility of witnesses; and, if there were facts and circumstances in evidence which justified jury in disbelieving plaintiff, it was their right and province to do so, and the appellate court cannot interfere.

2. Evidence ⇨589—Jury cannot find contrary to evidence arbitrarily.

Where plaintiff made a prima facie case, defendant cannot rely to sustain verdict for him entirely on the proposition that the verdict must stand, merely because the jury chose to disbelieve plaintiff; a jury must have some reason other than arbitrary choice to find contrary to evidence.

3. Brokers ⇨88(1)—Case for jury in view of evidence making prima facie case and tending to impeach.

In action for commission on loans and abstracts made by defendant, case held for jury under evidence making a prima facie case for plaintiff and evidence tending to impeach him as a witness.

4. Trial ⇨236(1) — Instruction jury might consider witness' "character" as bearing on credibility not erroneous.

In action for commission on loans and abstracts made by defendant, instruction jury were judges of credibility of witnesses and weight to be given their testimony, and that in determining weight of testimony of a witness the jury might consider his character for truth, veracity, or morality, if shown by evidence, held not erroneous, because not using "reputation" instead of "character."

5. New trial ⇨104(1)—Refusal for cumulative newly discovered evidence proper.

Where alleged newly discovered evidence was merely cumulative, it was not error to refuse to grant new trial on its account.

6. Appeal and error ⇨1003—Court cannot interfere with verdict as against weight of evidence.

The Court of Appeals cannot interfere with a verdict merely because it thinks it contrary to the weight of the evidence.

Appeal from Circuit Court, Texas County;
L. B. Woodside, Judge.

Suit by I. Harry Crain against D. P. McKinley. From judgment for defendant, plaintiff appeals. Affirmed.

Barton & Impey, of Houston, for appellant.
Lamar, Lamar & Lamar, of Houston, for respondent.

BRADLEY, J. Plaintiff sued in a justice of the peace court to recover \$158.40, claimed to be due him from defendant as commis-

sion on some loans and abstracts made by defendant. Plaintiff recovered in the justice court, but on appeal to the circuit court defendant prevailed, and plaintiff appealed.

Defendant was a loan agent, and seems also to have been doing some abstract business. Plaintiff was engaged in the real estate business. Plaintiff claimed that he had an agreement with defendant by which he was to have 50 per cent. of the commission on any loan he procured for defendant, and 20 per cent. of any abstract fee procured for defendant. He claimed that he procured and caused certain loan applicants to go to defendant, to whom defendant made loans, and that of the commission received by defendant on these loans he (plaintiff) was entitled under his agreement to \$151.50. Under the agreement concerning abstracts plaintiff claimed \$18.40. He credited his account with \$11.50 for abstract work for himself, leaving a balance alleged to be due of \$158.40.

Plaintiff testified positively to his alleged agreement and to each item in his account, and was corroborated by other witnesses. Defendant was not present at the trial, and there was no evidence offered on his behalf, except some evidence tending to impeach plaintiff. Defendant had lived in Texas county about 10 years, except for a few months prior to the trial. T. J. Hale, who had held the office of probate judge, testified that the general reputation of defendant for morality in that community was not good. W. W. Day, in the creamery business, testified that plaintiff's general reputation in that community for truth, veracity, and morality had not been good as far as he had heard. Jack McCaskill testified that he had lived in Houston for 16 years, and that he had been acquainted with plaintiff 4 or 5 years.

"Q. Are you acquainted with his (plaintiff's) general reputation here in Houston among the people that know him as to truth and veracity and morality? A. I don't know as I could say as to the truth absolutely, but as to the rest of it I think I am acquainted with it. Q. What is it, good or bad? A. I wouldn't consider it good. I don't think I ever heard the question of his truthfulness discussed, but the rest of it I have heard plenty said about it."

Taylor Wilson testified that he did not know much about plaintiff's general reputation for morality, but that the people said it wasn't extra good; that he never heard plaintiff's reputation for truth questioned. Plaintiff on cross-examination admitted:

"I have been convicted of a felony in this court. I was never convicted of crime until I came to Texas county. Since I came here I have been convicted about twice, here and in Dent county."

Plaintiff made no objection to the character of questions eliciting evidence as to gen-

eral reputation for truth and morality, nor did he make any objections as to the answers given. At the close of the case the court of its own motion gave this instruction:

"The jury are the judges of the credibility of the witnesses and the weight and value they will give to their testimony. In determining the weight you will give to the testimony of a witness you may take into consideration the character of such witness for truth and veracity, or morality, if shown by the evidence."

With his motion for a new trial plaintiff filed the affidavit of one Henry Britton, in which affidavit affiant stated that the defendant, McKinley, told affiant:

"That he (McKinley) owed plaintiff one hundred and fifty odd dollars, that plaintiff was about to sue him, and he would have to get some money from the bank, and it would be necessary for him to have some help, and asked affiant whether he ever helped persons under such conditions, and that so far as affiant knows neither plaintiff nor his attorney knew anything about the conversation aforesaid until Friday, the 25th day of April, 1918."

The trial was on April 23d. Plaintiff sought a new trial on the ground, among others, of newly discovered evidence, and this affidavit contains the evidence referred to. Plaintiff and his attorneys who represented him in the circuit court filed affidavits with the motion as to their diligence and failure to discover this evidence. There was also filed a counter affidavit of the attorney who represented plaintiff in the justice court. The counter affidavit stated that the affiant was attorney for plaintiff in the justice court, "and as such attorney filed such suit, and was attorney for plaintiff some time thereafter, and while such attorney for plaintiff learned of and knew what Henry Britton would testify in said cause, and thereafter Crain wrote affiant, and said he was afraid for affiant to try said cause on account of J. L. McKinley being on defendant's bond, and therefore he (the affiant) said nothing to him (plaintiff) about Britton's testimony. The bond referred to is defendant's appeal bond.

[1, 2] Plaintiff makes three assignments in effect as follows: That there is no evidence to support the verdict; that the court erred in giving the instruction; that the court should have granted a new trial on the ground of newly discovered evidence. Plaintiff could not have recovered unless the jury believed him. While his witnesses corroborated him in many particulars, yet there was no evidence upon which he could have recovered, except that his evidence be believed, and the jury evidently did not believe him. The jury was the judge of the weight of the evidence and credibility of the witnesses, and if there were facts and circum-

stances in evidence which justified the jury in disbelieving plaintiff that was their right and province, and an appellate court has no right to interfere. Plaintiff made a prima facie case, and, except for the impeaching evidence, the court no doubt would have directed a verdict. Defendant cannot rely entirely upon the proposition that the jury's verdict must stand merely because it chose to disbelieve plaintiff. A jury must have some reason other than mere arbitrary choice to find contrary to the evidence. It was so held in *Reichenbach v. Ellerbe*, 115 Mo. 588, 22 S. W. 573, but it seems that the Supreme Court held otherwise in *Gannon v. Gas Light Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505. But in *Guthrie v. Holmes*, 272 Mo. 215, 198 S. W. 854, Ann. Cas. 1918D, 1123, the Supreme Court held that a jury could not arbitrarily disregard facts which completely shattered a prima facie case based on a presumption of fact. We recently had occasion to consider this question to some extent in *Kazee v. Insurance Co.*, 217 S. W. 339.

[3] An elaborate discussion of the law relative to this question may be found in the dissenting opinion of Judge Marshal in *Gannon v. Gas Light Co.*, supra, and the doctrine announced therein seems to be the rule now in this state. But no case has gone to the extent of holding that, where there is impeaching evidence of the witnesses by whom the prima facie case is established, it is not then the sole province of the jury to believe or disbelieve as they may choose. Except for the evidence tending to impeach plaintiff, he would have been entitled to a directed verdict, but under the facts here the case was certainly for the jury, and not the court. This disposes of plaintiff's contention that there was no evidence to support the verdict.

[4-6] We do not think that any error was committed in giving the instruction complained of. It is contended that the use of the words "character" and "morality" in the instruction constitutes reversible error. The word "reputation" perhaps should have been used instead of "character," but we do not think that plaintiff was in anywise prejudiced. His general reputation for morality might be considered as affecting his credibility. We do not think that plaintiff has any ground to complain. He made no objections to the evidence as to his reputation for morality, and requested no instruction. He had a right to present instructions, but did not do so. Nor do we think that the court abused its discretion, and committed reversible error in refusing to grant a new trial on the ground of newly discovered evidence. The alleged newly discovered evidence was merely cumulative, and, such being the case, it was not error to refuse to grant the new trial. *Remfry v. Insurance Co.*, 196 S. W. 775. Finding that this new evidence was

merely cumulative, and that the court did not abuse its discretion, it is not necessary to go into the question as to whether plaintiff was or was not bound by the knowledge of his first attorney in this cause. We have no right to interfere with a verdict merely because we may think it contrary to the weight of the evidence. If an appellate court exercised such function, then the verdict of a jury would be no more than a recommendation. The judgment is affirmed.

STURGIS, P. J., and FARRINGTON, J., concur.

STEPHENS v. CURTNER. (No. 2616.)

(Springfield Court of Appeals. Missouri. June 5, 1920.)

1. Infants \S 84—Next friend may receive payment of judgment.

Rev. St. 1909, §§ 1744, 1745, relating to the appointment of a next friend for minor plaintiffs, contemplates that payment of the judgment in such suit should be to the next friend.

2. Infants \S 81—Failure to give bond does not affect next friend's right to receive payment of judgment.

Since the giving of a bond by the next friend of an infant is left to the discretion of the court or officer making the appointment, the fact that no bond is given because none is required will not affect the right of the next friend to receive payment of judgment debt.

3. Infants \S 84—A compromise of judgment debt with infant plaintiffs held invalid.

Where defendant in a suit by infant plaintiffs settled the judgment by paying to the infants only a small part of what was due, such settlement, disapproved by the infant's next friend, was invalid.

4. Compromise and settlement \S 6(1)—Payment of part of an undisputed debt does not discharge the whole debt.

The payment of a part only of an undisputed debt cannot be held to discharge the whole, although such was the agreement of the parties.

5. Replevin \S 5—Property taken under process cannot be replevied.

It is a valid defense in a replevin suit to show that the property in question has been seized under process, execution, or attachment against plaintiff's property.

6. Replevin \S 31—Affidavit that "property was not seized under valid process" held insufficient.

Under Rev. St. 1909, §§ 2637, 7759, requiring a replevin affidavit to allege that the property has not been seized under process, where property is to be taken in advance of the replevin judgment, the plaintiff, seeking to recover property levied on under execution in a suit by infants, could not evade such provision by alleging that the property was not seized under any "valid process or execution."

7. Replevin \S 5—Officer held not liable for failure to release levy.

Where no payment is made to the officer levying an execution, and the claim is made, but disputed, that the payment has been made to the execution plaintiff, such officer should not be held liable in replevin on his refusal to release the levy.

Appeal from Circuit Court, Pemiscot County; Sterling H. McCarty, Judge.

Replevin by J. W. Stephens against Wilce Curtner. Judgment for defendant, and plaintiff appeals. Affirmed.

Mayes & Gossom, of Caruthersville, for appellant.

M. O. Morris, Sam J. Corbett, and Ward & Reeves, all of Caruthersville, for respondent.

STURGIS, P. J. This is a suit in replevin for a quantity of whisky. This property was owned by plaintiff, and was seized and taken from his possession by the defendant, a constable, under and by virtue of executions issued by a justice of the peace. There were four several judgments, the validity of which are not questioned, rendered against this plaintiff in a justice of the peace court in favor of four minor negro boys, each being a plaintiff in one of such suits. In the proceedings in the justice court resulting in these judgments the plaintiffs being minors, the justice appointed M. O. Morris, as next friend of each such plaintiff under the provisions of section 7435, R. S. 1909, and the suits were conducted in the names of such minors by M. O. Morris as next friend. Judgments in each of such suits were obtained in the justice court and in due time four several executions were issued and placed in the hands of the defendant constable for collection. Under such executions the constable levied on and seized the whisky in question. Thereupon this plaintiff, the execution defendant, instituted this suit in replevin in the circuit court, and on giving bond the replevin writ issued, and under it plaintiff regained from the constable the whisky on which the constable had levied the executions mentioned.

The plaintiff's claim is that, after the constable had the executions against him in his hands for collection, he effected a settlement with the several execution plaintiffs, whereby each of such plaintiffs gave him a receipt in full for the amount due on the respective judgments and executions; that this plaintiff then paid the costs in each case, and demanded that the executions be returned satisfied. The next friend of such minor execution plaintiffs was not consulted in reference to the alleged settlements, and refused to sanction such settlement made by his wards, and instructed the constable to pro-

ceed to enforce the executions. The constable therefore refused to release the property levied on, and this suit in replevin was instituted. The judgment in the trial court was for defendant, and plaintiff appeals.

The position of plaintiff is that he had a right to settle the judgment debts directly with the minor plaintiffs on terms satisfactory to them, without consulting the next friend of such minors, who had been appointed such and conducted the suit for them; that, having made settlement with such execution plaintiffs and obtained receipts against the judgment debts, the executions became *functus officio*, and the constable no longer had a right to hold his property thereunder; that under such facts replevin is a proper remedy against this constable to regain the property.

[1-4] There are several reasons, we think, why plaintiff cannot recover in this action. The matter most discussed in the briefs and argument is the right of a judgment defendant, in a suit wherein the plaintiff is a minor and sues by next friend, to settle the judgment by paying the amount thereof directly to the minor plaintiff instead of to his next friend. That, however, is not the concrete case here presented. Had this plaintiff paid the judgments in full to the minor execution plaintiffs, a more difficult question would be presented. The provisions of our statutes with reference to appointment of a next friend for minor plaintiffs, providing for the giving of a bond by such friend conditioned to account to such infant for the money and property received in such suit, clearly contemplates that payment of the judgment should be to the next friend. Sections 1744, 1745, R. S. 1909; *Aley v. Railroad*, 211 Mo. 460, 476, 111 S. W. 102. As the giving of a bond is left to the discretion of the court or officer making the appointment of a next friend, the fact that none is given because none is required would not affect the right of the next friend to receive the payment of the judgment debt. In the present case, however, the judgment defendant in the suits by the minor plaintiffs did not pay the full amount of the judgment debts to such plaintiffs. He undertook to settle same in full by paying only a small part of what was due. This he could not do. Even before final judgment, when the matter is yet in dispute, a court could hardly hold as valid and binding a contract of compromise settlement, made by the infant plaintiff without the consent of the next friend having control of the litigation. Clearly such compromise settlement would not be binding after final judgment in favor of the infants, for then there is no disputed claim to settle. Even in the case of an adult the payment of a part only of an undisputed debt cannot be held to discharge the whole though such was the agreement of the parties. The payment of a part only of

what one is bound in law to pay does not discharge the residue, though paid under such agreement. *Chamberlain v. Smith*, 110 Mo. App. 657, 660, 85 S. W. 645; *Willis v. Gam-mill*, 67 Mo. 730; *Price v. Cannon*, 3 Mo. 453; *Winter v. Railroad*, 73 Mo. App. 173, 193; *Moore v. Bank*, 22 Mo. App. 684, 695; *Swaggard v. Hancock*, 25 Mo. App. 596, 606; *Harrison v. Iron Works*, 96 Mo. App. 348, 70 S. W. 261; *Hawthorn Lumber Co. v. Lee Jordan Lumber Co.*, 167 Mo. App. 201, 151 S. W. 199; *Scott v. Parkview Realty Co.*, 241 Mo. 112, 145 S. W. 48. In this case plaintiff claims that he made a settlement in full of the final judgment in favor of *Louis Cobb* for \$9.60 by payment of \$1.50, and a judgment in favor of *Fred Alexander* for \$24 by payment of \$5. The other judgments were settled in like proportions. Such payments did not satisfy the executions and the next friend of the minor plaintiff was right in directing the constable not to release the property levied on thereunder. The executions and judgments were not discharged and the defendant constable rightly refused to release the property.

[5, 6] Another barrier to plaintiff's recovery in replevin is that the property in question had been seized under execution against the plaintiff. It is a valid defense in a replevin suit to show that the property in question has been seized under process, execution, or attachment against plaintiff's property. *Knoche v. Perry*, 90 Mo. App. 483; *Moriund v. Johnson*, 140 Mo. App. 345, 352, 124 S. W. 80; *Bosse v. Thomas*, 3 Mo. App. 472, 478. Where the property is to be taken in advance of the judgment in replevin, as it was here, the plaintiff must allege under oath that such property "has not been seized under any process, execution or attachment against the property of the plaintiff." Section 7759 and 2637, R. S. 1909. Plaintiff sought to evade this provision by alleging in his replevin affidavit that the property was not seized under any valid process or execution against his property. We need not decide whether a defendant in execution may maintain replevin where the judgment in which the execution is issued is void or the execution itself is void on its face, for which there is some authority (34 Cyc. 1369), as that is not the case presented. The case of *Railroad v. Lowder*, 138 Mo. 533, 39 S. W. 799, 60 Am. St. Rep. 565, goes no further than to hold that in case of a void judgment the execution defendant has a remedy of replevin against the purchaser at the execution sale. See, also, *Ostmann v. Frey*, 148 Mo. App. 284, 128 S. W. 257. There is no pretense that these judgments in favor of the minor plaintiffs or the executions thereon were void. The most that plaintiff claims is that he made settlement with the minor plaintiffs and paid them what they agreed to accept in full settlement. This, as we have seen, was not binding on plaintiffs or on their next friend, and the executions

were not in fact satisfied. Under such facts replevin would not lie.

[7] Whether or not an execution defendant, who has paid to the officer having such execution the full amount due thereon, can maintain replevin against such officer, refusing to release the levy, might be a serious question. But where no payment is made to such officer, and the claim is made, but disputed, that payment has been made to the execution plaintiff, then such officer ought not to be held liable in replevin. *Mowrer v. Helfertine*, 80 Mo. 23; *Arnel v. Lendrum*, 47 Iowa, 535; *Kelso v. Youngren*, 86 Minn. 177, 90 N. W. 316. The clause protecting property seized under any process from an action in replevin should not be weakened by inserting the word "valid" after the word any. *Karr v. Stahl*, 75 Kan. 387, 89 Pac. 669.

The judgment as rendered is favorable enough to the plaintiff, and is affirmed.

FARRINGTON and BRADLEY, JJ., concur.

NORMAN v. KEY. (No. 2690.)

(Springfield Court of Appeals. Missouri.
June 5, 1920.)

1. Justices of the peace §101—Attachment affidavit used in aid of defective statement.

Attachment affidavit in an action in a justice court may be used in aid of a defective statement.

2. Justices of the peace §91(2)—Statement seeking to recover cotton as rent held sufficient.

A statement in justice court: "Arthur Key to Leslie Norman, Dr. To one-fourth of cotton grown by Key on land of Norman, in the year of 1918, as rent for said land, \$250.00"—held a sufficient statement when aided by an attachment affidavit.

3. Justices of the peace §91(1)—Statement need be only definite enough to inform of nature of action.

A statement in a justice court need only be definite enough to inform defendant of the nature of plaintiff's demand and act as a basis for a pleading of *res judicata*.

4. Landlord and tenant §53(2)—No formal attornment to purchaser of land or renewal of rental contract necessary.

No formal attornment of tenant to purchaser of land or renewal of the rental contract is required, since the covenant to pay rent runs with the land, and an assignment of the reversion carries the right to the assignee to sue for the rent, in view of Rev. St. 1909, § 7899.

5. Landlord and tenant §322—One-fourth of cotton raised "at the gin" required delivery by tenant at market place.

A tenant agreeing to pay as rent one-fourth of the cotton raised thereon at the gin thereby

agreed to deliver the cotton to the market place, "at the gin" being place where cotton was sold.

6. Landlord and tenant §326(5,6)—Tenant failing to deliver crop as rent may be sued for money value.

Where tenant is to pay landlord a part of crop as rent, the relation of landlord and tenant exists so as to authorize a suit for the money value of the portion of the crop due the landlord in case the tenant sells or converts same to his own use, and this is true although the landlord and tenant may be tenants in common of the crop raised, and the landlord might enforce, under proper circumstances, his right to his portion of the crop in kind, in view of Rev. St. 1909, § 7896.

7. Parties §6(2)—Beneficial owner of land may sue for rent.

Where land was sold and was conveyed to a third person instead of the purchaser, the purchaser could sue tenant for rent, being the real party in interest.

Appeal from Circuit Court, Pemiscot County; Sterling H. McCarty, Judge.

Action by Leslie Norman against Arthur Key. Judgment for plaintiff, and defendant appeals. Affirmed.

Shepard & Oliver, of Caruthersville, for appellant.

Ward & Reeves, of Caruthersville, for respondent.

STURGIS, P. J. The whole controversy in this case in the trial court was whether the rent on a part of a certain 40 acres of land in Pemiscot county which was cultivated by defendant in the year 1918 should go and be paid to plaintiff or to W. A. Key, the father of defendant. The defendant acknowledged owing the rent and said that it made no money difference to him whether he paid plaintiff or his father. Naturally enough, however, he defended this suit in the interest of his father. The controversy arose in this way: Plaintiff's father, W. A. Key, owned 130 acres of land in Pemiscot county which he sold to plaintiff in the early spring of 1918. The legal title to 50 acres of this land was in said W. A. Key, but he had only the equitable title to the other 80 acres, having purchased the same, but had not received a deed or paid all the purchase money. When W. A. Key sold this land to plaintiff, Norman, he made the deed to plaintiff for the 50 acres, but for convenience W. A. Key's vendor of the 80 acres made the deed direct to plaintiff. W. A. Key had taken possession of the land prior to selling to plaintiff, and had rented a portion of one 40 to his son, this defendant, to cultivate for the season of 1918, though at that time no crops had been planted. W. A. Key claims, or rather the defendant makes such claim for him, that when he sold the land to plain-

tiff he reserved and was to have the rent on this one 40 for the season of 1918. Plaintiff denies this and says no reservation of rent on any of the land was made by W. A. Key, the vendor. This was the matter threshed out at the trial below, and, while no reservation of rent was made in the deeds conveying the land to plaintiff, the court permitted oral evidence on behalf of defendant that such was the real agreement of the parties. Plaintiff's evidence is that, when he purchased this land, not only was he to have the rent for 1918, but that he and the vendor, W. A. Key, went to the tenants, including this defendant, and informed them of plaintiff's purchase of the land, that he was to have the rent on same, and that defendant consented to the arrangement. Defendant's evidence, including W. A. Key as a witness, was to the contrary, and that W. A. Key reserved and was to have the rent on this particular forty acres. We need not review the conflicting evidence, as defendant concedes here that the jury's finding on this controverted fact in plaintiff's favor is binding on this court.* We only desire to point out that this was the controverted issue—the merits of the case—and that the jury found for plaintiff that he is entitled to the rent, and not defendant's father. The judgment was for plaintiff, and defendant appeals.

[1-3] The case originated in a justice court, and defendant's first point here is that the statement filed in the justice court is wholly insufficient, states no cause of action whatever, and will not support the judgment. This point is raised here for the first time. The statement reads:

"Arthur Key to Leslie Norman, Dr. To one-fourth of cotton grown by Key on land of Norman, in the year of 1918, as rent for said land, \$250.00."

The suit was by attachment, and the affidavit for attachment states that defendant "is justly indebted to this affiant in the sum of \$250 for the annual rent of 15 acres of cotton which said defendant had been raising on the land of this affiant during the year 1918 on the northwest quarter of the southwest quarter, 17—17—11, and that said sum of \$250 is now due and payable." The statement itself clearly means that plaintiff claims that defendant owes him \$250, the value of one-fourth of the cotton grown by defendant on land of the plaintiff, Norman, in the year 1918 as rent for said land. The affidavit in attachment is still more explicit in describing the land and stating that the amount claimed is for the rent on land owned by plaintiff and which defendant planted in cotton. The attachment affidavit may be used in aid of the defective statement (*Holman v. Kerr*, 44 Mo. App. 481), if indeed it needs any aid, and we are not holding that it does. Under the informal method of

pleading allowed in justice courts we have no hesitation in holding this sufficient. A statement in a justice court need only be definite enough to inform the defendant of the nature of plaintiff's demand and act as a basis for a plea of *res judicata*. *Guarantee Fixture Co. v. Baseball Co.*, 152 Mo. App. 601, 604, 133 S. W. 849; *Rundleman v. Boiler Works*, 178 Mo. App. 642, 161 S. W. 609. The defendant had in fact no trouble in ascertaining and trying out the real question involved, and raises this point for the first time after this appeal. We overrule this assignment of error.

[4] The defendant bases several assignments of error on the ground that the relation of landlord and tenant never existed between plaintiff and defendant. This contention is based on the fact that defendant rented this land from his father, the former owner, that plaintiff became the owner thereafter, never was in actual possession of the land, and no rental contract was ever made between them. In this defendant is mistaken. The plaintiff's evidence, which the jury believed, is to the effect that when W. A. Key sold this land to plaintiff they together went to defendant, informed him of the fact and that the rent went to plaintiff, and defendant acquiesced in this agreement. No formal attornment of the tenant to the purchaser of land or renewal of the rental contract is required, since the covenant to pay rent runs with the land, and an assignment of the reversion carries the right to the assignee to sue for the rent. *McDonald v. May*, 96 Mo. App. 236, 242, 69 S. W. 1059; *Bradford v. Tilly*, 65 Mo. App. 181. Such also is our statute, section 7899, R. S. 1909. When, therefore, the lessor of this land, W. A. Key, sold and conveyed or caused to be conveyed this land to plaintiff, the relation of landlord and tenant, so far at least as gave plaintiff the right to sue for the rent is concerned, did exist between plaintiff and defendant. The cases cited by defendant, *Edmonson v. Kite*, 43 Mo. 176, *McLaughlin v. Dunn*, 45 Mo. App. 645, and *Peck v. Dunnevant*, 148 Mo. App. 69, 127 S. W. 678, holding that an action for rent or for use and occupation will not lie unless the relation of landlord and tenant is shown to exist, are cases where the defendant was not a tenant at all, but a trespasser or the like. Here the defendant acknowledges his tenancy of this land and that he owes the rent, and the only question is whether the rent was reserved by and is due the original owner and lessor or passed with the land to this plaintiff as purchaser and owner at the time the rent was due. That question has been settled in plaintiff's favor.

[5, 6] The evidence shows that in renting this land the defendant agreed to pay as rent one-fourth of the cotton raised thereon at the gin. "At the gin" was the place

where cotton was sold, and this meant that the tenant was to deliver the cotton to the market place where sold. Usually the market price of the cotton was then paid to the tenant for the landlord or deposited in a bank for him. In this case the tenant sold the cotton, collected the money, and refused to pay it over to plaintiff. After this suit was commenced he says that he paid it to his father. Defendant suggests, if we understand his point, that, as the rent was payable in kind, such fact made plaintiff and defendant tenants in common of the cotton, and that plaintiff could not sue for and recover a money judgment as for cash rent. Our statute (section 7896) recognizes the right of the landlord to sue for the rent due even by attachment "whether the same be payable in money or other thing"—that is, part of the crop raised. In *Caruthers v. Williams*, 53 Mo. App. 181, and 58 Mo. App. 100, the court held that—

"If the tenant by negligence or other fault fails or refuses to harvest and deliver the crop, he fails to render the rent agreed."

This was said in a suit by attachment for rent. The case of *Cramer v. Nelson*, 128 Mo. App. 393, 107 S. W. 450, cited by defendant, is a suit for rent of a farm, said rent being "one-half of all grain in the crib," in which plaintiff prayed judgment for \$750, the value of 1,500 bushels of corn which the tenant failed to deliver to the landlord. It seems clear, therefore, that, where the tenant is to pay the landlord a part of the crop as rent, the relation of landlord and tenant exists so as to authorize a suit for the money value of the portion of the crop due the landlord in case the tenant sells or converts same, to his own use; and this is true although the landlord and tenant may be tenants in common of the crop raised and the landlord might enforce, under proper circumstances, his right to his portion of the crop in kind. *Johnson v. Hoffman*, 53 Mo. 508; *Black v. Scott*, 104 Mo. App. 37, 78 S. W. 301; *Kamerrick v. Castleman*, 23 Mo. App. 481, 492.

[7] It also appears that when plaintiff purchased this land he caused same to be conveyed to one Elisha Johnson instead of to himself. Plaintiff's explanation of this is that he and his wife were not living together and their relations were not amicable. The evidence all clearly showed that plaintiff bought and paid for the land, and that Johnson merely held it for him and had no real interest in same. He was making no claim for the rent and could not do so except for plaintiff's benefit. Defendant urges that Johnson was the only proper party to sue if the rent followed the ownership of the land. Plaintiff, however, is the beneficial owner of the land, is the real party at interest, and, we think, should be allowed to recover. No

authorities are cited by defendant on this point, and we think it unnecessary to brief it ourselves.

Criticism of some of the instructions given is made, but what we have said answers such criticism for the most part, and we will not notice same in detail. Defendant had his day in court, lost the case on the merits, and we find no reason for remanding the case for new trial. The judgment is affirmed.

FARRINGTON and BRADLEY, JJ., concur.

MAJORS v. OZARK POWER & WATER CO. (No. 2612.)

(Springfield Court of Appeals. Missouri. June 5, 1920.)

1. Evidence ⇨7 — Judicial notice taken that electric wire insulation will not withstand shock of tree falling on it.

Judicial knowledge is taken of the fact that the insulation on electric wires is a covering of fiber and material that will not withstand such tremendous shocks as that caused to the wire by the falling on it of a tree 18 inches in diameter and 50 feet high.

2. Negligence ⇨136(5)—Jury case defined.

A case should not be submitted to a jury where under the testimony the cause of the accident is merely conjectural, and there must be some evidence of a causal connection between the act complained of and the injury.

3. Electricity ⇨16(7)—Lack of insulation held not proximate cause of death.

Lack of insulation held not proximate cause of death of one coming in contact with electric power wire, knocked down by the felling across it of a 50-foot tree, with its base 40 feet away in a yard.

4. Negligence ⇨58—Proximate cause of injury defined.

If the injury as occasioned was not one which could have reasonably been anticipated as a sequence of the alleged negligent act, then the alleged negligent act was not in law the proximate cause of the injury, and no recovery can be had therefor.

5. Appeal and error ⇨212—Appellant without standing where saving no objection or exception to direction of verdict.

In death case, where, after the court gave directed instruction for defendant, without more plaintiff took a nonsuit, and there was no objection or exception saved to such action, the appellate court could not interfere with the judgment.

Appeal from Circuit Court, Jasper County; Grant Emerson, Judge.

Action by Nora M. Majors against the Ozark Power & Water Company. Judgment

for defendant, and plaintiff appeals. Affirmed.

D. S. Mayhew and J. Olin Biggs, both of Monett, for appellant.

A. E. Spencer, of Joplin, for respondent.

FARRINGTON, J. The appellant brings her appeal from a judgment adverse to her rendered in the circuit court of Jasper county. The case made by her is that her husband was a common laborer, living in Peirce City, Mo., and in the month of January or February, 1919, was engaged by Henry Mohlering to cut some large trees in the yard of the home of one Webber. Plaintiff's husband was killed while engaged in this work in the following manner: He, with several other men, including Mohlering and Mohlering's brother, had cut one tree in Webber's yard, and after that cut down a tree which under the evidence was 18 inches in diameter and 50 feet high. They undertook to throw this tree in a certain direction, but, owing to the fact it fell sooner than they anticipated and struck some other limbs, its top reached out into the street, where it struck some high-powered electric current wires, owned and maintained there by the defendant. These wires were not insulated. There is evidence that there had been insulation on some of the wires in the past, but it had rotted off, and afforded no protection at the time of the injury. The top of this tree, when it struck the wires, crushed them to the ground, breaking one and holding the other two down to the ground. The wires prior to the time the tree fell upon them were maintained on poles out in the street about 40 feet from this tree, and from 20 to 30 feet up over the street or roadway. When the tree crushed down these wires a singing noise was made by the wires, and Mohlering, who was in charge and the employer of plaintiff's husband, went into Webber's house to telephone the company to cut off their electric current. Plaintiff's husband was at the stump of the tree, and while Mohlering was in the house telephoning he (Majors) walked up toward the top of the tree, through the limbs, and when he had gotten at a place some 6 or 7 feet from where the wires were crushed down, he either stumbled or received a shock of electricity that caused him to lunge forward toward the wires. One of his hands, according to one of plaintiff's witnesses, struck the broken wire. Another witness for plaintiff testified that his hand went forward and rested under one of the wires that was not broken. At any rate, he was gotten out by the workmen, and died almost immediately.

The charge of negligence in the petition is that the defendant carelessly permitted its wires, which were strung on poles and were charged with electricity, to become bare by reason of the fact that the insulation on the

wires had rotted off from long and constant use, and permitted said wires to remain in that condition for a long time prior to the date of the injury, and that it knew, or should have known by the exercise of ordinary care and caution, that the wires were bare and uninsulated, and were therefore dangerous and deadly to human life to any one coming in contact therewith. The answer was a general denial and a plea of contributory negligence.

At the end of plaintiff's evidence the defendant offered an instruction to the court, directing the jury to find the issues for the defendant, which the court gave. The record before us shows as follows:

"Thereupon the court instructs the jury that under the law and the evidence the plaintiff is not entitled to recover in this cause. Whereupon the plaintiff takes a nonsuit, with leave to move to set the same aside."

The court afterwards overruled plaintiff's motion to set aside the nonsuit, to which latter action of the court the plaintiff objected and excepted.

It is the contention of appellant that the defendant is answerable for this injury under these circumstances, because of the fact that it had failed to properly insulate these wires.

Without going into the question of whether plaintiff's husband was guilty of contributory negligence, as a matter of law, in leaving his place by the stump of the fallen tree and going up into the branches of the tree, where he came in contact with the wires, as we have set out, knowing that they were high-powered wires, were mashed down under the tree, we think that the action of the court in giving the instruction was proper, because plaintiff's evidence had failed to make out a case of negligence against the defendant.

[1] As a first proposition, we believe it would be nothing more than wild conjecture to hold that the failure to insulate the wires was the cause of plaintiff's husband meeting his death, with the weight and crash of a tree 50 feet high, with a diameter at its stump of 18 inches, falling upon and crushing to the ground these wires. To say that subjecting a properly and newly insulated wire to such a crash and force would have kept this wire in such condition as to have prevented the electricity from escaping as it did is purely conjectural. We take judicial knowledge that the insulation on electric wires is a covering of fiber and material that will not withstand such tremendous shocks as that caused to this wire by the tree falling upon it, and if the defendant is to be held for the death of this man the evidence must be sufficient to warrant a finding that the failure to insulate caused his death.

[2] The law is well settled that a case should not be submitted to a jury where under the testimony the cause of the accident

is merely conjectural. 29 Cyc. 631. There must be some evidence of a causal connection between the act complained of as negligence and the injury. *Battles v. Railway Co.*, 178 Mo. App. loc. cit. 614, 161 S. W. 614, and cases cited therein.

[3, 4] We, therefore, hold in this case, with these wires subjected to the force of this falling tree, that it would be a mere conjecture to say that it was defendant's failure to insulate this wire that caused plaintiff's husband's death. On the other hand, the law is well established in this state, as declared in the very recent case of *State ex rel. v. Ellison*, 271 Mo. 463, loc. cit. 474, 196 S. W. 1088, that if the injury, as occasioned, was not one which could have reasonably been anticipated as a sequence of the alleged negligent act, then the alleged negligent act was not in law the proximate cause of the injury, and no recovery can be had therefor. Here we have the defendant company placing its wires from 20 to 30 feet high on poles out in a street. We do not think that it could reasonably be anticipated that some one would cut down a shade tree, apparently strong and vigorous, in an adjoining yard from 40 to 50 feet away from these wires.

The last case cited quotes with approval from *American Brewing Association v. Talbot*, 141 Mo. loc. cit. 683, 42 S. W. 682, 64 Am. St. Rep. 538, where it is held:

"Numerous authorities hold that it is not negligence not to take precautionary measures to prevent an injury which, if taken, would have prevented it, when the injury could not reasonably have been anticipated and would not, unless under exceptional circumstances, have happened."

It is certainly an exceptional occurrence for trees to be cut 40 or 50 feet from the street so as to fall across wires strung therein.

In *Thompson on Negligence* (2d Ed.) vol. 1, § 58, quoting from *Lane v. Atlantic Works*, 111 Mass. 139, the rule is stated:

"The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of injury. The test is to be found in the probable injurious consequences which were to be anticipated—not in the number of subsequent events and agencies which might arise. And this principle will apply to a case where a catastrophe has been brought about by any intervening agency, having no connection with the act of the original actor, whether such agency be the act of a third person or a catastrophe of nature. Thus an ordinance of a borough regulating the speed of electric cars was violated, and in consequence of the violation the car was at a given point upon the track of the defendant, where a tree fell as the car was passing under it, in-

juring the plaintiff. If the ordinance had been complied with, the car would have been on an other point on the track at the time when the tree fell. The violation of the ordinance was not the proximate cause of the injury, since it could not be foreseen that the tree would fall, or that it would fall at any particular point of time; and hence, so far as human foresight could go, the violation of the ordinance might have prevented, as well as produced, the catastrophe."

Our attention is called to the case of *Harrison v. K. C. Electric Light Co.*, 195 Mo. 606, 93 S. W. 951, 7 L. R. A. (N. S.) 293, where the company was held on the showing that it knew that its electric line was grounded, and, without discovering where it was, it turned on this powerful and deadly current, which negligent act, coupled with the act of the deceased's son, caused the injury.

Again, in the case of *Williams v. Springfield Gas & Electric Co.*, 274 Mo. 1, 202 S. W. 1, the Supreme Court, in reversing a judgment of this court (187 S. W. 556), held that the company was liable, because they must anticipate that boys will climb up in trees; that, held to a knowledge of this, companies or persons dealing with electricity must guard against injuring those who exercise this prehistoric and probably inherited trait. It would be going far, however, to hold that reasonable and prudent people, exercising the highest degree of care, must anticipate that shade trees located in yards along the streets will be chopped down so as to fall across the wires. *Luehrmann v. Laclede Gas Light Co.*, 127 Mo. App. 213, 104 S. W. 1128; *Brubaker v. K. C. Elec. Light Co.*, 130 Mo. App. 439, 110 S. W. 12.

For these reasons, we hold that plaintiff failed to make out a case of negligence against the defendant, and that the action of the trial court in giving the peremptory instruction was proper.

[6] There is another reason, which is purely technical, that forbids any interference of the judgment in this case by this court, and that is shown by the record which we have heretofore set out. After the court gave the directed instruction to the jury, without more the plaintiff took a nonsuit. There was no objection nor exception saved to such action. This, under all the decisions of our appellate courts, is a vital omission in the preparation for an appeal. See *Lewis v. Mining Co.*, 199 Mo. 463, 97 S. W. 938; *Arnold v. Insurance Co.*, 167 Mo. App. 154, 151 S. W. 190; *Montel v. Railroad*, 130 Mo. App. 149, 108 S. W. 1073; *Carter v. O'Neill*, 102 Mo. App. 391, 76 S. W. 717; *McClure v. Campbell*, 148 Mo. 96, 49 S. W. 881.

The judgment of the trial court is affirmed.

STURGIS, P. J., and BRADLEY, J., concur.

MUNDAY v. BRITTON. (No. 2638.)

(Springfield Court of Appeals. Missouri.
June 5, 1920.)

1. Trover and conversion §32(3)—Allegation as to possession necessary.

In action for conversion, plaintiff must allege that he was in possession or entitled to possession of the property at the time of the alleged conversion.

2. Justices of the peace §174(5)—Defective pleading can be amended on appeal to circuit court.

In action for conversion, where statement filed in the justice court was defective for failure to allege that plaintiff was in possession or entitled to possession at the time of the alleged conversion, plaintiff could amend pleading by supplying such omission on appeal to the circuit court.

3. Chattel mortgages §114—Feed bill a lien on animals only if possession was necessary to protect mortgages.

Feed bill paid by mortgagee to get possession of mortgaged animals from third person hired by mortgagor to care for them was not a lien on animals where they were not depreciating in value so as to justify mortgagee in declaring a default, but, if they were depreciating in value to such an extent that possession by mortgagee would have been necessary to protect his rights, the amount so paid would become a part of secured debt or be of equal dignity therewith and be a lien on the property.

4. Chattel mortgages §161 — Mortgagor did not "dispose of" animals by hiring third person to take care of them.

Mortgagor by hiring a person to keep and care for mortgaged animals did not "dispose of" them within mortgage providing that mortgagor shall not "dispose of" them and entitling mortgagee to declare debt due and take possession if mortgagor disposes thereof.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dispose of.]

5. Chattel mortgages §161—Meaning of "dispose of" in chattel mortgages stated.

In mortgage on animals, providing that mortgagor shall not "dispose of" them, the word "dispose" has a larger meaning than selling; selling being only one of the methods of disposing of property.

6. Chattel mortgages §166—Mortgagee taking possession on default must foreclose within reasonable time.

The right to take possession given mortgagee on default by mortgagor is given him merely to enable him to foreclose mortgage, which he must do in good faith within a reasonable time.

Appeal from Circuit Court, Texas County;
L. B. Woodside, Judge.

Action by R. P. Munday against Henry Britton. Judgment for plaintiff, and defendant appeals. Affirmed.

Lamar, Lamar & Lamar, of Houston, for appellant.

W. L. Hiett, of Houston, for respondent.

STURGIS, P. J. This suit originated in a justice of the peace court in Texas county, and is for conversion of two mares and a mule colt. The defendant justifies his action in taking possession of said animals and his subsequent appropriation of same to his own use by reason of the foreclosure of a chattel mortgage thereon and his purchase thereunder. The plaintiff is the original owner and mortgagor of the two mares; the mule colt having been born between the giving of the mortgage and its foreclosure.

The principal facts are that the plaintiff induced the defendant to sign as joint maker a note for \$20 payable to a bank at Houston, Mo., and gave him a chattel mortgage on these animals for his protection. The note and mortgage are dated March 10, 1916, and were due and payable 60 days thereafter. The chattel mortgage contains the usual conditions as to the mortgaged property remaining in possession of the mortgagor till default in payment unless the mortgaged property unreasonably depreciates in value or the mortgagor sells or disposes of the same. A day or two after giving this mortgage the plaintiff left Texas county, placing the mortgaged property in the care and custody of one Dave Holland under an agreement that Holland was to feed and care for same at \$12 per month. The defendant's mortgage was not recorded until some two weeks later, but Holland had knowledge of same. In a little more than a month after the mortgage was given, and about the same length of time after Holland's possession under the agreement as to feeding and caring for the animals for plaintiff, the defendant demanded and took possession of the animals on the ground that same had greatly depreciated in value, the secured note not yet being due. To get such possession the defendant paid Holland the accrued feed bill then amounting to \$14.

The plaintiff paid the secured note before it became due. The plaintiff was yet absent, and it is not shown that he then knew of defendant's action in having taken possession of the property and paying the feed bill thereon. It appears that a nephew of plaintiff attended to paying off the note, and the nephew, being without authority or funds with which to do so, and claiming that defendant's action in taking possession of the mortgaged property before the secured debt was due was unwarranted, declined to reimburse defendant for the \$14 feed bill which

he had paid in order to obtain such possession.

It appears, therefore, that at the time the secured note became due it was fully paid by plaintiff, although the defendant as mortgagee had taken and was in possession of the mortgaged property on the ground that his liability on such note was endangered by a depreciation in value of such property. The only claim that defendant then had was that he should be reimbursed for the feed bill owed by plaintiff to Holland which he had paid on taking possession of the mortgaged property. No foreclosure proceeding had been commenced, and this condition of affairs continued for some four months when defendant advertised the property and sold it, ostensibly at least under the terms of the mortgage, and himself became the purchaser. Later the plaintiff brought this suit for conversion, and on trial in the circuit court without a jury the court found for plaintiff, assessing the value of the property at \$90, crediting thereon the amount of the feed bill paid by defendant, and rendered judgment for plaintiff for \$76. The defendant appeals.

[1, 2] A question of pleading is raised which must be disposed of first. In plaintiff's statement filed in the justice court he alleges that he was the owner of the property, and that defendant unlawfully took possession of the same and converted it to his own use, to plaintiff's damage in the sum of \$250. After appeal to the circuit court objection was made that the statement was fatally defective in that there was no allegation that plaintiff was in possession or entitled to possession at the time of the alleged conversion. The court thereupon permitted plaintiff to amend by adding such allegation. While the omitted allegation is essential to state a cause of action in conversion (*Schwald v. Brunjes*, 139 Mo. App. 516, 123 S. W. 472, and *Bank v. Land Co.*, 152 Mo. 145, 156, 53 S. W. 902), we need not decide whether this rather technical rule applies to the informal pleadings allowed in justice courts. Here the pleading was amended, and the question is whether such an essential allegation may be added by amendment after the case reaches the circuit court. This question was settled in the affirmative by the Supreme Court in *Dowdy v. Wamble*, 110 Mo. 280, 19 S. W. 489, certified to that court by the St. Louis Court of Appeals. It was there held that on appeals from justices of the peace the law "permits amendments on appeal, even where essential facts were thereby first brought into the case." That was a *replevin* case, and there is no reason by the same rule should not apply to a suit in conversion. It is there held, and has been repeatedly so held since, that a plaintiff's statement in a justice court which is fundamentally insufficient and lacking in some essential averment necessary to

state a cause of action may be made sufficient by amendment after the case reaches the circuit court. *Union Brewing Co. v. Ehlhardt*, 189 Mo. App. 129, 120 S. W. 1193; *Daniel v. Atkins*, 66 Mo. App. 342; *Rocheport Bank v. Doak*, 75 Mo. App. 332; *Rechnitzer v. Vogel-sang*, 117 Mo. App. 148, 93 S. W. 326.

[3] Looking to the merits of the case, we find that the question to which the evidence was mostly directed was whether the mortgaged property had materially depreciated in value so as to justify defendant's action in declaring a default on that ground prior to the secured note becoming due. The court found against defendant on this point and that such property had not so depreciated. That such finding is supported by substantial evidence and is binding on this appeal is conceded. Under the finding, therefore, that defendant wrongfully took this property into his possession before the secured debt was due, we cannot sustain defendant's claim to have a right to hold the property and later foreclose the mortgage, merely to reimburse himself for the prior payment of the feed bill. Had defendant been compelled to pay this feed bill at a time and for a purpose necessary to protect his rights under the mortgage, then we would grant that the amount so paid would become a part of, or of equal dignity with, the secured debt, and therefore be a lien on the property. 11 C. J. 562. But, as there stated, where the mortgagee wrongfully takes possession of the mortgaged property before the secured debt is due, he cannot charge the mortgagor with the expense of keeping it. And for the same reason he could not charge against the property a prior feed bill owed by the mortgagor which he paid solely to accomplish a wrongful taking of this property. The mortgagee is not entitled to such protection in doing a wrongful act.

It is not necessary, therefore, for us to determine whether or not the person to whom defendant paid the feed bill had an agister's lien on this property superior to the defendant's mortgage. Defendant concedes that an agister's lien is not superior to a mortgage lien where the mortgage is recorded within a reasonable time: *Birmingham v. Carr*, 196 Mo. App. 411, 197 S. W. 711. But, says defendant, this mortgage was not recorded till 15 days after being given, and meantime the agister made the contract and incurred expense in feeding these horses. Again we might say that defendant is seeking to be protected for his own wrong, for it was his fault that he did not file the mortgage within a reasonable time. Be that as it may, the defendant is a volunteer in paying this feed bill, since his taking this property when he did is found to be wrongful, and he was not paying a debt the payment of which was necessary to protect his rights.

[4, 5] The defendant also justifies the tak-

ing of this property before the secured debt was due on the ground of a violation of the provision of the mortgage forbidding any sale or disposal of the mortgaged property by the mortgagor. It is claimed that the mortgagor's leaving his property in the actual custody of Holland to keep and feed in the mortgagor's absence was a disposal of same within the meaning of the mortgage. Holland said that the agreement was that the mortgagor "was to give me \$12 per month to take that team and feed them until grass, and I was to pasture them." The court declared the law to be that the words "dispose of" as used in the mortgage meant a transfer of the property from the owner to another person by which such owner passed it out of his power or possession by either gift or bargain, and that a mere hiring of same to some other person to take care of such property for a limited time was not a disposal of same within the meaning of the mortgage. We agree that the word "dispose" has a larger meaning than "sell," and that selling is only one of the methods of disposing of property. The affirmative part of the

court's definition may not be altogether accurate, but the negative part is correct under the facts, and that is all we are concerned with. For the mortgagor to place the property in the hands of Holland to keep and care for same at so much per month, the agreement to terminate at will, is not a violation of the disposal clause of the mortgage warranting its foreclosure before the secured note is due.

[6] In this view of the case it is not necessary to discuss the effect of defendant's retaining this property in his possession without taking any steps to foreclose for nearly five months after taking possession. The only right as to taking possession conferred by the mortgage on the mortgagee is to enable him to foreclose such mortgage, and this the law requires to be done in good faith within a reasonable time. 11 C. J. 590; *Miller v. Biggs*, 183 S. W. 713.

We find no error affecting plaintiff's rights and affirm the judgment.

FARRINGTON and BRADLEY, JJ., concur.

ELLIOTT v. HENSLEY.

(Court of Appeals of Kentucky. June 11, 1920.)

1. Property \S 10—Constructive possession follows the senior of two patents as to land covered by both.

As to land covered by two patents, and not in actual possession of any one, constructive possession is in the holder of the title under the senior patent.

2. Adverse possession \S 101—Adjacent tracts patented on same day by separate patents are separate tracts with respect to constructive possession.

Adjacent tracts patented by separate patents, though on the same day and to the same person, not having been inclosed, are to be treated as separate tracts as regards effect of actual possession of a part of one of them only, by one having a later patent covering parts of all of them, so that such actual possession will be constructively extended only to such part of the tract within which is the actual possession as is covered by the later patent, and not to any of the other tracts.

3. Adverse possession \S 101—Actual possession with title cannot give title to adjoining lands with only color of title.

Actual possession of land to which the possessor has good title cannot give him title by adverse possession to an adjoining tract patented to another, though he obtains a later patent to his own land and the adjoining land, but actual possession within the adjoining land is necessary.

4. Adverse possession \S 67—Possession before acquisition of color of title, being afterwards continued, sufficient.

One's possession is sufficient to give title by adverse possession under color of title, though taken before he obtained color of title; it being thereafter maintained for a sufficient length of time.

5. Adverse possession \S 31—Trifling extension onto wild land of possessor's clearing held insufficient.

One's actual possession within a tract to which he has only color of title is insufficient to give him title thereto by adverse possession, being but a trifling extension of the clearing on his own adjoining land, and so insufficient, in view of the land being wild and uninclosed, to give notice thereof.

Appeal from Circuit Court, Leslie County.

Action by Henry M. Hensley against Gertrude Elliott. Judgment for plaintiff, and defendant appeals. Affirmed in part, and reversed in part.

B. B. Golden, of Barbourville, and Lewis & Lewis, of Hyden, for appellant.

Cleon K. Calvert, of Hyden, and E. O. O'Rear and J. C. Jones, both of Frankfort, for appellee.

CARROLL, C. J. In August, 1840, there was issued to Felix J. Gilbert a patent for 50 acres of land in Leslie county. On July 8, 1870, W. H. De Groot obtained four patents, Nos. 43195, 43196, 43197, and 43198, for 200 acres each; the land embraced in these patents being in one body, the southern end of which projected into the senior patent of Gilbert, and to the extent that the land patented to De Groot lapped over the patent issued to Gilbert it is conceded that the De Groot patents were void. In 1876 Robinson became the owner of the land for which patent issued to Gilbert, and in March, 1885, he obtained a patent for 100 acres; the lines of this patent embracing practically all of the Gilbert patent, a large part of the De Groot patents, 43197 and 43198, north of the Gilbert patent, and also a portion of the De Groot patents 43195 and 43196.

Gertrude Elliott, at the time this suit was brought, was the owner by connected paper title of the four patents issued to De Groot, but neither she nor any of her vendors had ever been in the actual possession of any of the land embraced in these patents, all of which was wild, uncultivated, and uninclosed, except a few acres on the southern boundary adjoining the Gilbert land. In 1910 Henry M. Hensley, the appellee, who connects himself in a regular way, through purchases extending back to Robinson with the Robinson patent, as well as the patent to Gilbert that had been purchased by Robinson, brought this suit against Gertrude Elliott, the appellant, averring that he was the owner and entitled to the possession of that part of the De Groot patents that were covered by the junior Robinson patent.

For answer to this suit Gertrude Elliott averred that the Robinson patent, under which Hensley claimed, was junior to the De Groot patents, and therefore to the extent that it lapped over these patents was void. She further set up her title to these De Groot patents, but admitted that to the extent they lapped over Felix J. Gilbert's prior patent the De Groot patents were void.

After the evidence had been taken by depositions, the case was submitted to the court, and there was a judgment in favor of Hensley, awarding to him the ownership and possession of the land embraced within the four De Groot patents that was covered by the lines of the patent issued to Robinson. It also appears that, after Robinson became the owner of the Gilbert patent in 1876, and before he obtained the patent issued to himself in 1885, he had built a house and made a clearing with cultivation on the Gilbert land. A part of this clearing and cultivation undoubtedly extended into the De Groot patent 43198, and Hensley contends that it also extended into the De Groot patent 43197.

As the patent issued to Robinson in 1885

covered that part of the Gilbert patent on which the house was situated and the clearing made, and also that part of the De Groot patent that had been cultivated and cleared, the court was evidently of the opinion that this cultivation and clearing, together with the adverse holding, placed Robinson and his vendees, down to and including Hensley, not only in the actual possession of the De Groot patent 43198, into which the clearing extended, but also in possession of the other three De Groot patents, although no part of either had ever been taken into actual possession by either Robinson or those claiming under him by clearing, cultivation, or otherwise.

The court was evidently influenced to make this decision upon the ground that these four contiguous and coterminous De Groot patents, which were issued on the same day to the same person, constituted one connected body of land, and, this being so, the actual adverse holding by Robinson and his vendees of any part of the land within either of these patents, and also within the lines of his patent, placed the adverse holders in the actual adverse possession of all the De Groot patents that were within the boundary of the patent issued to Robinson, as there had never been, as we have said, any actual possession of any of the De Groot patents by any person claiming under them.

On this appeal by Gertrude Elliott, it is contended, first, that each of these De Groot patents should be treated as a separate, distinct body of land from each of the other De Groot patents, and therefore the entry and adverse holding by Hensley, and those under whom he claims, of a part of one of these patents, would only place him in the possession of that one in which there was an entry and actual possession, and therefore it is said that, if Hensley is entitled to any of the De Groot patents, the recovery in his behalf should be confined to the land covered by patent 43198, as this was the only patent in which there was an adverse entry and holding. Her second contention is that there was no such entry or holding on the part of Robinson or his vendees as would entitle Hensley to recover any of these De Groot patents on the ground of adverse possession.

[1, 2] In considering the case, we will take up first the question whether these De Groot patents should be treated, in the application of the doctrine of adverse possession, as one body of land or four separate and distinct tracts. In 1885, when Robinson obtained his patent, embracing, as we have said, parts of the four De Groot patents, these De Groot senior patents, although not in the actual possession of any person, were in the constructive possession of De Groot, except to the extent of the clearing in 43198; and this constructive possession, there being no actual possession, adverse or otherwise, extended, except as to this clearing, to all of the land embraced within the lines of the

four patents. This constructive possession followed as a necessary consequence the title to this land, which was in De Groot by virtue of the patents issued to him, and this title and constructive possession he could be divested of only by an actual, open, notorious, and visible entry and possession by an adverse claimant for the statutory period. As was said in *Whitley County Land Co. v. Powers' Heirs*, 146 Ky. 801, 144 S. W. 2:

"It is as well settled as any principle in the land laws of the state can be that two persons cannot at the same time be in constructive possession of the same body of land, and that in a contest between constructive title owners the oldest title must prevail. This principle is aptly stated in *Jones v. McCauley*, 2 Duv. 14, where the court said: 'There can be no constructive possession of the same land by conflicting claimants. In the absence of any actual possession, if there be any constructive possession, it must necessarily be in the holder of the best title, unless he had renounced it. And his constructive possession can never be ousted by any constructive possession claimed under the inferior title; nothing short of renunciation or actual disseisin can evict him.'"

Looking now to the claim of adverse possession asserted by Hensley and those under whom he claims, we find that this claim had its origin in the patent obtained by Robinson in 1885, and it is the contention of Hensley that, as he and those under whom he claims entered at least upon and took actual possession of a part of the De Groot patent 43198, this open, visible, and notorious entry and possession, which was maintained for the requisite length of time, placed him in possession of all the De Groot patents within the lines of the Robinson junior patent, and we have been furnished with some authority supporting this view. *Overton's Heirs v. Davisson*, 1 Grat. (Va.) 211, 42 Am. Dec. 544; *Sharp v. Shenandoah Furnace Co.*, 100 Va. 27, 40 S. E. 103; *Virginia & West Virginia Coal Co. v. Charles* (D. C.) 251 Fed. 152; *Rich v. Braxton*, 158 U. S. 375, 15 Sup. Ct. 1006, 39 L. Ed. 1022. It should be said, however, that the land involved in the *Rich v. Braxton* case was located in Virginia, and the Supreme Court followed the ruling of the Virginia court in the *Overton* case, as did the federal court in the *Charles* case.

We do not think, however, that these cases are in accord with the weight of authority or the decisions of this court, and we are not disposed to follow them. Here we have a case in which four separate and distinct patents were issued for four separate and distinct, but adjacent, tracts of land. There had never been, on the part of the patentee or those claiming under him, any inclosure or actual possession of any part of the land covered by these patents. At the time Hensley set up his claim of right to it under the Robinson junior patent, all of this land was in the same wild, uncultivated, unin-

closed condition that it was when the patents were issued, except the small clearing in patent 43198, adjoining the Gilbert land. It had never been converted into one body of land by fenced inclosure, and the mere fact that the same person happened to obtain the four patents at the same time did not have the effect of converting the land covered by them into one body, in the sense that an adverse claimant, by making an actual entry within one of the patents, might assert claim to the others or any part of them.

It would be extending far beyond reasonable or just bounds the doctrine of adverse possession to permit an intruder to perfect his claim of adverse possession to several adjoining, uninclosed, vacant tracts of land, each conveyed to the rightful owner by separate title, on the ground that he had taken actual physical possession of one of the tracts. It has been the policy of this court to limit the acquiring of title by adverse possession to states of case in which the adverse holding was sufficient to put the rightful owner on notice of its nature and extent, and if the owner of these De Groot patents should have found an intruder in the actual possession of a part of one of them, it would not bring home to him any notice whatever that the intruder had asserted or would assert a hostile claim to the other adjoining patents outside of the one on which he had settled. In 1 R. C. L. p. 729, the principle we have announced is thus stated:

"The doctrine that the actual possession of a part of the premises will be constructively extended to all the land described in the 'color of title' deed or patent related only to an entire thing; that is, the constructive possession can only extend to the whole of that which is partially occupied. It does not extend to other and distinct parcels, even though they are contiguous, and were conveyed to the claimant by the same person and at one time. The reason for this exception to the rules stated in the preceding paragraphs is that, in the absence of an actual adverse possession, the law constructively places the possession of land in the owner of the legal title, and the actual possession of one tract of land is not a sufficiently open and notorious possession of an adjoining tract, which is not occupied, to give the owner notice of the adverse claim thereto."

To the same effect are 2 Corpus Juris, p. 238; Elliott v. Cumberland Coal Co., 109 Tenn. 745, 71 S. W. 749; Carstophen v. Holt, 96 Ga. 703, 23 S. E. 904; Hornblower v. Blanton, 103 Me. 375, 69 Atl. 568, 125 Am. St. Rep. 300; Turner v. Stephenson, 72 Mich. 409, 40 N. W. 735, 2 L. R. A. 277.

If, however, the land covered by these De Groot patents had been inclosed by a fence, this act of inclosure would have converted it into one connected body of land; and thereafter, if Robinson, under a color of title patent, had made an entry on any part of this inclosed boundary, taking actual, open, notorious, and visible possession of

same, and maintaining it without interruption for 15 years, this adverse entry and holding would have placed him in the actual possession of so much of the inclosed and fenced boundary as was embraced within the exterior lines of his color of title patent, because when the owner of contiguous tracts of land, that he has acquired by separate deeds or patents, converts them by fenced inclosure into one body, the interior lines of the patents or deeds under which he holds the land so inclosed will be obliterated, and actual possession within the fenced inclosure would put him on notice that the entrant was asserting a hostile title that might affect all of the inclosed land. On this point it was said in Parsons v. Dills, 159 Ky. 471, 167 S. W. 415, that:

"Appellants further contend that the proof of adverse possession is altogether insufficient. This contention is based on the assumption that, where a deed conveys several tracts by separate descriptions and not by one complete boundary, possession of one of the tracts for the statutory period is not a possession of the other tracts embraced in the deed. For this position there is respectable authority. 1 R. C. L. Adverse Possession, § 45; Hornblower v. Blanton, 103 Me. 375, 125 Am. St. Rep. 300; Carson v. Bennett, 18 N. C. 546, 30 A. D. 143; Loftus v. Cobb, 46 N. C. 406, 62 A. D. 173. However, in this state, where because of peculiar conditions the plea of adverse possession is regarded with more favor, that rule does not prevail. The deed, though invalid, is evidence of the extent of possession. Where, therefore, the tracts, though separately described, are conveyed by the same person, and embraced in the same deed, and are contiguous to each other, adverse possession of one of the tracts for the statutory period will extend to the whole. The owner or tenant holding under him may also move from one tract to another described in the particular deed, and the different periods of possession, just so they be continuous and aggregate 15 years, will constitute adverse possession of all the tracts described in the deed. On the other hand, possession of one tract described in one deed is not of itself sufficient to constitute possession of another tract described in another deed as against a superior title holder."

We are therefore of the opinion that the adverse holding of Hensley and those under whom he claims must be confined to such of the De Groot patents as he made an actual entry in and took actual adverse possession of.

[3] The remaining question is: Has there been such actual possession of any of these De Groot patents as would give Hensley the right to hold them, or any of them, by adverse possession to the extent of the lines of the Robinson patent? The answer to this question depends largely upon the evidence; but, before considering it, it may be well to briefly restate a few pertinent facts relating to this feature of the case. It appears, as we have said, that Robinson, when he purchas-

ed the Gilbert tract in 1876, obtained a good title to it, and, having settled on it soon after his purchase, he proceeded to build on it a house and some outbuildings, and make a clearing for cultivation, which clearing and cultivation certainly extended into the De Groot patent 43198, and this adverse holding and possession within this De Groot patent continued without interruption to the date when this suit was brought by Hensley. So that, when Robinson in 1885 obtained his patent, which embraced, as we have said, practically all of the Gilbert land to which he had previously secured a good title, as well as parts of all the De Groot patents, this color of title patent did not, in and of itself, have the effect of putting Robinson in the possession of any part of the De Groot senior patents, because, under the very terms of section 4704 of the Kentucky Statutes:

"Every entry, survey, or patent made or issued under this chapter shall be void, so far as it embraces lands previously entered, surveyed or patented."

Therefore it was indispensably necessary, in order to put Robinson in the adverse possession of any of the De Groot patents to the extent of his color of title patent, that he should make an actual entry, accompanied by physical as well as open, visible, and notorious acts of adverse possession on the De Groot patents and within the lines of his color of title deed. The circumstance that Robinson, at the time and previous to obtaining his color of title patent, was in the actual possession of the Gilbert land, to which he had good title, did not have the effect of putting him in possession of any part of the De Groot patents embraced within the lines of his color of title deed, as nothing short of actual entry and possession within the De Groot patents would be sufficient to place him in the adverse possession of the De Groot land.

This question has been definitely and finally settled time and again by this court in the cases of Whitley County Land Co. v. Powers' Heirs, 146 Ky. 801, 144 S. W. 2, Burt & Brabb Lumber Co. v. Sackett, 147 Ky. 232, 144 S. W. 34, Brewer v. War Fork Land Co., 172 Ky. 598, 189 S. W. 717, War Fork Land Co. v. Marcum, 180 Ky. 353, 202 S. W. 668, Bowling v. Breathitt Coal, Iron & Lumber Co., 134 Ky. 249, 120 S. W. 317, and many others. In the Bowling Case, Bowling asserted claim by adverse possession to 100 acres of land to which he had a color of title deed, but no actual possession, upon the ground that he had lived for many years on a tract of land that he owned adjoining this 100; but the court, in rejecting the claim of Bowling said:

"So the question comes to this: Can a man who is living on a tract of which he has title, and which is outside of the plaintiff's claim, obtain adverse possession of land within the plaintiff's older patent simply by taking a deed to it and continuing to live outside of the lap?"

After quoting from Trimble v. Smith and many other cases, the court further said:

"If, in a case like this, a man could, while living on land which he admittedly owned, gain title within an elder patent, which adjoined him, by simply marking off a boundary and taking a deed from some one to it, where there was nothing on the land to put the owner on notice of his adverse claim to it, there would be no security for land titles, and the entire doctrine that the settlement of the junior patentee, when without the lap, will give him no possession within the senior patent, would have to be abandoned. The plaintiff, having the title to the land, was in the constructive possession of it. The defendant could not defeat this constructive possession by merely living on an adjoining tract of land, not included in the plaintiff's patent, and claiming land within that patent."

Again in the case of Brewer v. War Fork Land Co. we said:

"A person who has under a good title constructive possession of a boundary of land is not required to take notice of subsequent deeds or patents that may be acquired by strangers to his title, or to look to the records for the purpose of ascertaining if any person has subsequently secured a deed or a patent covering the land embraced by his senior patent. He need only look to the land itself. So long as the land itself is free from actual intrusion, his title and constructive possession will remain undisturbed and unaffected. These principles have been announced by this court in a long line of decisions, beginning with Trimble v. Smith, 4 Bibb, 257, decided in 1815, and ending with Cumberland Coal Co. v. Croley, 172 Ky. 222, decided in 1916."

But, notwithstanding the plain declarations in the cases cited that a person who has good title to a tract of land on which he actually resides cannot assert title by adverse possession to an adjoining tract that he claims under a color of title deed or patent, without having made any actual entry and taking actual possession thereof, attorneys are continually, but unavailingly, attempting to ignore the principle so firmly established.

[4] Turning, now, to the evidence relied on to show an actual entry and actual adverse possession in the De Groot patents, we find well proven the actual physical possession by Hensley and those under whom he claims of the Gilbert tract, to which he and those under whom he claims has, as we have said, good title, and there is also evidence conducing to show that Hensley and those under whom he claims asserted ownership to all the land within the lines of the Robinson patent; but, when it comes to showing an actual adverse possession within the lines of the De Groot patents, there is no evidence sufficient to establish any adverse entry or actual holding in any of these patents, except 43198, and the entry and cultivation within the lines of this patent appear to have been made

after Robinson purchased the Gilbert land in 1876, and before he obtained his patent in 1885, but the clearing and cultivation within this patent have continued without interruption from the time they were first made.

It will be observed that the entry of Robinson in this De Groot patent was made before he obtained his color of title patent, and if he had not obtained this patent his right to hold any part of the De Groot land under an actual entry would have been confined to the lines of his clearing and cultivation. But, when he obtained the color of title patent, this clearing and cultivation placed him in the possession of the De Groot patent, in which the entry was made to the line of his color of title patent. This principle has been often announced by this court in cases holding that:

"Where one claims under color of title and is in actual possession of a part of the land within his boundary, the law, by construction, carries his possession to the full extent of his boundary; but, where he claims title by adverse possession only, he acquires no title to any land except that which is in his actual possession." *Slaven v. Dority*, 142 Ky. 640, 134 S. W. 1166; *Richie v. Owsley*, 137 Ky. 63, 121 S. W. 1015; *White v. McNabb*, 140 Ky. 828, 131 S. W. 1021; *Harrison v. McDaniel*, 2 Dana, 348.

Nor is it indispensable to put an adverse claimant under a color of title deed or patent in possession to the lines of his deed or patent that he should make an entry and take actual possession after he obtains it. It will be sufficient if it appears, as in this case, that the adverse claimant before he obtained his color of title patent made an actual entry and took actual possession of the vacant land of another within the lines of the color of title patent thereafter obtained, if it further appears that his actual adverse possession, made before he obtained his color of title patent, was continued without interruption up to the time the color of title patent was issued, and thereafter maintained for a sufficient length of time. So that we do not attach importance to the fact that the entry made by Robinson in the De Groot patent 43198 was made before he obtained his patent, because, after obtaining his patent, he continued in the actual physical possession of that part of this De Groot patent which he had been in the actual physical possession of before his patent issued, and his actual physical possession within this patent was of such nature and extent, and so open, visible, and notorious as to put the owner of the De Groot patent upon notice that an intruder had entered and was in the actual possession of a part of it.

[5] It is further claimed on behalf of Hensley that there was such entry and possession by those under whom he claims of the

De Groot patent 43197 as to put him in the actual possession of this patent to the extent of the Robinson patent. It is shown by Blakeman, the surveyor, who was the only witness, except Dixon, who testified on the point, that the clearing made on the Gilbert land extended only very slightly into patent 43197, and was not sufficient either in nature or extent, considering the wild and unclosed character of the country, to put the owner of the De Groot patent upon notice that any entry or possession had been taken within this patent. He said the clearing which extended within patent 43197 was "merely a pin point, so to speak"; it did not embrace one-fiftieth part of an acre; it would be hard for a person owning the adjoining boundary to discover the encroachment upon his land; he could not do it without a surveyor at all, and it would take the most careful surveying to discover any encroachment, or to determine whether the clearing was inside or outside of the Gilbert patent.

R. L. Dixon made a survey of this land for Hensley, and it is claimed in briefs of counsel for Hensley that his evidence shows that there was a considerable clearing within patent 43197; but an examination of his evidence does not support counsel. This evidence is not sufficient to show any right on the part of Hensley to claim by adverse possession any part of patent 43197, as it is too well settled to require even citation of authority that, when a hostile claimant undertakes to assert title by adverse possession to land in the constructive or actual possession of another, the nature and extent of his possession must be so open, visible, and notorious, considering the location, surroundings, and character of the land, as to give notice to a person of ordinary prudence that a hostile intrusion has been made on his premises.

We did not, of course, undertake to lay down any rule respecting the nature or extent of the adverse holding that will be sufficient to give to the real owner the requisite notice. This, as we have said, must depend largely on the facts and circumstances of the particular case. But, applying the principle announced to the facts of this case, it is perfectly plain that the small clearing, such as Hensley and those under whom he claims made in patent 43197, considering the wild, uncultivated condition of the country, and the fact that this clearing was merely an extension of the large clearing rightfully made on the Gilbert land, did not even approach the requisite of an entry demanded by the law of adverse possession.

Wherefore so much of the judgment as awarded Hensley any part of the De Groot patents, 43135-43137, is reversed. The judgment is affirmed as to patent 43198, and on a return of the case judgment will be entered in conformity with this opinion.

RODGERS v. LARRIMORE & PERKINS.

(Court of Appeals of Kentucky. June 11, 1920.)

1. Contracts §10(1)—Must be mutuality of obligation.

One of the essential elements of an enforceable contract is mutuality of the obligation, and where it is left to one of the parties to choose whether he will proceed or abandon it, the contract is not binding upon either.

2. Pleading §248(4)—Allowing abandonment of cause of action by amendment not abuse of discretion.

Where assignee of purchaser in contract of sale of crop of tobacco sued on an alleged written contract, which was not binding because not mutual, court did not abuse its discretion in allowing an amendment to the effect that the writing was merely a memoranda of an oral contract, thus abandoning the cause of action set up in original pleading, in view of Civ. Code Prac. § 134.

3. Contracts §303(1)—Performance excused only where rendered impossible by act of God, other party, or operation of law.

Every person undertaking the performance of obligations under a contract must perform the same, unless performance is rendered impossible by act of God, by the other party, or by operation of law.

4. Sales §172—Levy of attachment did not relieve seller from obligation to deliver.

A seller in a contract of sale of tobacco was not relieved of his obligation to deliver to the purchasers or their assignees because a garnishment was served upon him, which created a lien upon the interest of one of the purchasers, where prior to sale to third parties the attorney for the attaching plaintiff notified him that a motion to discharge the attachment had been filed.

Appeal from Circuit Court, Trimble County.

Action by Larrimore & Perkins against J. L. Rodgers. Judgment for plaintiffs, and defendant appeals. Affirmed.

Eugene Mosley, of Bedford, and Charles Carroll, of Louisville, for appellant.

Edwards, Ogden & Peak, of Louisville, for appellees.

QUIN, J. This action was instituted in the lower court by appellees for alleged breach of the following contract:

"Milton, Ky. Nov. 28, 1916. We have this day sold to R. A. Perkinson & Smith my entire crop of tobacco grown in the year 1916, which tobacco, or any part thereof, I have not sold or contracted to sell to another consisting of about 18,000 pounds, at the following prices: About 18,000 pounds of bright leaf, red leaf, lugs, trashes, flying tips, green or worm-eaten at nine cents per pound delivered at his factory in HHds. Louisville, Wts by April 1, 1917, in good handling order free of any material dam-

age, also to be well classed when stripped, and neatly tied in hands free of stalks and suckers. "J. L. Rodgers."

By successive assignments appellees became the beneficiaries of this contract. Having taken appellant's deposition and ascertained the exact weight of the tobacco and the price realized on the sale thereof to other persons, the petition was amended to conform to the proof. A demurrer was sustained to the petition as amended. In a further amendment the cause of action was based upon a verbal contract between the original parties, substantially the same as that set out in the writing sued on. It was alleged that the contract referred to in the petition was a memorandum of said sale delivered to the purchasers by appellant, a duplicate of which, signed by Perkinson & Smith, was delivered to appellant. A demurrer to the pleading as thus amended was overruled, and this is one of the two errors urged for reversal. In one paragraph of the answer it was alleged that appellant was prevented from delivering the tobacco to the purchasers or their assignees because of a garnishment that had been served upon him, which created a lien upon Smith's interest in the tobacco, and that Perkinson & Smith having, upon request, failed to release said lien, they violated their contract, thus releasing appellant. The court sustained a demurrer to said paragraph, and this is the other error complained of. Upon the remaining issues raised by the pleadings a trial was had, resulting in a verdict in appellees' favor for \$722.87.

[1, 2] It is contended the writing sued on was void because unilateral. One of the essential elements of an enforceable contract is mutuality of the obligation. Where it is left to one of the parties to an agreement to choose whether he will proceed or abandon it the contract is not binding upon either. *Berry v. Frisbie, etc.*, 120 Ky. 337, 86 S. W. 558, 27 Ky. Law Rep. 724. Therefore the lower court properly sustained the demurrer to the petition, but, as amended, it was not demurrable. It is alleged in the last amendment that the parties entered into an agreement by the terms of which appellant agreed to sell and deliver his tobacco for the price stated, to be paid for according to Louisville weights, that Perkinson & Smith agreed and bound themselves to receive and pay for said tobacco, and this contract was evidenced by the memorandum of sale, thus we have all the essentials of a binding contract. Appellees were privileged if they so desired to abandon the cause of action set up in the original pleading. The courts of this state have been liberal in permitting the filing of amendments in the furtherance of justice. Civ. Code Prac. § 134. It was no violation of the court's discretion to allow the amendment in question

to be filed. It is permissible, for example, in a suit upon an express contract, where only an implied contract is proven, to amend the pleadings to conform to the proof. *Smith v. Robinson*, 185 Ky. 76, 214 S. W. 776.

In *Georgetown Water Co., etc., v. Smith*, etc., 97 S. W. 1119, 30 Ky. Law Rep. 253, we held that the lower court properly allowed an amended petition to be filed, setting out the real contract under which the defendant was operating; plaintiff in the original petition having relied upon a former contract no longer in force.

[3, 4] The second proposition raised by counsel for appellant is unique. No authority is cited in support of same; we doubt if any can be found. The effect of their contention is that appellees' failure to release the attachment was an authorization to appellant to dispose of his tobacco to others. In other words, the levy of the attachment or garnishment released him from the obligations of his contract. The general rule is that a person undertaking the performance of certain obligations must perform same, unless the performance thereof is rendered impossible by act of God, by the other party, or by operation of law. An illustration of release under the third of the instances given is found in *L. & N. R. Co. v. Crowe*, 156 Ky. 27, 160 S. W. 759, 49 L. R. A. (N. S.) 848, holding that where an act contracted for is rendered unlawful by the enactment of a statute before the expiration of the time for performance, the obligation is thereby discharged; but no court has held, so far as we have been able to find, that the mere levy of an attachment relieved a party from the obligations of his contract. While appellant is contending here that he was released from the contract with *Perkinson & Smith*, he did not hesitate to dispose of his tobacco to other persons. Nor do we have far to go to find the reason—the price of tobacco had advanced in the meantime. It appears further that the first consignment of the tobacco to the other parties was made February 12, 1917. On the evening of that same day appellant admits he received from the attorney for the attaching plaintiff a letter, notifying him that a motion to discharge the attachment had been filed in the clerk's office, and that he was at liberty to deliver the tobacco to *Perkinson & Smith* or their assignees. Notwithstanding this notice, he proceeded to dispose of his tobacco elsewhere. The motion to discharge the attachment was not acted upon until some time later, but this in no wise affected the parties. The institution and pendency of the attachment suit was no justification to appellants to sell the tobacco to other persons. He had bound himself by contract to deliver this tobacco to appellees, this was admitted on the trial, and, having violated this contract, ap-

pellees were entitled to recover for the breach thereof. The lower court did not err in sustaining the demurrer to the paragraph of the answer referred to.

The judgment appealed from must be, and is, affirmed.

SEARCY v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 8, 1920.)

1. Criminal law §417(2), 1169(1) — Statements to officer out of presence of defendant held incompetent, but not prejudicial.

In a prosecution for murder, testimony of a police officer that deceased had attempted to get a warrant for the arrest of defendant was incompetent, because the statements of deceased were made to the officer out of the presence and hearing of defendant, but not so prejudicial to defendant as to warrant reversal of conviction.

2. Criminal law §656(4)—Statement of court that there was evidence of certain fact when it was only hearsay, held erroneous.

In a prosecution for murder, where testimony that defendant had been ordered out of decedent's house was hearsay, and was admitted only to contradict a witness, the action of the court in stating to the jury, on objection to argument by the commonwealth's attorney that defendant had been ordered out of the house, that such was the case, held erroneous as calculated to mislead the jury.

Appeal from Circuit Court, Jefferson County, Criminal Division.

Sam Searcy was convicted of murder, and he appeals. Reversed.

Brent C. Overstreet and Homer C. McLennen, both of Louisville, for appellant.

Chas. I. Dawson, Atty. Gen., for the Commonwealth.

SAMPSON, J. Appellant, Sam Searcy, shot and killed Henry Barger in the city of Louisville in May, 1918. An indictment charging Searcy with the willful murder of Barger was returned by the Jefferson county grand jury and a trial was had, resulting in a hung jury. Another trial was had on February 19, 1919, and the defendant found guilty and his punishment fixed at confinement in the state penitentiary for life. He prosecutes this appeal.

In his motion and grounds for a new trial he complains that the trial court admitted incompetent evidence offered by the commonwealth concerning the application of the deceased, Barger, to a police officer for a warrant for appellant, Searcy, and others, the said application and conversation concerning same being made out of the presence and hearing of Searcy, and also because the court allowed the commonwealth to introduce evi-

dence showing that Mrs. Babcock, daughter of deceased, had not placed flowers upon the grave of her father. All this evidence was objected to by defendant, Searcy, but his objection was overruled by the court, and the evidence allowed to go to the jury. Complaint is also made by appellant of the failure of the trial court to allow him to introduce evidence of threats by deceased against other persons for the purpose of showing animus in deceased's mind at the time of and shortly before the tragedy, but the chief complaint of appellant is of improper argument of the attorney for the commonwealth in concluding the case.

Barger lived with his family on Seventh street, in Louisville, and his wife conducted a boarding house, at which appellant, Searcy, his brother, and some other persons boarded and were lodged. Barger himself had no regular occupation about Louisville, but stayed a large part of the time in Indiana, only occasionally coming home to spend a few days with the family. Searcy had employment at a mill or factory in the city of Louisville and went to work about 6 o'clock in the morning. On Thursday, before the killing happened on Monday morning, Barger came home, and going upstairs to the family room, he saw his married daughter, Mrs. Babcock, and appellant, Searcy, sitting on a bed. Mrs. Barger was out of the house attending to some shopping. Barger became enraged at Searcy and Mrs. Babcock, because they were sitting on the bed together, and began to make complaint and to privately threaten both of them with death. According to the evidence, the appellant was shortly thereafter informed that Barger had threatened his life, and on Sunday he approached Barger and asked him if he had made such threats, whereupon Barger denied having used such language. They talked the matter over, however, and composed their differences and the whole matter was dropped; Barger and Searcy returning to the house together. Later that evening Searcy and his brother and one of the Barger boys went into the city and remained until 10 or 11 o'clock that night. When they came in, Mrs. Barger and some of the children were down stairs in the dining room or kitchen, and when asked why they did not go to bed, gave the information that Barger was upstairs and had threatened to kill them all, and to kill Searcy also. At the time Searcy received this information he was on his way to bed, and he and his brother shortly thereafter retired; but Searcy deposes that he did not sleep but very little that night, because he was in fear of Barger. He says, about the time he went to bed, he placed a pistol on the davenport near by, so that he could defend himself. Barger's room was next to where Searcy slept, but he did not see Barger that night. Next morning early Searcy arose and went down stairs and ate his breakfast; he then went back upstairs for the purpose of

getting his cap and some medicine to put on his face. In going from the stairs to Searcy's room he had to pass the room of Barger. After Searcy had obtained his cap and was leaving his room, passing the door of Barger, he says Barger suddenly appeared in the door with an open knife raised in a striking position, saying, "Now," and at the same time striking at Searcy with the knife, who at the same instant fired several shots into the body of Barger, killing him almost instantly. No one saw the shooting, but two of the young Barger boys were sleeping on a couch or bed in the upper hallway, and were awakened by the sound of the gun. Being drowsy and more or less alarmed, they did not know exactly what had happened, and reported to the family down stairs that their father had committed suicide. This story was told by the family to the police officers, who appeared on the scene very shortly afterwards. Searcy was arrested and charged with the crime, and very soon thereafter told the same story in substance that he testified to on the witness stand.

On the trial Officer Loran was called as a witness for the commonwealth and was asked, among other things:

"Q. What time did Mr. Barger go there on that occasion? A. On Sunday he came to me about 1 o'clock in the afternoon.

"Q. I will get you to state to the jury whether or not he endeavored on that occasion to get a warrant against three men. A. Yes, sir.

"Q. I will get you to state to the jury whether or not one of the men he was trying to get a warrant against at that time was this defendant, Searcy. A. Yes, sir."

[1] This happened on Sunday, before the killing on Monday morning about 6 o'clock, and this testimony was all objected to by appellant on the ground that, unexplained, it raised in the minds of the jury a belief that Searcy had threatened violence to Barger, or had committed some offense against him or his family. It is also objected to because the statements were made to the officer out of the presence and hearing of appellant. While we regard this evidence as incompetent, it is not so prejudicial as would warrant this court in reversing the judgment; but as there must be another trial for other reasons, the evidence given by Officer Loran as to what was said to him by deceased on the Sunday before the killing will be excluded.

On the trial Martha Barger, sister of deceased, was called as a witness for the commonwealth, and was asked:

"Q. I will ask you if, on the day or the night that your brother was killed, his wife told you that her husband, Henry Barger, had ordered Sam Searcy to leave his home. A. She told me that he did.

"Q. I will ask you if she further told you the reason he ordered him to leave his home was because he had gone home and found Searcy

and his daughter, Mrs. Babcock, in the bed? A. Yes; she did."

In his closing argument Mr. Huffaker, commonwealth's attorney, referring to Searcy, exclaimed:

"He said he was afraid of this dead man; that he had been told of his threats. If you were afraid of him, why did you go back there that night? It was his home; it was his castle; he had a right there, and you had none there, when he had ordered you out."

To this assertion counsel for appellant objected, saying:

"There is no proof he was ever ordered out of the place."

Mr. Huffaker responded:

"There was proof from old Martha Barger he had ordered him out.

"By the Court: That is correct.

"By Mr. Huffaker: Very strong proof he was ordered away from there."

[2] To all of this appellant, Searcy, objected and excepted at the time. As will be observed from reading the testimony of Martha Barger, she did not testify that her brother, Henry Barger, had ordered Searcy from his home; but Martha Barger only testified that the wife of Henry Barger had told her Henry Barger had ordered Searcy from his house. What she stated was the merest hearsay, and was allowed only for the purpose of contradicting the wife of Barger, who had testified that she had not made such statements. The court had properly admonished the jury that the evidence of Martha Barger on that subject could be received and considered only for the purpose of contradicting the witness Mrs. Barger, if in their judgment it did so do. However, when the question was raised by the commonwealth's attorney at the conclusion of the case, and the attorney had asserted that Martha Barger had testified that Henry Barger had ordered Searcy away from the house, the court promptly sustained the commonwealth attorney, and made the statement to the jury in substance that the declaration of the attorney in his argument was correct, when in truth and fact it was not so. Such a statement was calculated to mislead and deceive the jury, and was highly prejudicial to the rights of appellant, Searcy; his theory being that as a boarder at the Barger home he was entitled to go and come at pleasure, since he had composed all differences with Henry Barger and had paid his board in advance for some weeks. There was no evidence whatever to support the declaration that Barger had ordered Searcy away from his home, and the commonwealth's attorney improperly charged Searcy with remaining at the home after he had been ordered to leave. This was bad enough; but when the trial

judge, in the presence and hearing of the jury and over the protest of counsel for appellant, declared that the evidence did show that Barger had ordered Searcy away from his home, it upset entirely the whole theory of the defense, and no doubt was largely responsible for the verdict by the jury.

For the reasons indicated, the judgment is reversed, for a new trial consistent with this opinion.

Judgment reversed.

LEVY v. DOERHOEFER'S EX'R.

(Court of Appeals of Kentucky. June 8, 1920.)

1. Bills and notes \S 375—Gaming \S 19(1) —Note for gambling debt void even in the hands of bona fide purchaser.

A note given for a gambling debt is, under Ky. St. \S 1955, 1956, void in the hands of a bona fide purchaser for value and without notice; the adoption of the Negotiable Instruments Act, providing for protection of bona fide purchasers, not modifying the gaming statutes.

2. Appeal and error \S 837(11) — Deposition considered by appellate court where exceptions were not made or passed on in lower court.

Under Civ. Code Prac. \S 589, where exceptions to the depositions of witnesses in a case referred to a commissioner were not passed on by the chancellor, or, if passed on, no exception was taken to his rulings, such deposition cannot be disregarded by the appellate court.

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Action by Frederick Levy against the Fidelity & Columbia Trust Company, as executor of Louis P. Doerhoefer. From a judgment for defendant, plaintiff appeals. Affirmed.

Selligman & Selligman, of Louisville, for appellant.

Walter E. Huffaker, of Louisville, for appellee.

SETTLE, J. The controversy in this case is as to the right of the appellant, Frederick Levy, to recover of the appellee, Fidelity & Columbia Trust Company, executor of the will of Louis P. Doerhoefer, deceased, the amount of a note of \$1,663.05, with 6 per cent. interest from its maturity, October 18, 1916, executed by Louis P. Doerhoefer July 18, 1916, to one Samuel Dinkelspiel, and payable to his order, who, acting on the advice of the appellant, Levy, July 25, 1916, indorsed the note to the Liberty Insurance Bank of Louisville, which accepted and discounted it at the request of Levy and upon his writ-

ten guaranty that he would see it paid at maturity.

As the note was not paid at maturity by the maker or indorser, it was then paid by Levy in compliance with his guaranty and delivered to him by the Liberty Insurance Bank, containing the indorsement of Dinkelspiel, the payee. The death of Louis P. Doerhoefer having occurred in the meantime, this action was brought in the court below by the appellee, Fidelity & Columbia Trust Company, executor of his will, for a settlement of his estate, to which the known creditors of the testator were made parties defendant. By an order of the court there was an early reference of the cause to the master commissioner for the ascertainment and a report of the assets and liabilities of the estate, with authority to take proof regarding any controverted debt.

Among the claims presented against the estate was the note in question which appellant filed with the commissioner verified by the affidavits respecting such claims required by the statute. At the time of, or shortly after, filing the note with the commissioner, the appellant filed in the court below his answer to the petition of the appellee, executor, which was made a cross-petition against the latter, wherein was alleged the due execution of the note by Louis P. Doerhoefer to Samuel Dinkelspiel; appellant's ownership thereof by assignment from Dinkelspiel; its subsequent maturity and nonpayment by the maker; and the fact that it had been filed with the commissioner for its allowance by the latter as a debt against Doerhoefer's estate. By the prayer of the answer and cross-petition judgment was asked against appellee as executor of Doerhoefer for the amount of the note, and interest from its maturity.

To this answer and cross-petition of the appellant appellee filed a responsive pleading, styled an answer and reply, which denied appellant's ownership of the note or its assignment to him by Dinkelspiel, the payee, for value, and, in substance, pleaded the following facts as a bar to the recovery on the note sought by appellant, viz.: That the note was executed by Doerhoefer to Dinkelspiel in settlement and payment of the aggregate amount of various sums all lost by the former and won of him by the latter in divers unlawful gaming transactions between them, which, as further alleged, made the consideration an illegal one and rendered the note void ab initio; furthermore, that these facts and the consequent vice in the note were fully known to the appellant when and before it was assigned him or came into his possession; hence he did not become, and is not, a purchaser or holder thereof in good faith or for value. All affirmative matter of appellee's answer and reply was controverted by appellant's rejoinder. Following such com-

pletion of the issues and the taking of all proof offered by the parties, the commissioner in and by his report filed in the circuit court held the note void and refused to allow it as a valid demand against Doerhoefer's estate. Appellant filed in the circuit court an exception to so much of the commissioner's report as rejected the note, but on the hearing that court overruled the exception, confirmed the report, and dismissed the appellant's cross-petition. From the judgment manifesting these rulings, the latter has appealed.

[1] From what has been said of the contents of the appellant's pleadings, it will be observed that his claim of ownership of the note in suit is made to rest on its assignment to him by the payee, Dinkelspiel, and not upon the fact of his (appellant's) payment of it after it was discounted by the Liberty Insurance Bank for Dinkelspiel at appellant's request; for the discounting of the note by the bank, admittedly at appellant's request and upon his guaranty of its payment at maturity, as well as the time and manner of his payment of it and its delivery to him by the bank, was first developed by the evidence produced to the commissioner in his behalf. However, in view of his alleged ownership of the note, it is not material in which of the ways mentioned he acquired it. And if in fact the note was executed by Doerhoefer to Dinkelspiel in consideration or settlement of moneys lost by the former and won of him by the latter in gambling transactions in which they engaged, it is not material to the decision of the case whether the appellant at the time of purchasing or otherwise acquiring the note was or not ignorant that such was its true consideration. Therefore the important question presented for decision by the appeal is: Was the note given to evidence an indebtedness of the maker to the payee arising out of a gambling transaction or transactions? If so, the appellant, though shown by proof to be a purchaser for value and holder in good faith of the note, will not be allowed to recover the amount thereof of the estate of the deceased maker, in the absence of a further showing by proof that he was induced to purchase the note, or accept an assignment of it, by reason of the assurance of the maker that it was a legal obligation and would be paid by him, of which there is no evidence whatever to be found in this record. Kentucky Statutes, § 1955, provides:

"Every contract, conveyance, transfer, or assurance, for the consideration, in whole or in part, of money, property, or other thing won, lost or bet in any game, sport, pastime, wager, or for the consideration of money, property, or other thing lent or advanced for the purpose of gaming, or lent or advanced at the time of any betting, gaming, or wagering to a person then actually engaged in betting, gaming, or wagering, shall be void."

By section 1956 it is provided that recovery by suit at any time within 5 years may be had by the loser, or his creditor, of the winner, or his transferee having notice of the consideration, of any money to the amount, or property of the value therein stated, that may have been lost in gaming at one time or within 24 hours; and that such recovery may also be had against the winner, although the payment, transfer, or delivery was made to his indorsee, assignee, or transferee.

Another section of the statute makes it a misdemeanor, punishable by fine, for any person or persons to engage in any hazard or game of chance on which money or other property is bet, won, or lost; and yet others declare it a felony, punishable by confinement in the penitentiary, to set up and operate games for betting, bookmaking on racing, houses or contrivances for gaming, all conducing to show the law's abhorrence of gambling and that it is the public policy of the state to do all in its power to suppress the evil. It will be observed that the language of section 1955, *supra*, is exceedingly broad and forceful in its condemnation of all contracts resting upon a consideration arising out of a betting, gaming, or wagering transaction; for by it all such contracts are declared absolutely void. It extends no protection to the innocent purchaser or holder in good faith of a note given for a gambling consideration. In such a case the note will be declared void. Such has been the construction given the statute by numerous decisions of this court. In *Bohon's Assignees v. Brown*, 101 Ky. 354, 41 S. W. 275, 38 L. R. A. 503, 72 Am. St. Rep. 420, quoting from *Cochran v. German Ins. Bank*, 9 Ky. Law Rep. 196, decided by the superior court, we said:

"A bill or note based upon a gambling consideration is absolutely void, and the drawer or maker is not bound to even an innocent holder."

And in the case of *Farmers' & Drovers' Bank v. Unser*, 13 Ky. Law Rep. 966, the court said:

"The whole current of authority is that the obligor may insist upon the illegality of the contract or consideration, notwithstanding the note is in the hands of an innocent holder for value, in all those cases in which he can point to an express declaration of the Legislature that such illegality makes the contract void."

In *Alexander & Co. v. Hazelrigg*, 123 Ky. 677, 97 S. W. 353, 29 Ky. Law Rep. 1212, the opinion discusses at length the question under consideration and reviews numerous authorities bearing on it; and we therein held that, when a statute in express terms declared contracts growing out of wagering or gambling transactions, which are prohibited by statute, absolutely void, no recovery can be had upon a note evidencing such a contract, even where the action is brought by an

innocent holder of the note. The contention was made in the case *supra* that Kentucky Statutes, § 1955, in so far as it declares contracts growing out of wagering or gambling transaction void, has been repealed by the Negotiable Instruments Act of 1904 (Laws 1904, c. 102), providing for the protection of innocent holders of negotiable instruments. In rejecting that contention we said:

"It has been the policy of this state to suppress gaming, and the statutes making gaming contracts void are founded upon what the Legislature has for many years deemed to be sound public policy. It is inconceivable that the General Assembly, in the passage of the act of 1904, for the protection of innocent holders of negotiable instruments, intended to or did repeal section 1955, Ky. St. 1903, which declares all gaming contracts void. In our opinion the disappointment now and then of an innocent holder of a negotiable instrument would not be as hurtful and injurious to the best interests of the state as the removal of the ban from gaming contracts."

See *Daniel on Negotiable Instruments*, § 197; *Sondhein v. Gilbert*, 117 Ind. 71, 18 N. E. 687, 5 L. R. A. 432, 10 Am. St. Rep. 23.

In the later case of *Holzbog v. Bakrow*, 156 Ky. 161, 160 S. W. 792, 50 L. R. A. (N. S.) 1023, the doctrine that, where a note is given for a gambling consideration, its infirmity may be shown against a bona fide holder, was again approved, but with this qualification authorized by the facts of that case, viz.: That the maker of such a note who induces another to purchase it of the payee, assuring him that it is valid and will be paid, cannot set up the illegality of the consideration against the assignee, who had no notice thereof, as in that case the doctrine of estoppel will be applied to prevent such defense. *Wooldridge v. Cates*, 2 J. J. Marsh. 22; 16 Cyc. 783.

But, however great his ignorance of the illegality of the consideration for which the note here sued on was given, the appellant, as assignee thereof, cannot rely on such estoppel, as he has neither alleged nor attempted to prove that he was induced to purchase the note or accept an assignment of it by anything said or done by the maker. So, if the finding of the commissioner that the consideration for the note was a gambling debt or debts owing by the maker to the payee is supported by the evidence as set forth in his report, the action of the chancellor in overruling appellant's exception to such finding was amply authorized. And in looking to the evidence we find it all to the effect that the note was given in settlement of an indebtedness of Louis P. Doerhoefer to Samuel Dinkelspiel growing out of gambling transactions between them.

[2] It is true that the greater part of this evidence was furnished by the testimony of Huffaker, the attorney of Doerhoefer, and later of appellee, his executor, and by Brown, a servant of Doerhoefer, the competency of

which is now complained of by appellant. But we do not find that exceptions were filed by appellant to this evidence with the commissioner or to his report on that ground after it was filed in court; and, if filed, it is manifest from the record that they were not passed on by the chancellor. It is a well-recognized rule of practice and procedure that, when exceptions filed to the depositions of witnesses are not passed on in the circuit court, or, if passed on, no exception was taken to the ruling of that court thereon, upon appeal the Court of Appeals will regard such exceptions as having been waived, and treat the case as if no question had been made as to the competency of the witness or witnesses, or as to the admissibility of his or their testimony. Civil Code, § 589; Hatfield, Adm'r, v. Hatfield, 166 Ky. 761, 179 S. W. 832; Lewis v. Wright, 3 Bush, 311; Corn v. Sims, etc., 3 Metc. 398; Bronston v. Bronston, 141 Ky. 639, 133 S. W. 584; Patterson v. Hansel, 4 Bush, 654; L. & N. R. R. Co. v. Graves, 78 Ky. 74.

We are therefore prevented by the rule supra from passing on the competency of the evidence in question, which is not only uncontradicted, but strengthened by the testimony of the appellant himself admitting his intimacy with Dinkelspiel, the fact that the latter was his tenant when the note was executed, and his knowledge that he conducted in the building rented of him gambling transactions, such as bookmaking on horse racing and the like. Dinkelspiel was not introduced as witness.

On the whole case we find no reason for disagreeing with the report of the commissioner, or the action of the circuit court in confirming the same and dismissing the cross-petition of appellant. Wherefore the judgment is affirmed.

DISTRICT BOARD OF TUBERCULOSIS SANITARIUM TRUSTEES FOR FAY- ETTE COUNTY V. BRADLEY, Mayor, et al.

(Court of Appeals of Kentucky. June 8, 1920.)

1. Constitutional law § 35—Provisions mandatory.

All provisions of the Constitution are mandatory.

2. Constitutional law § 47—Wisdom of Constitution not subject of judicial inquiry.

The wisdom of a provision of the Constitution is a matter with which the courts and other departments of the government have no concern.

3. Statutes § 109—Title may be general, and provisions having natural connection with subject and not foreign thereto, satisfies Constitution.

The Legislature may make for an enactment such a general title as it chooses, in which

case any provision having a natural connection with the subject expressed in title, and not foreign to it, satisfies Const. § 51.

4. Statutes § 109—Title may be made as restrictive as Legislature chooses, and act violates Constitution if provisions are outside restriction, though proper under broader title.

The Legislature may make the title as restrictive as it chooses, and so far as the act contains provisions outside the limits thus marked out, it violates Const. § 51, though such provisions might properly have been included under a broader title.

5. Statutes § 110½(4) — Section requiring city to levy tax for tuberculosis sanitarium not within title.

The title to Sess. Acts 1918, c. 65, is not sufficiently broad to give notice that the chapter contained Ky. St. Supp. 1918, § 2061a15, or extended the powers of a bureau to be created in the board of health beyond those had by the state tuberculosis commissioners, nor that it embraced a scheme for the creation of districts for the erection and maintenance of sanitariums and added to the powers of the trustees of such sanitariums the power to require cities of the second class to levy and collect the taxes at the behest of the trustees for the benefit of the sanitariums, and the act is void under Const. § 51, to that extent.

Appeal from Circuit Court, Fayette County.

Action by the District Board of Tuberculosis Sanitarium Trustees for Fayette County against T. O. Bradley, Mayor of the City of Lexington, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Allen & Duncan, of Lexington, for appellant.

W. H. Townsend, Hogan L. Yancey, Henry B. Miller, and Jas. A. Wilmore, all of Lexington, for appellees.

HURT, J. This action involves the right of the district board of tuberculosis sanitarium trustees of Fayette county to require the mayor and commissioners of the city of Lexington, a city of the second class, to levy upon the taxable property within that city a tax and collect the same, for the benefit of the tuberculosis district which is composed of Fayette county. The right to do so is based upon the provisions of section 2061a15, vol. 3, Ky. Stats. Pursuant to such provisions the district board of tuberculosis sanitarium trustees of Fayette county made a demand of the mayor and commissioners of the city of Lexington to levy, for its benefit, a tax upon the property of the inhabitants of the city for the year 1920, sufficient, when collected, to produce the sum of \$27,032.79. The mayor and commissioners refused to levy or collect the tax required. The district board of tuberculosis sanitarium trustees thereupon instituted proceedings against the mayor

and commissioners to secure a writ of mandamus which would require them to levy and collect the tax. The mayor and commissioners resisted the motion for the writ upon the ground that the act of the General Assembly which authorized the demand for the levy of the tax and required them to make such levy and collect such tax was unconstitutional and void. The court sustained the contentions of the mayor and commissioners and denied the writ, and from the judgment the sanitarium trustees have appealed.

Several different grounds are relied upon as reasons for the invalidity of the statute, which authorizes the trustees of the sanitarium district to require the levy of the tax, and the mayor and commissioners of the city to make the levy and collect the tax, among which is that the statute was not enacted in conformity with the requirements of section 51 of the Constitution, and this objection to the validity of the statute will be first considered.

Section 51, *supra*, is in part as follows:

"No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title. * * *

The authority to require the tax levy, if such authority exists, is wholly by virtue of section 2061a15, Ky. Stats. vol. 3, and is a part of subsection 9 of section 4 of chapter 65, Session Acts 1918. That part of the act of 1918 which constitutes section 2061a15, *supra*, is as follows:

"Provided, however, that in a district where-in there is a county or counties containing a city or cities of the second class the district board of trustees shall annually estimate and prior to December 31st lay before the general council or board of commissioners of such city or cities the need of such district for the site, erection and maintenance, or for improvements, additions and maintenance, or for improvements, additions and maintenance, or for the maintenance of the tuberculosis sanitarium for the next succeeding year.

"In order to raise such portion of this money as the board holds to be equitable proportion for the city or cities for the purpose or purposes above set out, such general council or board of commissioners shall at the next succeeding levy cause to be levied and collected a tax of not less than two cents and not more than eight cents on each one hundred dollars of property assessed for taxation for city purposes, and said levy shall be included in the annual appropriation ordinance for that year. * * *

The above-quoted statute is a portion of chapter 65 of the Session Acts of the General Assembly of 1918, and that enactment has a title which is as follows:

"An act relating to public health, repealing, amending and re-enacting sections 2054, 2059, 2060 and 2061 of the Kentucky Statutes, Carroll's Edition of 1915, relating to the state

board of health, creating bureaus within said board to perform the functions of the existing state tuberculosis commission, the hotel inspector, the pure food and drug division of the agricultural experiment station, and for other purposes, creating county and district departments of health and providing and limiting appropriations of the state board of health and further defining its powers and duties."

[1, 2] All provisions of the Constitution are mandatory, and the duty imposed upon the courts is to construe and enforce them in accordance with their meaning and purpose. The wisdom of a provision of the Constitution is a matter with which the courts, nor any other department of the government, has any concern. Their wisdom, propriety, and desirability were tried out before the sovereign tribunal of the people, when the great plebiscite for that purpose resulted in their adoption as the supreme law of the land which cannot be contravened by the legislative, judicial, nor executive departments of the government, and any act or thing which is undertaken to be performed contrary to its provisions is void. Hence any act of the General Assembly which relates to more than one subject, or the title of which does not express the subject about which the legislation is attempted, is void. In construing the section of the Constitution, *supra*, to determine its applicability to any particular legislative act, the courts have looked to the purpose of its adoption and the evil sought to be remedied by it as guides and assistants to its interpretation. The courts have uniformly assigned as the reasons for its adoption that log-rolling legislation might be prevented, and to protect the legislators from surprise and fraud by provisions in legislative measures, the title to which give no notice of their contents, and might therefore be overlooked, or carelessly adopted, and, further, to apprise the public of proposed legislation so that the usual publication of the proceedings of the legislative bodies would give notice, to such persons as might read them, of the contents of the proposed legislative measures, in order that objectionable provisions might be opposed in a hearing for that purpose. These reasons will be found assigned for the adoption of the constitutional provision in a number of cases, among which is *Commonwealth v. Bassett*, 171 Ky. 385, 188 S. W. 459; *Smith v. Commonwealth*, 175 Ky. 291, 194 S. W. 367; *Bosworth, Auditor, v. State University*, 166 Ky. 436, 179 S. W. 403, L. R. A. 1917B, 808; *Board of Trustees, etc., v. Tate*, 155 Ky. 296, 159 S. W. 777; *South v. Fish*, 181 Ky. 349, 205 S. W. 329; *Exall v. Holland*, 166 Ky. 315, 179 S. W. 241.

[3] The Legislature in the enactment of a measure may make for it such a title as it chooses, and, as said in *Cooley's Constitutional Limitations*, 212, the title of an act is

"the conclusive index of the legislative intent as to what shall have operation," and the Constitution has so ordained it. The title may be general, and in such a state of case any provision of the statute having a natural connection with the subject expressed in the title, and not foreign to it, satisfies the requirements of the Constitution. *Johnson v. Higgins*, 3 Metc. 566; *McReynolds v. Smallhouse*, 8 Bush, 447; *Com. v. Starr*, 160 Ky. 260, 169 S. W. 743; *Johnson v. City of Fulton*, 121 Ky. 194, 89 S. W. 672, 28 Ky. Law Rep. 569; *Burnside v. Lincoln County Court*, 86 Ky. 423, 6 S. W. 276, 9 Ky. Law Rep. 635; *Conley v. Com.*, 98 Ky. 125, 32 S. W. 285, 17 Ky. Law Rep. 678.

[4] The Legislature may, however, make the title to an act as restrictive as it chooses, and in that state of case, as said in 26 Am. & Eng. Ency. of Law, p. 589:

"Where the language employed in the title is such as would lead a reasonable man to suppose that the Legislature intended to restrict the scope of the act within certain limits specified in the title, such act is unconstitutional, so far as concern any provisions outside the limits thus marked out, even though such provisions might properly have been included in the act under a broader title."

Instances in which this court has held legislation to be unconstitutional, on account of the restricted nature of the subject expressed in the title, excluding matters which would have been germane to a broader title, will be found in the cases of *Board of Trustees v. Tate*, 155 Ky. 296, 159 S. W. 777; *Henderson Bridge Co. v. Alves*, 122 Ky. 46, 90 S. W. 995, 28 Ky. Law Rep. 994; *Thompson v. Commonwealth*, 159 Ky. 8, 166 S. W. 623; *Board of Penitentiary Commissioners v. Spencer*, 159 Ky. 255, 166 S. W. 1017; *Burton v. Monticello Burnside Turnpike Co.*, 162 Ky. 787, 173 S. W. 144; *Bosworth, Auditor, v. State University*, 166 Ky. 436, 179 S. W. 403, L. R. A. 1917B, 808; *Exall v. Holland*, 166 Ky. 315, 179 S. W. 241; *Ogden v. Cronan, Sheriff*, 171 Ky. 254, 188 S. W. 357; *Houston v. Boltz*, 169 Ky. 640, 185 S. W. 76; *South v. Fish*, supra.

In *Wiemer v. Commissioners, etc.*, 124 Ky. 377, 99 S. W. 242, 30 Ky. Law Rep. 523, it was said:

"The General Assembly may, by the terms used in the title, restrict the scope of the act to as narrow a plane as they choose; and it follows that, if the title be too narrow and restrictive to embrace any part of the body of the act, to that extent the statute will be unconstitutional, although the different parts of the body are sufficiently cognate as not to be inimical to the inhibition of the Constitution against placing more than one subject in an act."

It was in the same case held that the relationship of the body of the act to the title

should be so "natural and obvious that the ordinary mind will readily perceive it." These rules of construction of section 51, supra, have been referred to and approved in *Ogden v. Cronan*, supra, and *South v. Fish*, supra. With the above approved rules of construction and the reasons for the adoption of the section 51, supra, in mind, the concrete question for determination presented by the instant case is, Does the title to the act of 1918 express the subject of the legislation embraced in section 2061a15, Ky. Stats. vol. 3, which is a provision of the act of 1918?

[5] It will be observed that the particular subject of legislation to be made by the act of 1918, as declared or expressed in the title, by reason of the language made use of, is somewhat obscure and doubtful, but this court, in *South v. Fish*, supra, in which the validity of subsection 20 of the amendment to section 2061 of the act was considered, determined, that the proper reading of the title to the act of 1918 was as follows:

"An act relating to public health, by repealing, amending and re-enacting sections 2054, 2059, 2060 and 2061 of the Kentucky Statutes, Carroll's Edition of 1915, relating to the state board of health," etc.

In another place, in the same opinion, it was said:

"By reading the title to this act one would naturally suppose that it related only to sections 2054, 2059, 2060, and 2061 of the Kentucky Statutes, and created the three bureaus therein specified."

Whether a proper reading of the title would make necessary the insertion of the preposition "by" or the conjunction "and" or the insertion of both, preceding the words "creating bureaus within said board to perform the functions of the existing state tuberculosis commission," etc., either would convey substantially the same meaning to one reading the title, and that would be that the act contained legislation which created a bureau within the board of health to perform the functions of the then existing state tuberculosis commission and would exclude the idea that a bureau would be created to perform the functions of any district board of trustees of a tuberculosis sanitarium, unless, at least, the district board performed functions as an agency of the state commission. A reference to sections 2054, 2059, 2060, and 2061, Ky. Stats., Carroll's Edition of 1915, which the title of the act of 1918 in part expressed as the purpose of the act to repeal, amend, and re-enact, readily demonstrates that neither of these sections treated of a tuberculosis sanitarium district, nor the duties nor functions of the state tuberculosis commission or commissioners, nor to taxation for the erection or maintenance of

a tuberculosis sanitarium, and hence a reference to them by one who might read or see a publication of the proposed legislation by its title would receive no intimation that the legislation proposed under the title would or did contain any provisions providing for the creation of tuberculosis sanitarium districts or imposing taxes upon a city of the second class for the erection or maintenance of a tuberculosis district. Hence if the legislation contained in the act of 1918, touching the subject of creation of tuberculosis sanitarium districts and the imposition of taxes for the erection and maintenance of sanitariums, is anywhere expressed in the title, it is that portion of the title which is couched in the following language:

"Creating bureaus within said board to perform the functions of the existing state tuberculosis commission."

While, if it is conceded that the title of the act thus expresses that the act contains legislation which will create a bureau within the board of health to perform the functions of the then existing state tuberculosis commission, one naturally and logically reading the title would understand that the legislation in the act purposed to create a bureau in the board of health for the purpose, and to transfer to it the powers and duties and functions which the state tuberculosis commission then had, but he could not conclude that the act contained legislation extending the powers of the bureau beyond those then had by the state tuberculosis commissioners, nor that it also embraced a scheme for the creation of districts for the erection and maintenance of tuberculosis sanitariums, and adding to the powers of the trustees of such sanitariums, including the power to require cities of the second class to levy and collect taxes at the behest of the trustees and for the benefit of the sanitariums. The state board of tuberculosis commissioners was not created nor dealt with by sections 2054, 2059, 2060, or 2061, of the Kentucky Statutes of 1915, but was created and all its functions defined by section 4711b and its subsections of Kentucky Statutes of 1915, and was an act of the General Assembly of the session of 1912. There is no intimation in the title to the act of 1918, nor in the provisions of the act, of any purpose to repeal section 4711b, *supra*, nor any of its subsections, and if such act or any part of it is repealed, it is by implication. If one reading the title to the act of 1918 should have examined section 4711b, *supra*, and its subsections, to have determined what functions that the act of 1918 was proposing from its title to invest in the bureau to be created by it, he would have learned that the board of tuberculosis commissioners was a corporate body, the duties

of which chiefly consisted in investigating the cause and prevalence of tuberculosis and encouraging the efforts for its eradication and the publication of information in regard to it, but without duties or powers touching the creation of tuberculosis sanitarium districts, or the levying of taxes for their erection or maintenance. He would have found that the duty and authority to levy taxes for the erection and maintenance of tuberculosis sanitariums was vested entirely in the fiscal courts of the counties, except in the instances where two or more counties were embraced in a district the fiscal court of each county should appropriate its equitable portion of the burden of the maintenance of the sanitarium to be ascertained under regulations to be prescribed by the tuberculosis commission. The creation of tuberculosis sanitarium districts was vested in the fiscal courts of the counties, or in the people of a proposed district to be expressed by their votes at an election to be held for that purpose. The only functions which the board of tuberculosis commissioners which is necessarily the same board as is referred to as the state tuberculosis commission, had with reference to the creation and conduct of a tuberculosis sanitarium district, were, that after the district was created it should nominate persons to be trustees thereof, and from the nominations the judge of the county court should appoint the trustees. The board of tuberculosis commissioners also had the right to select the site for a sanitarium in a district, and to recommend plans and specifications for the sanitarium, which it seems the fiscal courts were not obliged to accept, and it was also vested with authority to visit the sanitarium and prefer charges of misconduct or inefficiency against the trustees and employees thereof before the authorities which appointed them. The governing authority of the sanitarium was vested in its trustees, and these were without authority to require the fiscal courts to appropriate the sums it should designate for its needs, and the fiscal courts had discretion in fixing the appropriation to the needs of the institution. Hence it will be observed that the board of tuberculosis commissioners were without authority, as well as the sanitarium district trustees, to apportion any portion of the needs of a sanitarium to a city of the second class within the district, and to require its authorities to levy or collect a tax for either the site, construction, or maintenance of a sanitarium. The act of 1918, however, without any expression in its title of the subject of creating or maintaining tuberculosis sanitarium districts, or the powers or duties of the trustees of such a district to estimate the needs for maintenance or otherwise, and to certify same to the fiscal courts or commissioners of a second class city, but by the use

of the language in the title which expressly limited the purpose of the act with reference to tuberculosis to legislation creating a bureau within the board of health to perform the duties of the then existing state tuberculosis commission, there was incorporated into the act, with other legislation with which we now have no concern, the section 2061a15 which authorized the district board of tuberculosis sanitarium trustees, where the district contained a city of the second class, in December of each year to estimate the needs of the district for the ensuing year for the site, erection, improvements, and maintenance of the sanitarium, and to fix the equitable portion which such city should appropriate for such purposes, and to lay same before the commissioners of the city who were required to levy a tax sufficient to produce the sum demanded and to collect and pay same to the sanitarium. No reasonable interpretation of the title of the act of 1918 could be made that would include such legislation within the subject there expressed. The title of the act thus limiting its scope to legislation affecting the public health by repealing, amending, and re-enacting sections 2054, 2059, 2060, and 2061, supra, a reasonable man would suppose by reading the title that so far as the amendatory legislation of those sections was intended it would be legislation touching such matters as were reasonably and naturally connected with the subjects dealt with in those sections. The title, so far as the subject of tuberculosis was expressed, limited the scope of the act to the creation of a bureau to which the functions of the state tuberculosis commission would be assigned. Section 2061, supra, to which the legislation in controversy here was enacted as an amendment, did not deal with the subject of tuberculosis, nor sanitarium districts, nor their creation, management, nor maintenance in any respect. Hence the powers conferred upon the trustees of the sanitarium district and the duties of the commissioners of second class cities with reference to the maintenance of sanitariums by the levying of taxes for that purpose, as set out in section 2061a15, Ky. Stats. vol. 3, was beyond the limits marked out by the title to the act of 1918, and the subject of same was not expressed in the title, although such legislation might have been included in the act under a broader title without violating the constitutional provision embraced in section 51 of that instrument, touching the requirement that a law enacted by the General Assembly can relate to only one subject, and that must be expressed in the title. It is unnecessary to consider any other objection to the validity of any of the provisions of the act.

The judgment is therefore affirmed.

LOUISVILLE & N. R. CO. et al. v. WILLIAMS et al.

(Court of Appeals of Kentucky. May 11, 1920.
Petition for Modification of Opinion Sustained June 8, 1920.)

1. Eminent domain \S 293(4) — To recover compensation for destruction of passway by railroad embankment landowners need not prove title to passway in themselves.

In a proceeding to recover compensation for land appropriated by a railroad company for a right of way and for obstruction of a passway, a peremptory instruction in favor of the railroad company as to damages for the destruction of the passway was properly overruled, since it was not necessary for the landowners to show title in themselves to the passway in order to entitle them to prove that it had been obstructed by the railroad company as an element of damage.

2. Eminent domain \S 293(4)—Destruction of passway in appropriating land for railroad need not be pleaded in proceedings for compensation.

In a proceeding by landowners for compensation for appropriation of land and destruction of a passway by the construction of a railroad embankment, that no claim for damages for the destruction of such passway was made in the pleadings did not require a peremptory instruction in favor of the railroad company; the passway being a mere incident to the enjoyment of the premises, and its destruction being provable under a general averment or incidental damages.

Appeal from Circuit Court, Letcher County.

Proceedings by Hiram Williams and another against the Louisville & Nashville Railroad Company and another, to recover damages for appropriation of land. Judgment for the former, and the railroad companies appeal. Affirmed.

Benjamin D. Warfield, of Louisville, and Morgan & Harvie, of Whitesburg, for appellants.

David Hays, of Whitesburg, and Wm. G. Deering, of Louisville, for appellees.

SAMPSON, J. In February, 1919, this case, under a somewhat different style, was before this court on a prayer for specific performance of an option contract for a right of way, and an opinion was delivered which contains a complete statement of the facts as well as the law applicable to this case, in large part. See Lexington & E. R. Co. v. Williams, 183 Ky. 343, 209 S. W. 59.

On the same pleadings the case on its return to the lower court was tried before a jury on a plea for damages, made by Williams and his wife against the two railroad companies, for taking and appropriating 1.4 acres of their land as right of way for damages incidental thereto. The jury returned

a verdict in favor of Williams and his wife for the sum of \$2,800 direct damages. The railroad companies are prosecuting this appeal and ask a reversal upon three grounds:

(1) Appellees were allowed to recover damages for the obstruction of a private passway, which was not located entirely upon their own lands, but partly upon their lands and partly upon the lands of another, while "the obstruction complained of," if there was an obstruction, was near the end of the passway and on the lands of a third person.

(2) The verdict is grossly excessive.

(3) The court gave to the jury erroneous instructions. It will be seen, however, that the chief, if not the only, error complained of by appellant is the failure of the trial court to admonish the jury at the conclusion of all the testimony not to consider evidence offered by appellees as to loss suffered by them by reason of the obstruction of the private passway.

This litigation started almost ten years ago. In 1910 the railroad companies obtained from one of the appellees, Hiram Williams, a written option of a right to appropriate a strip of land 100 feet wide through his farm, for the purpose of building a railroad. Mrs. Williams did not sign this contract, although she was the owner of an undivided one-half interest in the farm. The railroad companies started construction work, to which Williams objected, and was threatening to eject the workmen, when the railroad companies instituted an action praying an injunction against Williams, staying him from interfering with their construction work. There was an injunction granted, but it was shortly thereafter dissolved on motion of Williams; in the meantime the railroad companies had instituted another action against Williams for specific performance of his option contract, and this latter action is the one in which the opinion *supra* was rendered. While these two actions were pending, Mrs. Williams instituted another action in her separate name, claiming to be the exclusive owner of the tract of land and seeking damages against the railroad companies for trespassing upon her property and appropriating a portion thereof. By special demurrer the question of defect of parties plaintiff was raised, and the court required Mrs. Williams to make her husband a party, which was done. In this action Mrs. Williams and her husband averred that the railroad companies had appropriated a strip of their land as a right of way and had entered thereon and constructed a railroad, which construction had in part filled up the channel of the Kentucky river, which ran immediately in front of their residence, thereby flooding their farm at intervals and washing away their lands; and, further, that the embankment of the recently constructed railroad obstructed and rendered of no practical use a certain passway used by plaintiffs in

going to and from their home and farm across the river to their other lands, as well as to the public highway leading to the county seat. The railroad companies admitted that the Williams were the owners of the land in question, but they denied the trespass, as well as all damages resulting therefrom, and relied upon their right under the option given by Hiram Williams as a justification for entering upon the lands. At the trial the railroad companies offered to confess judgment for \$50 for appropriating the 1.4 acres of land taken and used by them as a right of way, and \$1,200 for damages to the adjacent property, or a total of \$1,250, and tendered said sum to the plaintiffs for the taking of said property and for all damages incident thereto. This the appellees rejected.

[1, 2] Appellees alleged ownership in themselves of the lands in controversy and this was admitted by the railroad companies. Appellees also alleged that they had used and enjoyed a passway from their home and farm across the river to their other lands and to the highway, and this was not controverted. In the taking of proof, appellees started in to establish their title, but appellants, to save time, admitted that the plaintiffs were the owners of the lands, and this was noted of record. The first witness introduced, after telling about the obstruction of the channel of the river by the embankment of the railroad, told also of the obstruction of the passway by the railroad embankment. No objection was made to this evidence by appellants. Other witnesses gave similar evidence without objection, but at the conclusion of all the evidence the appellants moved for a peremptory instruction in their favor as to the damages for "the alleged destruction of the passway in controversy" upon two grounds: (1) Because the appellees had not shown that they owned the passway; (2) because the pleading did not make any claim for damages upon that ground. This motion was overruled by the court, and we think properly so, because in the first place it was not necessary for appellees to have alleged or shown title in themselves to the passway in order to entitle them to prove that it had been obstructed by the railroad companies as an element of damages. Whether they had a deed to it or not made little difference, if they had the right to use it. Furthermore, it was not necessary to set forth in the pleadings that damages would be claimed for the obstruction of a passway used in connection with the lands, because that is a mere incident to the enjoyment of the premises, and evidence of the obstruction or destruction of the passway was admissible under a general averment of incidental damages to the land from the taking of the strip for right of way. The second ground relied upon by appellants for peremptory instructions was equally without

merit. The pleadings do sustain the claim for appellees to damages on account of the passway even by specific averment, but had there been no such averment appellees could have shown that they suffered damages by reason of the obstruction of the passway which was appurtenant to their freehold.

The other two grounds urged for reversal are rested upon the one we have just disposed of, and, the first one being without merit, the other two are rendered unavailing, for it is practically admitted by appellants that the damages are not excessive if the obstruction to the right of way could have properly been considered; and, further, that the instructions are not erroneous if the evidence concerning the obstruction of the passway was properly admitted. The right of appellees to recover not only for taking of the 1.4 acres of land as a right of way but for all damages to the remainder of the farm, which directly flowed from such taking, was fully recognized and established by the opinion on the first appeal.

Judgment is affirmed.

OWENS v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 15, 1920.)

1. Constitutional law §206(1), 221, 267—Restrictions by Fourteenth Amendment on qualification of jurors only inhibits disqualification on account of race or color.

The Fourteenth Amendment to the Federal Constitution contemplates no other restriction upon the power of the state to prescribe the qualifications of jurors, except to inhibit a disqualification on account of race or color.

2. Criminal law §1134(3)—Court of Appeals cannot review action of court in refusing to set aside indictment.

Under Cr. Code Prac. § 281, no exception can be taken by the commonwealth to action of the circuit court in setting aside an indictment, or by the defendant to his refusal to do so; the power conferred by such statute upon the circuit court being beyond the revisory control of the Court of Appeals.

3. Constitutional law §221—Statute making final decision upon challenges to panel, etc., not discriminatory against race.

Cr. Code Prac. § 281, making the action of circuit court upon challenges to the panel and for cause upon motions to set aside an indictment final and not reviewable, is not unconstitutional as being discriminatory against persons of any race or color.

4. Criminal law §1004—Right of appeal not inherent.

Right of appeal is not a natural or inherent right, and the Legislature may declare under what conditions the right, when conferred, may be exercised.

5. Intoxicating liquors §238(4)—Whether defendant had liquors in possession for sale held for jury.

In a prosecution for having intoxicating liquors in possession for the purpose of sale, evidence held sufficient to make defendant's intent a question for the jury.

6. Criminal law §376—Reputation of accused admissible only where defendant offers proof thereof.

Testimony as to the reputation of accused is admissible only where accused has offered proof of his good reputation, or where he has offered himself as a witness.

Appeal from Circuit Court, Hardin County.

William Owens was convicted of having intoxicating liquors in his possession for the purpose of sale, and appeals. Reversed and remanded.

H. L. James, of Elizabethtown, for appellant.

Chas. I. Dawson, Atty. Gen., for the Commonwealth.

CLAY, C. William Owens was indicted for the offense of having intoxicating liquors in his possession for the purpose of sale. The indictment also charged that he had theretofore been indicted, tried, and convicted for a violation of the local option law. The jury found him guilty, and fixed his punishment at confinement in the penitentiary for one year. He appeals.

It appears that two indictments were returned against the defendant, one in March, 1918, and the other in June, 1919. The defendant moved to quash the first indictment on the ground that he was a negro, that the grand jury which indicted him was composed of white persons only, and that the jury commissioners excluded from the list, from which the members of the grand jury were drawn, all persons of African descent because of their race and color, thus denying him the equal protection of the law, etc. On this motion evidence was heard and the motion was overruled. The defendant then demurred to the indictment, and the demurrer was sustained. On motion of the county attorney the case was referred to a subsequent grand jury, which returned the second indictment under which defendant was convicted. The defendant then moved that this indictment be quashed on the ground that he and members of his race had been discriminated against because persons of African descent had been excluded from service on the grand jury solely because of their race and color. The cause being submitted on the motion, the motion was overruled.

[1-4] Defendant insists that the court erred in overruling the motion without giving him an opportunity to present evidence and

taining the grounds relied on, and in support of this position we are referred to the case of *Carter v. Texas*, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839. Precisely the same question was raised in the case of *Miller v. Commonwealth*, 127 Ky. 391, 105 S. W. 899, 32 Ky. Law Rep. 249, where the court held that section 281 of the Criminal Code deprived it of the power to review the alleged error. In discussing the question the court said:

"This court, recognizing the binding force of section 1 of the Fourteenth Amendment of the Constitution of the United States, which forbids any state to 'deny to any person within the United States the equal protection of the laws,' as far back as the year 1880, declared the then existing statute prescribing the qualifications of jurors unconstitutional in so far as it excluded from the jury service persons of the negro race (*Commonwealth v. Johnson*, 78 Ky. 509; *Commonwealth v. Wright*, 79 Ky. 22, 42 Am. Rep. 203; *Haggard v. Commonwealth*, 79 Ky. 386), and shortly thereafter the statute was so amended by the Legislature as to conform to the requirements of the Fourteenth Amendment of the federal Constitution. It is not declared by the Fourteenth Amendment, nor has any court, federal or state, ever held, that a negro cannot lawfully be indicted and tried unless the jury is composed in part of persons of his own race, or that a white person cannot lawfully be indicted and tried unless the jury is composed in part of persons of his own race. The Fourteenth Amendment contemplates no other restriction upon the power of the state to prescribe the qualifications of the jurors, except to inhibit a disqualification on account of race or color. *Strauder v. West Va.*, 100 U. S. 303, 25 L. Ed. 664; *Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567; *Gibson v. Mississippi*, 162 U. S. 579, 16 Sup. Ct. 907, 40 L. Ed. 1075; *Carter v. Texas*, 177 U. S. 443, 20 Sup. Ct. 687, 44 L. Ed. 839; *Tarrance v. Florida*, 188 U. S. 519, 23 Sup. Ct. 402, 47 L. Ed. 572. Upon the face of the record it may well be doubted whether the steps taken by appellant to sustain his plea in abatement and motion to quash the indictment so conformed to the practice obtaining in the courts of this state as to make it appear that he was prejudiced in any substantial right by the refusal of the circuit court to quash the indictment. But, without resting our decision of the question involved on that ground, there is another and sufficient reason why this court cannot exercise revisory power as to the alleged error complained of. It is forbidden by section 281 of the Kentucky Criminal Code of Practice, which provides: 'The decision of the court upon challenges to the panel, and for cause, upon motions to set aside an indictment and upon motions for a new trial, shall not be subject to exception.' Section 158 contains three grounds upon which the circuit court may set aside an indictment, the first being, 'A substantial error in the summoning or formation of the grand jury,' but no exception can be taken by the commonwealth to the action of the circuit court in setting aside an indictment, or by the defendant to its refusal to do so. The power conferred upon the circuit court by the mandatory provisions of section 281 is broad and beyond the revisory control of this court. *Commonwealth v. Si-*

mons, 100 Ky. 164, 37 S. W. 949, 18 Ky. Law Rep. 648. Section 281 was enacted after the repeal of the former statute disqualifying persons of the colored race for jury service. It does not in the meaning or effect discriminate against persons of any race or color, and its enactment, according to numerous decisions of this court, was clearly within the bounds of legislative discretion. The right of appeal is not a natural or inherent right. Indeed, in the state of Kentucky an appeal in a criminal or penal case was not allowed prior to the year 1853, but the right was then conferred by statute, and has ever since existed by legislative sanction, subject to certain conditions and limitations imposed by the same power. If competent to confer or withhold the right of appeal, the Legislature may declare under what conditions the right, when conferred, may be exercised, and the courts of the state, in administering the law, must obey the legislative will by observing the restrictions imposed. In other words, in matters appealable, the revisory power of this court is restricted by the conditions and limitations imposed by statute."

The views above expressed have been uniformly adhered to, and we have frequently written that section 281 of the Criminal Code applies with equal force to all persons, regardless of their race, color, or circumstances in life, and that the action of the trial court upon challenges to the panel, and for cause, or upon motion to set aside an indictment, however erroneous or prejudicial it may be, cannot be reviewed on appeal. *Harris v. Commonwealth*, 163 Ky. 781, 174 S. W. 476; *Frasure v. Commonwealth*, 180 Ky. 274, 202 S. W. 653; *Smith v. Commonwealth*, 154 Ky. 613, 157 S. W. 1089; *Leadingham v. Commonwealth*, 182 Ky. 291, 206 S. W. 483; *Slaughter v. Commonwealth*, 152 Ky. 128, 153 S. W. 46. It necessarily follows that we are without jurisdiction to determine whether the trial court erred in overruling the motion to set aside the indictment.

[5] It is next insisted that the evidence was not sufficient to sustain the charge that the defendant had intoxicating liquor in his possession for the purpose of sale. *H. L. Blakey*, who had been hired to get people to violate the local option law, testified that during the last week of January, 1917, he went to defendant's home and purchased a pint of whisky from him, paying him a dollar for it. He also purchased whisky from him on several other occasions. *Robert McCullum*, who was also employed to get persons to violate the local option law, testified that on one occasion he went to defendant's house with *Blakey*. The defendant went into the house and returned with a pint of whisky, which he sold to *Blakey*. Since this evidence showed that defendant had whisky in his home and was engaged in selling it, it was sufficient to make it a question for the jury whether he had the whisky in his possession for the purpose of selling it.

[6] The last error assigned presents a more

serious question. Several prominent citizens of the county were permitted to testify that the defendant had the reputation of being a bootlegger. There are only two ways by which the reputation of the accused may be put in issue: (1) Where he has offered proof of his good reputation; (2) where he has offered himself as a witness. Gregory's Criminal Law, § 1096; Combs v. Commonwealth, 160 Ky. 386, 169 S. W. 879; Romes v. Commonwealth, 164 Ky. 388, 175 S. W. 669. Here, however, the accused did not offer proof of his good reputation, or go on the

witness stand, but evidence that his reputation was that of a bootlegger was permitted to go to the jury as substantive evidence of his guilt, and the authorities all agree that this cannot be done. 4 Chamberlayne on Evidence, § 3275; 8 R. C. L. § 208, p. 212. We are also of the opinion that the admission of this evidence was prejudicial error, in view of the character of evidence by which the defendant's conviction was secured.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

WORLD GRANITE CO. v. MORRIS BROS.

(Supreme Court of Tennessee. June 5, 1920.)

Courts **80(1)**—Defendant in equity suit demanding jury trial in answer not to be deprived thereof by rule of court.

Chancery court could not deprive a defendant who has demanded a jury trial in his answer of the right to such trial given him by Shannon's Code, § 6283, in view of sections 5739, 5740, 6282, 6284, though defendant had not complied with rule of court requiring defendant to demand a jury by a motion in court after joinder of issue, such statute being mandatory, and such rule of court being in conflict therewith.

Appeal from Chancery Court, Shelby County; F. H. Heiskell, Chancellor.

Bill by the World Granite Company against Morris Bros. Decree for complainant, and defendants appeal. Reversed and remanded.

L. T. M. Canada, of Memphis, for appellants.

Banks & Harrelson, of Memphis, for appellee.

McKINNEY, J. The original bill in this cause was filed by the World Granite Company to recover from Morris Bros., a partnership, an account amounting to \$1,420.

Defendants answered the bill, denying that they were indebted to the complainant in any sum, and in said answer demanded a jury to try the issues.

When the cause came on for hearing, the defendants insisted on having same tried by a jury, but the chancellor was of the opinion that they were not entitled to a jury, and, over their objection, heard the cause without a jury.

The defendants declined to offer any proof, and upon the evidence introduced by the complainant the chancellor entered a decree in its favor for the amount sued for. The defendants have appealed from said decree, and have assigned as error the action of the chancellor in denying them a trial by a jury.

The pertinent provisions of our statutes (Shannon's Code) in regard to jury trials in chancery causes are as follows:

"Sec. 6282. Either party to a suit in chancery is entitled, upon application, to a jury to try and determine any material fact in dispute, and all the issues of fact in any case shall be submitted to one jury.

"Sec. 6283. If the demand is made in the pleadings, the cause shall be tried at the first term before a jury summoned instantan, in the same way that jury causes are tried at law.

"Sec. 6284. If the demand is only made after the cause is ready for hearing, the trial will be before a jury summoned instantan upon the like evidence as a suit at law, together with such

parts of the bill, answers, depositions, and other proceedings in the cause, as the court may order."

"Sec. 5739. The chancellors of this state, or a majority of them, may make such rules as they may deem beneficial and proper to regulate the practice of the chancery courts, not inconsistent with the provisions of this Code; and the rules thus agreed upon shall be obligatory on all the chancery courts.

"Sec. 5740. In the absence of any such action by the chancellors as a body, each chancellor may make rules and regulations of practice for the purpose of expediting business in his own chancery division."

The rules of the chancery court of Shelby county provide that, even where a jury is demanded in the pleadings, such demand will be treated as waived, unless the party demanding the jury make a motion in court, after the cause is at issue, for an order to have the cause placed on the jury calendar. The defendants did not comply with this rule, and we presume that it was for this reason that the chancellor declined to submit the issues to a jury.

The rules further provide that no cause shall be placed on the jury calendar until an order has been entered directing it.

It is insisted by the defendants that such a rule is inconsistent with the statute, and, they having demanded a jury in their answer, it was the duty of the clerk to enter the cause upon the trial docket, and that the chancellor has no right to make any rule that would deprive them of the right given them by the statute.

The statute in question is mandatory, and provides that where a jury is demanded in the pleadings the cause shall be tried before a jury.

In *Harris v. Bogle*, 115 Tenn. 701, 92 S. W. 850, this court had under consideration a chancery rule which provided that—

"Application for a jury must be made by petition in open court upon the first day of the trial term."

The court said:

"It is observed that the sections last quoted [5739 and 5740] forbid the making of any rules which are inconsistent with the provisions of the Code.

"The rule above quoted has no application to the case contemplated in Code, § 6283. If there be any conflict it must be with the provisions of section 6284. This provides for the making of an application 'after the cause is ready for hearing.' That section does not, in terms, give the right to demand a jury at any time after the cause is ready for hearing. This omission left the matter open to regulation by rule of the court under the sections of the Code above quoted upon that subject."

Where the demand for a jury is made in the pleadings, section 6283, in express

terms, gives the right to a jury trial. The omission referred to above in section 6284 does not occur in section 6283; therefore the chancellors were without power to change said statute by rule, and the rule in question does conflict with the statute.

The Code provides that the cause shall be tried by a jury where the demand is made in the pleadings. The rule of the court provides, in effect, that notwithstanding this plain mandate of the statute, such jury trial shall not be had unless certain other things are done. In discussing the rule under consideration in *Harris v. Bogle*, supra, this court said:

"This we think a reasonable regulation, preventing surprise to the adverse party and affording opportunity to obtain a jury."

These reasons are potent in a cause like the one being considered in that case, but such reasons would not apply in a cause like the present one for the adverse party was given notice upon the filing of the answer, and as soon as the cause was at issue, that the defendants desired to have the cause heard by a jury, and hence the complainant could not be surprised.

It is likewise apparent that this means of demanding a jury is just as effective as appearing in open court, as provided by the rule, and moving for an order to have the cause heard by a jury, and the opportunity for summoning the jury is certainly afforded where the demand is made in the pleadings as much so as where the demand is made in open court.

Counsel for the complainant, in their brief, have not presented any reason or shown any necessity for such a rule as the one we are here considering, and none occurs to us. Nor has it been pointed out how such a rule could be upheld without contravening the provisions of the Code.

We are of the opinion, therefore, that the defendant was entitled to have the issues tried by a jury.

As soon as the cause was at issue, a demand for a jury having been made in the pleadings, the clerk should have entered the cause upon the trial docket.

For the error in declining to submit the cause to a jury, the cause will be reversed, and remanded for a new trial.

BOYD v. McCARTY et al.

(Supreme Court of Tennessee. May 29, 1920.)

1. Landlord and tenant ⇨223(6)—Lessees, knowing premises dilapidated, took them at their own risk.

Where a florist and his successor, at time of lease and transfer, knew leased premises

were dilapidated, and lease contained no covenant by landlord to make repairs, florist and successor took premises at their own risk, and there was no implied covenant by landlord that they were fit for the purposes for which rented, so that florist could not as against landlord's demand for rent recoup for damages when bricks fell from the house to the greenhouse.

2. Landlord and tenant ⇨172(3)—Failure to repair not a constructive eviction.

Failure of landlord to repair leased premises was not a constructive eviction of the lessees, where the dilapidated condition of the premises was not the result of any wrongful act of the landlord, who was not under obligation, express or implied, to repair.

3. Landlord and tenant ⇨152(2)—Subsequent promise of landlord to repair void as without consideration.

Where the lessees of a brick house and greenhouse gave notes for the rent, the subsequent promise of the landlord's son, as her agent, to make repairs, was without consideration, and imposed no obligation on the landlord.

4. Landlord and tenant ⇨192(1)—Threat of condemnation does not affect rights of parties.

Since the destruction of leased property by municipal action does not relieve the tenant from the obligations of his lease, mere threat of condemnation does not affect the contract rights of the parties.

Appeal from Chancery Court, Shelby County; F. H. Heiskell, Chancellor.

Suit by Mrs. L. R. Boyd against H. W. McCarty and another. From decree for defendants, complainant appeals. Decree reversed, and decree rendered for complainant.

J. H. Watson, of Memphis, for appellant.

R. Lee Bartels, of Memphis, for appellees.

GREEN, J. The complainant entered into a contract with Pierson & McCarty Company on January 25, 1910, whereby complainant leased to Pierson & McCarty Company for a term of ten years from March 9, 1910, certain property in Memphis described as "the two-story brick house and lot on west side of Dunlap street, 105 feet fronting on Dunlap street, and running back to Ragland avenue, near north gate of Elmwood Cemetery." This property was rented for greenhouse purposes. The rent was \$3,600, evidenced by 120 notes for \$30 each, payable monthly. In addition to the notes the lessees were to pay certain taxes on the property during the term. There is no other provision of the lease material to this inquiry.

Pierson & McCarty Company seems to have been a trade-name under which S. G. Hexter was doing business as a florist. He conducted this business at this place up until the year 1916, when he transferred his lease to defendant McCarty, who continued the same kind of business on these premises.

The rent notes were paid by Hexter and McCarty until March, 1917. They have made no payments since. This bill was filed to recover the amount of the unpaid notes, and also certain taxes which it is alleged the defendants failed to pay according to contract.

The defendants answered and interposed a certain claim for damages by way of recoupment, and the chancellor rendered a decree in defendant's favor, from which the complainant has appealed.

The proof shows that the house on this property was in a dilapidated condition when the lease was made. It does not appear, however, to have been in such condition as that it amounted to a nuisance to anybody prior to 1915. At that time the city authorities condemned the house as unsafe and ordered it to be torn down, but this order was never enforced.

Defendants' claim for damages arises in this way: The greater portion of the lot not occupied by the house was covered with greenhouses. Defendants allege and introduce proof tending to show that in March, 1917, bricks and shingles from the old house blew down on the greenhouse and broke the glass, and the flowers and plants in the greenhouse were thereby exposed and damaged by the cold. This damage in March, 1917, is estimated to have been about \$80. In December, 1917, the glass on the greenhouse was again broken in the same way during a severe spell of weather, and defendants claimed that the contents of the greenhouse was damaged to the extent of about \$1,300. After the last accident McCarty vacated the premises.

The defendants ceased to pay rent notes after the loss in March, 1917, and called upon complainant to repair the old house and make it safe. There is a letter in the record from the son of complainant, who is alleged to have been her agent in response to this demand of defendants for repairs, in which he agreed that the necessary repairs would be made. Defendants also testify to other assurances from complainant's son that he would have such repairs made.

Under these circumstances the chancellor was of opinion that defendants were entitled to recoup their damages against the complainant's demand for unpaid rent. In this we think his honor was in error.

The lease contract contains no covenant on the part of the landlord to make any repairs to the premises demised. The defendant Hexter was familiar with the condition of the property when he leased it, and defendant McCarty was familiar with the condition of the property when he took a transfer of the original lease to himself. There was no fraud whatever on the part of the lessor.

[1] We think under such circumstances the tenant takes the premises as he finds them at

his own risk, and there is no implied covenant to be ascribed to the landlord that they are fit for the purposes for which they are rented. It therefore follows that the landlord is not responsible to his tenant under such circumstances for damages occasioned by the landlord's failure to repair them.

Principles governing this case have been set out by the court in *Schmalzried v. White*, 97 Tenn. 36, 36 S. W. 393, 32 L. R. A. 782, where, speaking of the landlord, the court said:

"It does not make him an insurer to the tenant. On the contrary, in the ordinary contracts of letting, it does not imply any warranty on the part of the landlord that the leased premises are in a safe and habitable condition, since the tenant ordinarily has it in his power to inspect the premises and so accept them at his own risk. *Buswell on Law of Per. Inj.*, 82.

"In *Edwards v. N. Y. & H. R. R. R.*, 98 N. Y. 245, it is said: 'It is a universal rule, to which no exception can be found in any case now regarded as authority, that, upon the demise of real estate, there is no implied warranty that the property is fit for occupation or suitable for the use or purpose for which it is hired.'

"In *Jaffe v. Hartean*, 56 N. Y. 398 (S. C., 15 A. R. 438), it was held that 'a lessor of buildings, in the absence of fraud or any agreement to that effect, is not liable to the lessee or others lawfully upon the premises for their condition, or that they are tenantable and may be safely and conveniently used for the purposes for which they are apparently intended.'

"In *Francis v. Cockrell*, L. R. 5 Q. B. 501, *Kelley, C. B.*, said that there was no implied warranty by the lessor that the demised real estate 'shall be reasonably fit, or fit at all, for the purpose for which it is let'; and in *Keates v. Cadogan*, 10 C. B. 591, the rule is stated to be that 'no action lies by a tenant against a landlord on account of the condition of the premises leased, in the absence of an express warranty or active deceit.'

Schmalzried v. White, supra.

[2] It is urged that the failure on the part of the complainant to repair these premises amounted to a constructive eviction of the defendants. This could not, however, be true unless the duty of making repairs rested upon the lessor.

"The mere fact, however, that the premises become untenable if such condition is not the result of any wrongful act of commission or omission on the part of the landlord cannot be the basis of an eviction." 16 R. C. L. p. 686.

"Eviction necessarily being the result of an intended, willful, wrongful act, it must be a willful omission of duty or a commission of a wrongful act where there is no duty not complied with, and no wrongful act committed by the landlord toward the tenant, no eviction occurs." *Barrett v. Boddie*, 158 Ill. 479, 42 N. E. 143, 49 Am. St. Rep. 172.

[3] It is insisted that the complainant became legally obligated to make repairs by reason of the promise of her son and agent

heretofore referred to. We think, however, this promise was absolutely without consideration. The agreement of the defendants to remain and to pay the rent notes furnish no consideration for this promise to repair, even if the authority of the agent in this respect be conceded. The lessees were bound to pay the rent notes anyhow, and the agreement relied on was nudum pactum. Such is the weight of authority. *Gregor v. Cady*, 82 Me. 131, 19 Atl. 108, 17 Am. St. Rep. 466; *Eblin v. Miller*, 78 Ky. 371; *Proctor v. Keith*, 12 B. Mon. (Ky.) 252.

Defendants rely on *Ehinger v. Bahl*, 208 Pa. 250, 57 Atl. 572, and *Beakes v. Holzman*, 47 Misc. Rep. 384, 94 N. Y. Supp. 33, announcing a contrary rule. We think these cases can be distinguished on their facts. If not, we regard the authorities first cited as better reasoned.

[4] Defendants refer us to cases which hold that, when the property leased is condemned by municipal authorities, the cost

of tearing it down or repairing it, as between landlord and tenant, must be borne by the former. We do not think these cases are pertinent. It has been expressly decided in this state that the destruction of leased property by municipal action does not relieve the tenant from the obligations of his lease. *Banks v. White*, 33 Tenn. (1 Sneed) 613. Mere threat of condemnation, therefore, would not affect the contract rights of the parties.

Willcox v. Hines, 100 Tenn. 524, 45 S. W. 781, 68 Am. St. Rep. 761, and *Hines v. Willcox*, 96 Tenn. 148, 33 S. W. 914, 34 L. R. A. 824, 832, 54 Am. St. Rep. 823, are obviously not relevant. These cases relate to defects of which the tenants are ignorant.

The decree of the chancellor must accordingly be reversed, and a decree rendered here for the complainant. If the parties can agree on the amount thereof, such a decree may be prepared and entered. The defendants will pay the costs.

Ex parte COWARD. (No. 3335.)

(Supreme Court of Texas. June 2, 1920.)

1. Injunction \S 231 — Commitment for contempt not disturbed because of irregularity in order, where properly amended.

Though the original verbal order adjudging relator in contempt for violating an injunction directing imprisonment and fine was bad because oral and imposing a penalty in excess of that allowed, yet, where the judge amended his order reducing the fine and jail sentence to authorized limits, the commitment will not be disturbed because of the invalidity of the original order.

2. Injunction \S 148(1) — Statutory requirement of bond applies to divorce suit.

Notwithstanding Rev. St. 1911, arts. 4638, 4639, the statute making the giving of a bond a condition precedent to the issuance of an injunction applies to a divorce suit.

Petition by R. A. Coward for writ of habeas corpus. Writ granted, and relator discharged.

Leonard Brown and W. H. Russell, both of San Antonio, for plaintiff.

PHILLIPS, C. J. The relator as the defendant in a divorce proceeding was temporarily enjoined by the Special District Judge of one of the District Courts of Bexar County from molesting his wife and interfering with her control of certain property. For disobeying the injunction he was by the Special District Judge held in contempt, and by verbal order a fine of \$500.00 assessed against him and a sentence of 60 days in jail imposed. No commitment was issued on this verbal order. The sheriff acted, it appears, wholly upon the mere oral direction of the Judge.

The injunction writ had issued without the giving of any bond by the plaintiff in the suit. Apparently, no bond was required of the plaintiff.

The relator having applied here for a writ of habeas corpus following his being adjudged in contempt, the Special District Judge, before action here on the application and while the District Court was still in session, amended his order in the contempt proceeding, entering a written judgment as of the date of the original order, adjudging the relator in contempt and reducing the penalty imposed to a fine of \$100.00 and 3 days imprisonment in jail; a certified copy of the judgment as amended being duly delivered to the sheriff as a commitment.

[1] The Special District Judge had no authority to assess against the relator for disobedience of the injunction any such fine or impose any such jail sentence, as was originally ordered. Nor did he have any authority to direct the imprisonment of the relator by his verbal order. Since, however, he

amended his judgment or order, reducing the fine and jail sentence to the limits he was authorized under the statute to impose and there was placed in the hands of the sheriff as a commitment a certified copy of the amended order before the writ of habeas corpus was issued by this court, we would not direct the relator's discharge because of the invalidity of these original proceedings.

[2] Under the statute the giving of a bond is made a condition precedent to the issuance of an injunction. This requirement applies to divorce suits brought by the wife, notwithstanding Articles 4638 and 4639. *Wright v. Wright*, 3 Tex. 168. The Judge was therefore without power to grant the injunction without requiring a bond from the plaintiff, and the injunction was accordingly void. *Williams v. Huff*, *Dallam*, 554; *Diehl v. Friester*, 87 Ohio St. 473; *Lawton v. Richardson*, 115 Mich. 12, 72 N. W. 988.

The injunction being void, the contempt orders were equally so.

The relator is discharged.

CITY OF FT. WORTH v. CURETON, Atty. Gen. (No. 3351.)

(Supreme Court of Texas. June 2, 1920.)

1. Municipal corporations \S 958—Amendment to Ft. Worth charter, allowing an additional tax for school purposes, did not decrease general taxing power.

The amendment to the Ft. Worth charter, adopted June 17, 1919, pursuant to Const. art. 11, § 5, as amended, which allowed additional taxes for general school purposes, etc., did not diminish the city's general taxing power fixed by the charter at \$1.75 per \$100, which, however, included the school tax limited to 50 cents per \$100, and, hence, a bond issue cannot be rejected on the ground that the taxing power was so reduced.

2. Municipal corporations \S 918(1) — Under Ft. Worth charter only qualified voters paying property taxes may vote at bond election.

Under the referendum provisions of the Ft. Worth charter, only qualified electors paying property taxes may vote at an election to issue bonds, and the bond issue cannot be attacked on the ground that the electors were restricted to such persons.

Original petition by the City of Ft. Worth for a writ of mandamus against C. M. Cureton, Attorney General. Writ granted.

T. J. Powell, D. W. Odell, and R. M. Rowland, all of Ft. Worth, for plaintiff.

Hon. C. M. Cureton, Atty. Gen., and W. P. Dumas, Asst. Atty. Gen., for defendant.

PHILLIPS, C. J. The Attorney General having refused to approve a bond issue of the City of Fort Worth in the amount of \$1,890,-

000—\$400,000 of the bonds being for water works purposes, the City prays for a mandamus to compel his approval of the issue.

The bonds and the tax necessary to provide for their payment, principal and interest, were duly voted at an election held April 8, 1919, for the purpose. The objections to them made by the Attorney General are based upon his construction of certain provisions in the City's charter. If that construction is erroneous, it is conceded that the bonds should have his approval.

The charter of the City granted by the Legislature in 1909 gave it the power to levy for general purposes a tax not exceeding \$1.75 on the \$100 valuation, "inclusive of the school tax that may be levied by the board of trustees of public schools, as provided in this Act."

By the other provisions of the charter, the board of trustees of the Fort Worth Independent School District, created by the same Act, was authorized to require of the City a tax levy for school purposes of not exceeding 50 cents on the \$100 valuation.

Accordingly, the City's maximum tax rate for all general purposes under the original charter, was \$1.25 on the \$100 valuation.

[1] The charter also authorized a special tax for water works purposes of 25 cents on the \$100 valuation, not to be levied, however, except upon the approval of "the qualified voters" of the City at an election ordered according to the referendum provisions of the charter. Under those provisions governing bond elections, only qualified property tax paying voters are entitled to vote; and in the election held with respect to these bonds, only such voters were allowed to vote.

The charter was amended, June 17, 1919, at an election held under Amended Section 5 of Article 11 of the Constitution, so as to authorize for general school purposes and for medical inspection in the schools an additional tax of 21 cents and 2 cents on the \$100 valuation, respectively. The effect of these two amendments was to enlarge the City's taxing power for all school purposes to the extent of 23 cents, affording it a maximum rate for such purposes of 73 cents on the \$100 valuation.

The principal question in the case is whether the grant by these amendments of the additional taxing power for school purposes of 23 cents on the \$100 valuation, has reduced in the same proportion the City's general taxing power of \$1.25 on the \$100 valuation as originally conferred by the charter. As to the 2 cent tax for medical inspection in the schools, the Attorney General does not contend that the City's general taxing power has been impaired, but we will treat the question as affected by the authorization under the amendments of both the additional 21 cents general school tax and the 2 cent tax.

If notwithstanding these amendments the City still has a general taxing power of \$1.25

on the \$100 valuation, the tax voted as provision for the payment of the \$1,490,000 of the bonds is a valid tax, since, with other taxes required and currently levied for other general charges and indebtedness of the City as shown by the record, it does not exceed that amount.

The proposition advanced by the Attorney General is, that the grant by the charter of a taxing power for general purposes of \$1.75 on the \$100 valuation was to be inclusive of any tax for general school purposes which might be thereafter authorized.

This in our opinion is not the true construction of the charter provision. It is, contrary to its manifest intention, and opposed to its literal language, as well. The charter, as all other laws, looked to the future. Its object was to make definite provision for the general taxation needs of the City, and like provision for the City's schools and water works. Otherwise it would have failed as a charter and been undeserving of the name, in furnishing no dependable measure of vital powers necessary for the City's subsistence. The taxing powers for schools and water works, it defined with exactness. It is not to be supposed that the purpose was to leave the taxing power for general purposes only vague and indeterminate. A chief concern of all city charters is to make, within constitutional limitations, adequate provision for the public needs confided to the care of municipal government. Taxing powers granted, if they are to prove a capable means to that end, must be stable powers. A principal object of such charters is to make them so by defining their limits with precision. A taxing power with its limits made variable by the law conferring it according merely to the possible future authorization of other unascertained and unknown taxes, and therefore without any assurance as to the extent to which it might be exercised for any given period, is but an empty power. Such a power would be vain because altogether unreliable in there being no certainty as to its continued existence, and its being impossible for that reason to make provision for the public necessity in dependence upon it.

This charter should be construed, therefore, if its language reasonably admits of it, as consistent with an intention to fix the measure of the City's taxing power for general purposes as definitely and certainly as that of any other taxing power granted by the charter. To subserve those purposes was as vital to the City as the making of proper provision for its public schools. The public interest centered in them as well as in the schools, and rested no less upon the continuance of the City's power in their regard. Without a proper taxing power exercisable for their account, the City would have been impotent to perform the essential duties of a municipal government. It was important, not only that such a power be conferred, but

that as conferred it subsist not impaired. Full recognition of this ought to be attributed to the makers of the law which comprised the charter. Laws are to be interpreted in the light of the purposes they are intended to accomplish.

The taxing power conferred by the charter for general purposes of \$1.75 on the \$100 valuation was, in the exact language of the provision, to be inclusive of "the school tax that may be levied by the board of trustees of public schools, as provided in this Act." It was not to be inclusive, in addition to the school tax authorized by the Act, of all possible school taxes, then unknown and hence wholly uncertain, which might be authorized by future changes in the Constitution and laws. The only school tax authorized "as provided in the Act" was a maximum tax of 50 cents on the \$100 valuation. The taxing power for general purposes of \$1.75 on the \$100 valuation was therefore to be subject to diminution to the extent of the then authorized 50 cent school tax, but no further. This is plainly the meaning of the charter provision. The construction urged by the Attorney General would leave the City's general taxing power undetermined by definite law, and in the precarious position of being measured wholly by future authorized school taxes. In our view, it is measured by the charter, as it ought to be. Its limits are defined by the declaration that its maximum amount shall be \$1.75 on the \$100 valuation, less the authorized school tax of 50 cents, or, in other words, \$1.25 on the \$100 valuation.

[2] The objection made to the \$400,000 water works bonds is that they, with their necessary special tax, were voted at an election where only qualified property tax paying voters, instead of simply qualified voters, were allowed to participate. We do not regard the objection as tenable. It was necessary that the special tax for these bonds have the approval of the qualified voters of the City at an election ordered according to the referendum provisions of the charter. Under the referendum provision of the charter governing bond elections, as this one was, only qualified voters paying taxes on property in the city may vote in such an election. Necessarily, at a bond election ordered according to that provision, only such voters were entitled to vote.

The mandamus is granted.

PRUETT v. CATTLEMEN'S TRUST CO. et al. (No. 115-2975.)

(Commission of Appeals of Texas, Section B.
June 16, 1920.)

Corporations \S 99(1)—Issuance of stock for note violative of Constitution and statutes.

Where a bank took a note for a subscription to its stock, which it issued in the subscriber's

name, retaining possession until note should be paid, apportioning dividends to subscriber from date of making certificate, recognizing subscriber's proxy as valid, and sending him notices as a stockholder, the transaction was violative of Const. art. 12, § 6, and Rev. St. 1911, art. 1146.

Error to Court of Civil Appeals of Eighth Supreme Judicial District.

Suit by C. E. Pruett against the Cattle-men's Trust Company and another. From judgment for plaintiff, defendants appealed to the Court of Civil Appeals, which reversed and rendered judgment for the named defendant (184 S. W. 716), and plaintiff brings error. Judgment of the Court of Civil Appeals reversed, and judgment of the trial court affirmed on recommendation of the Commission of Appeals.

Lea, McGrady & Thomason, of El Paso, C. C. Belcher, of Del Rio, and C. R. Sutton, of Marfa, for plaintiff in error.

A. H. Kirby, of Abilene, for defendants in error.

SADLER, J. For a full statement showing the questions involved in this case, see the decision of the Court of Civil Appeals. 184 S. W. 716.

In the trial court, Pruett sought a cancellation of the notes in question on two theories: (a) Fraud in the inception of the transaction; and (b) the invalidity of the notes under the provisions of article 1146 of the Revised Statutes, and of article 12, section 6 of the Constitution. On the trial, the issue of fraud and its waiver was submitted to the jury by special issues. The issue as to the validity of the notes under the statute and Constitution was determined by the court. The jury verdict was favorable to the contention of Pruett. The court construed the transaction as being lawful under the statute and Constitution; in other words, that plaintiff could not avail himself of that defense. Judgment was rendered, on the findings of the jury, for the plaintiff, canceling the notes. The defendants appealed, attacking the findings of the jury on the question of fraud and its waiver, and the judgment of the court thereon. Plaintiff filed a cross-assignment to the conclusion of the court in depriving him of his defense, under the view that the notes were given by him and accepted by the Cattle-men's Trust Company, in payment for the stock issued.

On appeal, the Court of Civil Appeals held against the findings of the jury on the question of the waiver of fraud in the inception of the subscription contract, but on the cross-assignment of Pruett denied relief, and reversed and rendered judgment for the defendants in the court below. We think the judgment of the trial court, although pro-

ceeding upon an incorrect theory of the law, correctly determined the rights of the parties and should be affirmed. The Court of Civil Appeals, in discussing this question, says:

"The question presented by appellee in his cross-assignment has recently been very fully considered and passed upon by the Ft. Worth Court of Appeals, and we think correctly so, in the case of the Cattlemen's Trust Company of Ft. Worth v. Turner, 182 S. W. 438, not yet officially published. In that case the facts are the same as in this, and we think we need not restate them here. In that case the court holds that the transaction had between the trust company and Turner does not contravene the provisions in our Constitution and laws."

On writ of error, the judgment of the Court of Civil Appeals for the Second District in *Cattlemen's Trust Co. v. Turner* was reversed, and it was there held that the stock was issued in consideration of the notes, and that the transaction was violative of the Constitution and statutes of this state. *Turner v. Cattlemen's Trust Co.*, 215 S. W. 831, not yet [officially] reported.

We think the decision there decisive of the question involved here, and that the judgment of the Court of Civil Appeals, on the authority of that case, should be reversed, and the judgment of the trial court affirmed, and so recommend.

MONTGOMERY, P. J., did not sit in this case.

PHILLIPS, C. J. We approve the judgment recommended in this case. The question of Pruett's not being entitled to relief against the transaction as prohibited by the Constitution because of his equal participation in it, is not made in this case.

HOUSTON OIL CO. OF TEXAS v. OLIVE STERNENBERG & CO. (No. 169-3178.)

(Commission of Appeals of Texas, Section B. June 9, 1920.)

1. Adverse possession §103—Possession of part of overlap held sufficient to give constructive possession of whole.

Where there was an overlap of 48 acres and a field of 60 or 60 acres, cultivated and occupied by the junior patentee, who resided on the junior patent, occupied about 15 acres of the overlap, the remainder being on the junior patent, such possession of part of the overlap being in good faith, was sufficient to give constructive title to all the overlap, notwithstanding the claim that such possession did not extend beyond actual possession, because merely incidental to possession of the residence of the junior patentee on the junior patent.

2. Adverse possession §106(4)—Possessor, though technically a trespasser at first, may secure title by limitation.

Owner under a grant which conflicted with and extended over on an earlier grant from the state was technically a trespasser, but when he opened a field thereon and continuously cultivated it and used it for the purpose for which it was adapted for the period prescribed by the statute of limitations, he lost the character of trespasser and became owner.

3. Appeal and error §1094(2)—Finding approved by Court of Civil Appeals conclusive on Supreme Court.

On a claim of title by adverse possession, where the facts necessary to constitute limitation were found by the trial court and approved by the Court of Civil Appeals, the Supreme Court was precluded from passing upon the question; it being purely one of fact.

4. Vendor and purchaser §239(6)—Limitation title prevails over paper title secured when land was vacant.

Where a person has in fact held land long enough to give him title by limitation, it is good against a claimant under a paper title, although at the time of the purchase the land is vacant and there is no trace of the prior adverse possession.

5. Adverse possession §103—Owner of subsequent conflicting state grant held to acquire title by limitation as against holders of prior grant not in actual possession.

Where there was a conflict between surveys of two grants by the state and holders of junior grant were in actual possession of the part of the land in conflict, cultivating and using it, claiming to the extent of the boundaries of their recorded deed, and there was not shown any actual possession or use of any part of the prior grant by the owners of that title and the possession by the owners of the subsequent grant was exclusive, open, adverse, and notorious, it matured into a legal title by the limitations statute.

6. Adverse possession §84—Good faith possession vests possessor with title.

Every owner of land is presumed to know its boundaries, take notice when they are invaded, and when such invasion arises by reason of field notes and monument of title, issued to the adverse claimant's grantor and not from the intent of such claimant to acquire lands belonging to another by limitation, 10 years' possession and use vests such claimant with complete legal title.

Error to Court of Civil Appeals of Eighth Supreme Judicial District.

Action by Olive Sternenberg & Co. against the Houston Oil Company of Texas. A judgment for plaintiff was affirmed by the Court of Civil Appeals (200 S. W. 232), and the defendant brings error. Judgment of Court of Civil Appeals affirmed.

H. O. Head, of Sherman, and Kennerly, Williams, Lee & Hill, and Fred L. Williams, all of Houston, for plaintiff in error.

Blount & Strong, of Nacogdoches, for defendant in error.

KITTRELL, J. On December 20, 1847, the state issued patent No. 406 to Lewis Bouillet to 320 acres of land located in Hardin county, being a body of land 1,344 varas square.

At an earlier date—but exactly when the record does not reveal—the state had issued a patent to F. P. Elliott to a league survey lying east of where the Bouillet 320-acre survey was located, and it was evidently intended that the east line of the Bouillet and the west line of the Elliott should be coincident, but the former as located, or at least as patented, lapped over on the Elliott about 600 varas. On December 14, 1859, Bouillet, for a recited consideration of \$1,500, sold the 320 acres to M. Bracken, who at once moved on the same.

It appears that at that time no person knew of any conflict between the Bouillet and the Elliott. J. D. Bracken, son of W. G. Bracken, and grandson of M. Bracken, testified upon the trial that the first time he knew or heard of any Elliott line in conflict with the Bouillet was in 1906. It is shown—or at least suggested—by the testimony that a survey, made by one Doncetti within the comparatively recent past, first revealed the conflict. One Monk appears to have lived on the land before Bracken bought it, and there was testimony that the place appeared to have been cultivated for some years before Bracken moved on it. After a lapse of more than 50 years the memory of witnesses as to lines and locations, and the size of the fields and lots of cleared and used land and the exact location, is very indistinct, but it is evident that Bracken's house was on the Bouillet land proper, while somewhere between 5 and 15 acres was east of the true west line of the Elliott. Defendant in error by regular chain of title owns the Bouillet or Bracken land, while plaintiff in error holds the Elliott by regular chain of title. The map which was part of the statement of facts makes clear the relative location of the Bouillet and Elliott surveys, as it does also the description of the land claimed by plaintiff in the action.

M. Bracken died in March, 1872, leaving surviving him his widow, Mary L. Bracken, and one child, a son, W. G. Bracken, and on April 24, 1872, Mrs. Bracken made to her said son a deed to the south half of the Joseph Landis survey lying west of, and adjoining, the Bouillet, and also to that part of the Bouillet described as follows:

"All that part * * * which lies south of Beaumont creek and the branch thereof in front and south of the homestead place of the late Mathias Bracken, deceased, the quantity of land south of said branch and creek being as yet unascertained."

On the same day the son executed to his mother a deed to the north half of the Landis—to the south half of which she had executed to him a deed, as above stated—

and also conveyed by the same deed a part of the Bouillet described as follows:

"Beginning at the northwest corner of the Bouillet; thence south along the west line of the same and the east line of the Landis, to the branch south of the homestead place of Mathias Bracken, deceased; thence down said branch to Beaumont creek, and down Beaumont-creek to the east line of said Bouillet survey; thence north to the northeast corner of the said Bouillet survey; thence west to the beginning, the quantity of land not being exactly known."

Although upon the trial there was a surveyor on the stand, it was not shown how far it is from the junction of the branch and creek to the east line of the Bouillet, nor how far the creek is from the south line, nor what the area of land is between the branch and creek, nor what the area between the creek and the south line is, and even plaintiff in the court below (defendant in error here) does not allege the area, the description in the petition being substantially as follows:

"Beginning at the southwest corner of the Bouillet, at 703 varas cross the supposed west line of the Elliott league, at 1,344 varas corner, being the southeast corner of said Bouillet survey; thence north with the east line of said Bouillet survey to Beaumont creek and corner; thence up said creek to mouth of branch which runs south of the old Bracken homestead place, and corner; thence up said branch crossing Elliott west line to the west line of said Bouillet survey and corner; thence south with the west line of said Bouillet survey which is also the east line of said Landis survey, to the place of beginning."

The defendant, plaintiff in error here, disclaimed as to all the land sued for except that part which is in conflict with the Elliott and Hampton leagues. None of it appears to have been in conflict with the latter league. It pleads also that if any adverse possession was held by plaintiff as alleged, it was ineffective by reason of limitation and pleaded the 3, 5, and 10 year statute of limitation, but as to that defense concededly failed to make necessary proof. The record reveals no evidence of actual possession of any part of its Elliott by defendant below.

Defendant recalled J. D. Bracken, son of W. G. Bracken, and proved by him that in 1878 his father conveyed to him and his sister each a tract of land out of the east end of the Bouillet, beginning at the southeast corner, running north for the tract conveyed to the witness, and basing that conveyed to his sister on the north end of the tract conveyed to witness, and the witness testified that there were no improvements on either tract at that time. It was in evidence also that the fences had disappeared, but the old rows and furrows could be seen in the fields east and south of the house.

It may serve a useful purpose to say in this connection that the field notes in the deed just above referred to as having been made in 1878 by W. G. Bracken to his son, J. D. Bracken, were as follows:

"Beginning at the southeast corner of said Bouillet survey; thence west along the south boundaries of said survey 225 varas; thence north 600 varas; thence east 225 varas; thence south 600 varas to the beginning."

Within those limits are included practically 24 acres. It evidently includes a body of land 225 varas wide and 600 varas long, the southeast corner of which is the southeast corner of the Bouillet survey and its east boundary is the east boundary of the Bouillet. All the interests of the heirs of W. G. Bracken, grandchildren of Mathias Bracken, are owned by defendant in error, and when the action out of which this appeal arose was brought in January, 1914, the deed above recited to J. D. Bracken from his father had been executed nearly 36 years.

The field notes of the deed made on the same day by W. G. Bracken to his daughter, Mrs. Herrington, were evidently incorrectly copied into the statement of facts, in that one or more calls are missing. It was evidently intended to put that survey, so to speak, on the top of the survey deeded to J. D. Bracken, as in the statement of facts it appears that both the deeds were offered at the same time, and it was stated by counsel that they conveyed two tracts 225 by 600 varas, the east boundary of both being the east boundary of the Bouillet survey. Notwithstanding the incorrect copying of the field notes of the second deed, it is made evident that the two deeds contain a body of land 1,200 varas north and south by 225 varas east and west, or about 48 acres, all of which is in that part of the Bouillet survey which overlaps and conflicts with the Elliott.

From the deed made to W. G. Bracken by his mother and the deed made by her to him it is evident that it is the land she conveyed to him out of the Bouillet that is sued for, and it is through his heirs, the grandchildren of Mathias Bracken, that defendant in error claims title.

The case was tried without a jury, and the court found that M. Bracken went into possession of the Bouillet about January 1, 1860, and immediately commenced the cultivation of the field on said survey, consisting of 50 or 60 acres, and that within said field was about 15 acres of land on the conflict between the Bouillet and the Elliott surveys, and that said field was continuously held and possessed and cultivated from January, 1860, until some time in 1872, when Mathias Bracken died, and that his widow continued to cultivate, possess, and enjoy the 15 acres until 1884.

He found also that when Mrs. Bracken, now Mrs. Patterson, made the deed above re-

cited to W. G. Bracken, her son, he immediately went into possession of the land conveyed. He also found that prior to the death of M. Bracken he had cleared a field south of the branch which is the present dividing line between the plaintiff and M. L. Patterson (formerly Bracken), and that said field had been continuously cultivated from said time during the war up to the death of M. Bracken, and that immediately after the death of M. Bracken, W. G. Bracken, his son, went into possession of said field south of the branch and east of the Elliott west line, and continued to use, cultivate, possess, and enjoy the land situated on said conflict until 1879. These findings are amply supported by the evidence.

The court's conclusion of law was that M. Bracken had matured title under the 3-year statute of limitation to all of the Bouillet survey, and that W. G. Bracken had matured title to the part south of the branch under the 10-year statute of limitation. The judgment of the district court was affirmed by the Court of Civil Appeals.

Opinion.

Plaintiff in error bases its whole case on the following assignment of error:

"The court erred in not rendering judgment for the defendant as the owner of the record title to the senior survey, because, as shown by the undisputed evidence and findings of fact, the possession of the owners of the Bouillet survey of that part of same in conflict with the Elliott league consisted entirely of the possession, cultivation, and use of a field which lay partly on the Elliott and partly off of same, and was adjoining and was incidental to the residence, houses, and all other improvements which were situated entirely without the Elliott league, and such possession as was held on the Elliott league was merely subsidiary, and incidental to, and therefore referable to, the home and place of residence, and was therefore insufficiently distinct to afford a basis for the acquisition under the statute of limitations of more of the adjoining survey than was actually so possessed and used throughout the statutory period."

The authorities cited in support of the above contention are the following: *Hill v. Harris*, 26 Tex. Civ. App. 408, 64 S. W. 820; *Holland v. Nance*, 102 Tex. 177, 114 S. W. 346; *Bailey v. Kirby* (Civ. App.) 195 S. W. 221.

The holding in the first case cited was, under the facts manifestly correct, and the Supreme Court by refusing writ of error so adjudged, but it is not controlling, and is indeed but to a small, if to any, extent applicable to the case in hand.

In *Holland v. Nance* the appellee got his fence by accident of error a few feet over on the adjoining survey, and when he discovered that fact, he got a deed (from some party who had no title) to a large part of the adjoining survey, and recorded that deed

and paid taxes according to its boundaries for 5 years, but never moved his fence or gave any other notice of his intention to claim title to any part of the adjoining survey. The writer of this opinion was judge of the district court in which the case was tried, and he held that Nance did not acquire title by his deed and payment of taxes, which conclusion, though disapproved by the Court of Civil Appeals, was later upheld by the Supreme Court.

In *Bailey v. Kirby*, *Bailey* (to use the language of counsel for appellee, which is quoted by the Court of Civil Appeals) "purposely straddled the line between the Irion (for part of which survey he sued) and the Thompson, subjecting an insignificant portion of the Irion to a purely incidental use under such circumstances as to avoid the appearance of an adverse claim upon his part to the entire Irion survey." The court correctly held that *Bailey* could not by such method and in such way perfect title to 160 acres of the Irion by limitation.

The case of *Fliedler v. Houston Oil Co.* (plaintiff in error in this action), 208 S. W. 158, is not cited by counsel, but it is a case most apposite to the instant case. In a very clear and able opinion by Justice Montgomery he held in that case that the actual possession of a few acres of a tract of land by inclosure with other land owned by the claimant is insufficient to put the owner (of the other land) upon notice that any claim of adverse possession is asserted beyond that actually fenced. Such holding is in strict accordance with that in *Bracken v. Jones*, 63 Tex. 184, a case which has been consistently adhered to, because it is in harmony both with sound law and sound morals.

[1] To our minds there is an obvious distinction between all the cases cited and the instant case. The Brackens never consciously put any improvements on any land which they did not believe belonged to them, because it was included, as they believed, in the boundaries by which they bought from the original grantee of the land. It was described by metes and bounds in the patent, and by said metes and bounds was conveyed by onerous title to Mathias Bracken, who did not know that it in any extent conflicted with the Elliott.

He evidently was not seeking, as was the claimant in most, if not all of the cases cited above, by devious and insidious methods to acquire by limitation land that he knew was not included in the boundaries of that which he had bought.

It is true his land overlapped on the Elliott, and that while his house was on the Bouillet west of the conflict, 15 acres of his field was east of the conflict, yet he knew of no conflict but supposed his field was in fact on the Bouillet survey (which was the case), and, so believing, cleared it, cultivated it,

and exercised dominion over it. His possession was open and notorious, and was hostile, because the patent under which he claimed and his deed were of record, and he built and improved within the boundaries by which he had bought.

[2] He was of course as to the land lying beyond the line which conflicted with the Elliott, technically a trespasser; but when he opened a field thereon and continuously cultivated it and used it for such purposes as it was adapted to, for the period prescribed by the statute, he lost the character of a trespasser and became the owner. *Charles v. Saffold*, 13 Tex. 111; *Craig v. Cartwright*, 65 Tex. 422.

[3] While the testimony of J. D. Bracken concerning the conveyances made to him and his sister in 1878 and the field notes of the deeds as revealed in the record was persuasive testimony against the claim of improvements and use, as alleged by plaintiffs, yet it is not conclusive, and the facts necessary to constitute limitation having been found by the trial court, and that finding having been approved by the Court of Civil Appeals, we are precluded from passing on the question, as it is purely one of fact.

[4] Furthermore, such a situation is controlled by the holding that where a person has in fact held land long enough to give him title by limitation, it is good against a claimant under a paper title, although at the time of the purchase the land is vacant and there is no trace of the prior adverse possession. *McGregor v. Thompson*, 7 Tex. Civ. App. 32, 26 S. W. 649.

[5] Regardless of the question of conflict between the two surveys, the Brackens, under and through whom defendant in error claims, were in actual possession of parts of the land in conflict, cultivating, using it, and claiming to the extent of the boundaries of their recorded deed, and there not being shown any actual possession or use of any part of the Elliott by the owners of that title, the Bracken possession was exclusive, and was open, adverse, and notorious, and by lapse of time matured into a legal title.

We are of opinion that the case in hand is not within the rule as laid down in the cases cited, and in other cases decided by this court.

If the east line of the Bouillet and the west line of the Elliott had been in fact coincident and there had been in consequence no conflict, and Bracken had then built his house on the Bouillet, but had extended his field a few acres over on the Elliott, a different case would be presented; but so far as he was concerned he manifestly had no intention of putting his improvements anywhere except within the boundaries by which he had bought, and he was only claiming title to land which he was justified by the state's patent in believing belonged to him.

[6] Every owner of land is presumed to know its boundaries and to take notice when they are invaded, and when that invasion arises not from the purpose of the adverse party to prostitute the law of limitation to the unworthy end of securing title to his neighbor's land, but arises by reason of depending on the field notes in the muniment of title issued to his grantor, 10-year possession, and use, vests the party so possessing and using with complete legal title. Authorities *supra*.

We are of opinion that defendant in error has under the law when applied to the facts the complete legal title, and the Court of Civil Appeals rightly so adjudged, and we therefore recommend that its judgment be affirmed.

PHILLIPS, C. J. We approve the judgment recommended in this case.

HOUSTON OIL CO. OF TEXAS v. PATTERSON. (No. 170-3177.)

(Commission of Appeals of Texas, Section B. June 9, 1920.)

Error to Court of Civil Appeals of Ninth Supreme Judicial District.

Suit by M. L. Patterson against the Houston Oil Company of Texas. A judgment for plaintiff was affirmed by the Court of Civil Appeals (199 S. W. 1140), and the defendant brings error. Judgment of Court of Civil Appeals affirmed.

H. O. Head, of Sherman, and Kennerly, Williams, Lee & Hill and Fred L. Williams, all of Houston, for plaintiff in error.

D. F. Singleton, of Kountze, for defendant in error.

KITTRELL, J. This is a companion case to that of the same plaintiff in error against Olive Sternberg & Co., defendant in error, 222 S. W. 534, No. 169. It involves the question of the title to the land in the upper part of the area in conflict between the L. Bouillet 320-acre survey and the F. F. Elliott, a senior league survey, while the case of Houston Oil Co. v. Olive Sternberg & Co., involved the title to land in the lower, or southeastern part of the Bouillet.

The same counsel represent the respective parties, and, except the title and style of the cases, the briefs are the same, and both cases were appealed upon the same Statement of Facts.

The opinion in the first-named case (No. 169) is treated as applicable in every respect to this case. Therefore we recommend that the judgment of the Court of Civil Appeals in this case be affirmed.

PHILLIPS, C. J. We approve the judgment recommended in this case.

HARBIN INDEPENDENT SCHOOL DIST. et al. v. DENMAN. (No. 168-3173.)

(Commission of Appeals of Texas, Section B. June 2, 1920.)

1. Schools and school districts \S 24(2)—Enjoining assessment of taxes held collateral attack on corporate existence of district.

A suit to enjoin assessment of taxes on plaintiff's land by defendant school district, on the ground that the land was in another district and that the incorporation of the former district was void, in that it encroached on the latter district when it included plaintiff's land, was collateral attack upon the corporate existence of the defendant district, and not maintainable by an individual.

2. Schools and school districts \S 32—Boundaries may not be changed indirectly by injunction after issuance of bonds.

The boundaries of a school district may not be changed, so as to reduce the taxable value of the property included in it after the district has issued bonds which are outstanding obligations, under Acts 29th Leg. (1905) c. 124, \S 50, as amended by Acts 31st Leg. (1909) c. 12, by appeal to the injunctive power of the court, since the court cannot do indirectly what cannot be done directly by the commissioners' court.

Error to Court of Civil Appeals of Eighth Supreme Judicial District.

Suit by B. V. Denman against the Harbin Independent School District and others. The Court of Civil Appeals (200 S. W. 176) affirmed a decree for plaintiff, and defendants bring error. Reversed and rendered.

Chandler & Pannill, of Stephenville, for plaintiffs in error.

Hickman & Bateman, of Stephenville, for defendant in error.

Statement of the Case.

KITTRELL, J. On June 2, 1888, an election was held in Cottonwood, Erath county, for the purpose of determining whether or not said village should be incorporated for school purposes only. The election resulted in favor of incorporation, and the result was duly recorded in the records of the commissioners' court on June 20, 1888, together with the lines and boundaries of the district. No map of the district was ever filed in connection with the field notes, and it is clearly inferable that none was ever made.

On July 9, 1888, five trustees were elected for said district and the report of the election duly recorded. The land of defendant in error was included in the boundaries of said district. In December, 1898, the commissioners' court directed the county surveyor to subdivide the county into convenient school districts, which was done, and the boundaries of Cottonwood district were set

forth in the surveyor's report, as were also those of the Harbin school district.

In February, 1904, petition was filed in statutory form for an election to determine whether the inhabitants of the Cottonwood district should levy a tax of 20 cents on the \$100 for the purpose of supplementing the state and county school funds. The election was held, the tax voted, and the result duly recorded. At a time not shown by any date, the line between the Cottonwood district and the Harbin district was changed, so as to transfer the property of two citizens from the Harbin to the Cottonwood district.

On December 2, 1911, by due statutory process, the Harbin district was duly incorporated by a vote of 40 to 2 for school purposes only. The metes and bounds of the district are set forth in the order reciting the result of the election, which order was duly recorded, and the boundaries include the land of the defendant in error. On December 11, 1911, the lands of three citizens were in accordance with the statute transferred from the Harbin district to the Oak Grove district, and the boundaries of the Harbin district were changed to conform to the conditions created by such transfer.

So far as a very meager statement of facts reveals, the Cottonwood school district was conducted in a changing and intermittent way, sometimes as an independent district, and sometimes as a common school district, apparently for the greater part of the time in the latter way. A witness who lived for several years in the district testified that—

"The teachers were paid by vouchers to county judge or county superintendent, just like a common school district, and it didn't claim to be an independent district, and didn't operate as such."

The Cottonwood district never issued any bonds, and never succeeded in obtaining recognition by the Attorney General as an independent district. The Harbin district issued bonds, which were approved by the law department of the state government, and the proceeds were used for the purpose of erecting a schoolhouse, and the bonds are still outstanding, and a sinking fund is provided for their redemption at maturity.

Defendant in error brought his action March 6, 1916, to enjoin the collection of the tax of 50 cents on the \$100 levied by the Harbin district, on the ground that the Cottonwood independent district had never been dissolved or abolished, and is yet an existing district, and that as affects his lands the Harbin district had no legal existence. He alleged, further, that the Harbin district includes his lands, and taxes have been and will be in future assessed and collected upon their value. The county tax assessor and county tax collector and the members of the board of trustees of the Harbin district were

joined as defendants, and prayer was made for injunction against them from the assessment or collection of taxes by the Harbin district against his land. The district court granted the prayer of the defendant in error, and the Court of Civil Appeals of the Eighth District affirmed that judgment.

Opinion.

Plaintiffs in error by proper assignments present the question of nonuser on the part of the Cottonwood district, and of the vagueness, indefiniteness, and insufficiency of the boundaries of that district; but the view we take of the preliminary, and as we conceive the controlling, question in the case, makes discussion of these assignments unnecessary. As we understand the record, it is not alleged that the proceedings whereby the Harbin independent district was incorporated were not in all things regular, or that it is not duly performing all the purposes of its incorporation, or that it has not received recognition at the hands of the law department of the state, or that it has not issued and sold bonds which are yet outstanding; but the only ground alleged as basis for injunctive relief is that its organization is not valid, in that it encroaches on the territory already included in another district, viz. Cottonwood district, and includes the land of defendant in error.

[1] Conceding all the defendant in error alleges as matters of fact to be true, and that there were irregularities or even illegalities in the incorporation of the Harbin district, which in a direct proceeding might be sufficient to invalidate its corporate existence, and that it is assuming authority and exercising powers with which it has not been legally vested, these are matters which can only be inquired into and determined in a suit brought for that purpose in the name of the state, or by some individual under its authority, who has a special interest which is affected by the existence of the corporation. It cannot be done by an individual suing to enjoin the collection of a tax levied by the authorities of the district. It was so held in *Graham v. Greenville*, 67 Tex. 62, 2 S. W. 742, and that holding has been consistently adhered to.

That case is cited as authority in the case of *City of El Paso v. Ruckman*, 92 Tex. 86, 46 S. W. 25. In the last-named case the city sued Mrs. Ruckman for taxes. She resisted on the ground that the city did not have valid control of its public schools. Her contention was sustained by the trial court, and the Court of Civil Appeals of the Fourth District certified the case to the Supreme Court. It was conceded that neither of two elections held with reference to the city taking control of its public schools was regular, or sufficient to constitute the city a school district, and it was so certified, and the Su-

preme Court was asked to answer whether, in view of that fact, taken in connection with the long-continued exercise of the powers of a school district, its legal existence could be inquired into in a suit by the city to recover taxes levied for the years 1894-1895. The Supreme Court answered the question in the negative. It said:

"When the creation of a public corporation, municipal or quasi municipal, is authorized by statute, and a corporation has been organized under color of such authority, its corporate existence cannot be inquired into * * * in a collateral proceeding."

That holding has never been departed from; on the contrary, has been followed at as late a date as the time of the decision of the case of *Crabb v. Celeste School District*, 105 Tex. 194, 146 S. W. 528, 39 L. R. A. (N. S.) 601, Ann. Cas. 1915B, 1148. In the *Ruckman Case* the city sued to recover taxes. In the instant case the plaintiff (defendant in error) sued to enjoin the levy and collection of the tax. Had he been sued as was the defendant in the *Ruckman Case*, and had set up as a defense the same contention he presented affirmatively in the trial court, his answer would have been subject to demurrer, on the ground that it involved a collateral attack on the validity of the corporation.

We are not able to perceive any distinction in principle between the two situations, because in one he would have been defendant, and in the other he is plaintiff. In either attitude his attack on the corporation would be distinctly collateral. No complaint was made by plaintiff in the court below, nor is any made here, that there has been any such action taken by the commissioners' court as would have justified the exercise of the supervisory power of the district court which was invoked in the cases of *McLaughlin v. Smith*, 105 Tex. 330, 148 S. W. 238, *Dubose v. Woods* (Civ. App.) 162 S. W. 3, and *Williams v. Woods* (Civ. App.) 162 S. W. 1031. The sole ground on which he bases his prayer for injunctive relief is that the Harbin school district has no legal existence; hence has no right to exercise the sovereign power of taxation.

It certainly exists de facto, and has secured recognition at the hands of the state, which the Cottonwood district has never received, and it is performing all its functions as a body corporate, and its right so to do cannot be called in question in the manner attempted by plaintiff in the court below. The duty does not devolve upon us to discuss the reasons for the holding so long prevailing. They are based on sound principle, and supported by high and long-recognized authority. The late Chief Justice Willie said:

"If a municipality has been illegally constituted, the state alone can take advantage of the fact." *Graham v. Greenville*, supra.

Mr. Cooley says:

"When the question arises collaterally, the courts will not permit its corporate character to be questioned if it appears to be acting under the color of law, and recognized by the state as such" (a corporation).

In the *Ruckman Case*, Chief Justice Gaines said:

"The election was irregular, and for that reason might have been set aside in a proper proceeding instituted for that purpose. But, having been acquiesced in by the state and all parties in interest, * * * it [the city] was an effective and legal control."

The fact has not been lost sight of that the facts in the cases cited were not identical with those in the case before us, nor were the grounds of defense the same; but, regardless of such differences, the fact remains that a corporation, organized pursuant to the forms of law, and the legal existence of which has been recognized by the superior sovereign, the state, and which is performing all the functions for which it was organized, is attacked, and its right to exist called in question in a collateral way, which cannot be done whatever may be the grounds upon which the attack is based.

Applying the established rules of law to the instant case, we find that defendant in error had lived for about 16 years where he was living at the time he brought his action. The Harbin independent school district was organized in 1911. So far as the record reveals, he made no protest nor offered any objection to the incorporation of his property within its territory, nor did he invoke the process of the law to prevent such action.

He alleges no inconvenience as regards access to the schools; nor does he impute any improper purpose or action to the commissioners' court. He waited until the district had been organized five years, and until four years after it had issued bonds, before he took any action by which the legal existence of the district could be tested, and then chose a method which was ineffective and unavailable.

[2] If the plaintiff below could succeed in achieving his purpose, he would, by changing the boundaries of the district, reduce the taxable value of the property included in it, after the district has issued bonds which are outstanding obligations. Such change is expressly forbidden by section 50, c. 124, Acts 29th Leg., as amended by chapter 12 of the act of February 18, 1909, and that cannot be done indirectly, by appeal to the injunctive power of the district court, which cannot be done directly by the commissioners' court.

It follows from what we have said that the district court erred in granting defendant in error's prayer for injunction. We recommend that the judgments of the district

court and of the Court of Civil Appeals be reversed, and judgment be here rendered for plaintiffs in error.

PHILLIPS, C. J. We approve the judgment recommended in this case.

TEXAS CITY TRANSP. CO. v. WINTERS.
(No. 145-3083.)

(Commission of Appeals of Texas, Section B.
June 9, 1920.)

1. Appeal and error \S 1082(1)—Assignments not presenting questions of substantive law not within jurisdiction of Supreme Court.

Assignments of error, not presenting questions of substantive law, are not within the jurisdiction of the Supreme Court, on writ of error to Court of Civil Appeals.

2. Master and servant \S 103(2)—Injuries to servant charged with duty of making working place safe not actionable.

If under the terms of the employment the employé was charged with the duty of seeing that the walls of an excavation are safe for himself and those working under him, recovery cannot be had by him for injuries based on his dereliction in performance of that duty.

3. Trial \S 350(2)—Rule with respect to submission of special "issues of fact" stated.

Every issue of fact presented by the pleadings and supported by evidence must be submitted to the jury, where requested by either party; "issues of fact" meaning, not the various controverted specific facts which may enter into the main issues of fact, but only the independent ultimate facts which go to make up plaintiff's cause of action and defendant's ground of defense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Issue of Fact.]

4. Appeal and error \S 974(1) — Trial \S 352(1)—Mode of presentation of ultimate issues of fact to jury will not be reviewed.

If ultimate issues of fact are fairly presented to the jury, the mode of presenting them by the trial court is discretionary and will not be reviewed.

5. Appeal and error \S 218(2) — When too great generalization in submission of special issues will not be reviewed stated.

Too great a generalization by the trial court in submitting ultimate issues of fact to the jury will not be reviewed, even upon timely objection, in the absence of correct special issues tendered by the objecting party, unless there is affirmative error in the issues submitted by the court.

6. Trial \S 350(6)—Special issue as to duty of placing material for curbing walls in excavation held improperly refused.

In an employé's action for injuries sustained by the caving in of a side of an excavation,

a special issue as to whether the duty rested on the master to place in the excavation material for curbing the wall, and, if so, whether the master failed in that duty, and, if so, whether employé in the exercise of ordinary care could have obtained the material, was improperly refused, where sustained by evidence.

7. Trial \S 350(6)—Special issue as to whether failure to warn was proximate cause of injury held improperly refused.

In employé's action for personal injuries sustained by caving in of wall of excavation, a special issue as to whether the failure of the master's engineer to warn plaintiff of the dangerous condition of the wall was the proximate cause of the injury held improperly refused, where sustained by evidence.

8. Appeal and error \S 1062(2)—Refusal of special issue as to safe place to work held harmless error.

In employé's action for personal injuries sustained by the caving in of a wall of an excavation, refusal of a special issue as to whether duty of placing in the excavation material for curbing the wall rested on defendant, and whether he failed therein, and whether the employé by his exercise of ordinary care could have obtained material, held harmless error.

9. Appeal and error \S 1062(2)—Refusal of special issue as to failure to warn as proximate cause held harmless error.

In employé's action for personal injury sustained by the caving in of a wall of excavation, refusal of a special issue as to whether the failure of defendant's engineer to warn plaintiff of dangerous conditions was the proximate cause of the injury held harmless error.

10. Master and servant \S 286(3)—Evidence held to raise issue as to employé's duty to make place of work safe.

In a foreman's action for injury by caving in of a wall in an excavation, evidence held to raise the issue as to whether the duty to see to the safety of the wall rested on plaintiff.

Error to Court of Civil Appeals of First Supreme Judicial District.

Action by C. E. Winters against the Texas City Transportation Company. Judgment for plaintiff was affirmed (193 S. W. 366), and defendant brings error. Reversed and remanded, as recommended by the Commission of Appeals.

W. T. Armstrong, of Galveston, and Eugene A. Wilson, of Brownwood, for plaintiff in error.

Frank S. Anderson and Aubrey Fuller, both of Galveston, for defendant in error.

McCLENDON, J. C. E. Winters, the plaintiff, while in the employ of the Texas City Transportation Company, the defendant, as a carpenter foreman, superintending at the time the construction of concrete forms in an excavation at Texas City, received personal

injuries, caused by a caving in of a portion of one of the sides of the excavation. Plaintiff brought this suit against defendant to recover compensatory damages for said injuries. The Court of Civil Appeals affirmed a judgment of the trial court in favor of plaintiff, rendered upon a verdict, upon special issues. 193 S. W. 366.

[1] Defendant presents in this court seven assignments of error. The last two of these relate to the action of the trial court in refusing to strike out certain testimony as hearsay, and the refusal to permit defendant to introduce certain portions of plaintiff's pleadings. These assignments do not present questions of substantive law, and are not, therefore, within the jurisdiction of the Supreme Court.

The other five assignments, eliminating duplication, relate to the refusal of three special issues requested by defendant and objection to the first special issue submitted to the jury, which special issues were in substance:

(1) Defendant's refused special issue No. 14, calling for a finding whether the duty to see to the safety of the walls of the excavation rested upon the plaintiff.

(2) Defendant's refused special issue No. 16, calling for a finding whether the duty rested upon defendant to place in the excavation material for curbing the walls; and, if so, whether defendant failed in that duty; and, if so, whether plaintiff by the exercise of ordinary care could have obtained the material.

(3) Defendant's refused special issue No. 18, calling for a finding whether the failure of C. A. Stevens, defendant's engineer, to warn plaintiff of the dangerous condition of the walls was the proximate cause of plaintiff's injury, in the event the jury should find that Stevens knew of such dangerous condition.

(4) The trial court's special issue No. 1 submitted to the jury reading: "Did the defendant exercise reasonable care to furnish plaintiff a safe place to work?"

The Court of Civil Appeals held that defendant's special issues Nos. 14 and 16 were properly refused, because there was no evidence of probative force to support them. With regard to defendant's special issue numbered 18 above, the court held that they were unable to determine whether the requested issue related to contributory negligence of plaintiff or to the proximate cause of his injuries, but that in either event no error was presented, because the case was within the Employers' Liability Act, which abolished the fellow servant defense, and because the court in issue No. 9 properly submitted the issue of proximate cause.

The objection urged to special issue No. 1 was that the whole matter of negligence was condensed into one issue, whereas a number of issues were tendered by the pleadings. This contention was overruled, upon the ground that the only issue presented by the

pleadings and supported by the evidence was whether defendant had negligently failed to furnish plaintiff a safe place to work, and that all other issues were incidental thereto and evidentiary. It will thus be seen that the questions here presented are more or less interrelated, and in order to determine the correctness of the holdings of the Court of Civil Appeals a clear understanding of the issues presented by the pleadings is essential.

[2] It may be stated at the outset that, although the general duty of furnishing plaintiff a safe place in which to work rested upon the defendant, yet if, under the terms of plaintiff's employment as a carpenter foreman, he was charged with the duty of seeing that the walls of the excavation were safe for himself and those working under him, recovery cannot be had by him, based upon his own dereliction in the performance of that duty. The pleadings of both parties are very fully set out in the opinion of the Court of Civil Appeals. A careful analysis of them leads to the conclusion that the following issues were clearly presented thereby: First, whether the duty to see to the safety of the walls of the excavation rested upon plaintiff; second, whether defendant negligently failed to furnish plaintiff a safe place to work; third, whether the duty rested upon defendant to furnish plaintiff with material to brace the walls, and it failed in that duty; and, fourth, whether defendant's engineer in charge knew of the dangerous condition of the wall and failed to warn plaintiff thereof. The last three of these issues are raised by plaintiff's pleadings in alleging primary negligence on defendant's part; the first issue is raised by defendant's answer.

[3-5] Considering first special issue No. 1, it is quite evident to our mind that the objection thereto is not well taken. The general rule laid down by the authorities with respect to the submission of special issues is that every issue of fact presented by the pleadings and supported by evidence must be submitted to the jury, where requested by either party. So far the law is mandatory. The particular manner in which the issues are presented is largely discretionary with the trial court. By the expression "issues of fact" is not meant the various controverted specific facts, which may enter into the main issues of fact, but only the independent ultimate facts which go to make up plaintiff's cause of action and defendant's ground of defense. If such ultimate issues of fact are fairly presented, the mode of presenting them by the trial court will not be reviewed. Nor will too great a generalization by the trial court be reviewed, even upon timely objection, in the absence of correct special issues tendered by the objecting party, unless there is affirmative error in the issue submitted by the court. This

subject is very ably and exhaustively treated by the Supreme Court of Wisconsin in *Baxter v. Railway*, 104 Wis. 307, 80 N. W. 644.

[6, 7] The question of defendant's negligent failure to furnish a safe place to work in our opinion presented a single issue of fact, independent of any of the other three issues embraced in the pleadings. It is true that the duty to warn is sometimes treated under the general duty of the master to furnish his servants a safe place to work; but, when so treated, it does not arise, except in those cases where from its very nature the making of the place safe is rendered impossible, or, as a secondary duty, where the master has failed in the primary duty to furnish a safe place to work. The duty to warn, as presented by the pleadings here, arises independently of the general duty to furnish a safe place to work, under the allegation that defendant's engineer had actual knowledge of the danger. The theory presented is that, even though plaintiff rested under the duty to see that the walls were safe, yet the actual knowledge of the engineer that a particular danger existed, and that plaintiff was subjecting himself thereto, imposed a new duty to warn plaintiff of that danger.

The same reasoning applies to the issue of furnishing plaintiff with material to brace the wall. The duty to furnish material necessarily presupposes a duty in plaintiff to use the material for making the wall safe, and could not arise if the duty to make the wall safe was upon defendant. It follows from what we have said that each of the three refused special issues should have been given, if there was evidence to support them.

[8, 9] With regard to the sixteenth and thirteenth special issues, however, we have concluded that, although supported by evidence, their refusal upon the request of defendant was harmless. These issues were tendered by plaintiff's pleadings, and presented grounds of recovery based upon acts of primary negligence on defendant's part. They in no way related to any matter of defense to the action as submitted to the jury. The only ground of recovery which the trial court submitted was embraced in special issue No. 1: Whether defendant negligently failed to furnish plaintiff a safe place to work. If that issue had been answered favorably to defendant, it would have been the duty of the trial court to render judgment for the defendant. The power of the trial court to substitute its findings, where none have been made by the jury does not admit of a finding by the court upon an independent ground of recovery which the party alleging it does not urge. In such case, the issues submitted will be treated as embracing the only grounds upon which recovery can be had; and the failure of plaintiff to tender

an issue not submitted by the court will be treated as a waiver or abandonment thereof.

[10] Upon the issue of whether the duty rested upon plaintiff to see that the place was safe, E. B. Rhodes, who was defendant's superintendent, gave the following testimony:

"Mr. Winters was foreman of the carpenter work in the excavation in which he received his injury on the 8th day of January, 1915. By reason of my experience and knowledge gained as superintendent of the two concerns, I know the duties and responsibilities resting upon a foreman of the character that Mr. Winters was at that time. In the work that Mr. Winters engaged in, in that excavation, on the 8th of January, it was his duty to look after the question of the safety, and so on, of the walls of that excavation. That is what he was there for."

Upon cross-examination, this witness testified that Winters was employed by and received his instructions from Mr. Stevens, the engineer of the company, who had since died, and that he knew the duties imposed upon Mr. Winters by Mr. Stevens. In addition to this, several witnesses testified that bracing had been placed in a portion of the ditch by or under the direction and supervision of the plaintiff. We think the probative force of this testimony was such as to raise the issue under consideration, and that the trial court committed error in refusing it.

We conclude that the judgments of the Court of Civil Appeals and District Court should be reversed, and the cause remanded to the latter for a new trial.

PHILLIPS, C. J. We approve the judgment recommended in this case and the holding of the Commission with respect to the refusal of special issue No. 14.

VARN v. GONZALES. (No. 152-3114.)

(Commission of Appeals of Texas, Section B.
June 16, 1920.)

1. Vendor and purchaser \S 214(1)—Assignment of option contract held fraudulently induced by secret agreement.

There can be no recovery on notes given for assignment of option contract to convey land in Mexico, where valuable timber on land not on tract was represented to be on land sold, and there was a failure to point out when land was inspected that great areas of the land were gorges and canyons, and two of the makers of the notes coming from the states were represented by Mexican interpreters, who became their agents and partners, and they entered into a secret understanding with assignor that the amount they became liable for as parties to the contract need not be paid, as in such case contract is absolutely void.

2. Vendor and purchaser ⇨214(1)—Fraudulent assignment of option contract not subject to ratification.

An assignment of an option contract to purchase land, having its inception in fraud, is not subject to ratification.

3. Vendor and purchaser ⇨214(1)—Fraudulent assignment of option contract, promptly repudiated, not ratified.

Where two makers of notes given for option to purchase Mexican land on discovery of a secret agreement of Mexican cosigners with assignor to defraud them promptly repudiated the contract, and tendered back the property, which was refused, they did all that was required of them, and no ratification could take place.

Error to Court of Civil Appeals of Eighth Supreme Judicial District.

Action by Amador Gonzales against Geo. W. Varn, administrator, and others. From a judgment of the Court of Civil Appeals (193 S. W. 1132), affirming a judgment for plaintiff, Varn brings error. Reversed, and judgment entered for defendant.

M. W. Stanton and Turney & Burges, all of El Paso, for plaintiff in error.

F. G. Morris, B. Bryan, and T. A. Falvey, all of El Paso, for defendant in error.

KITTRELL, J. This case is reported in (Civ. App.) 193 S. W. 1132. The opinion to be there found will reveal the character of the case, and the defense interposed.

In order, however, to make our opinion complete within itself, we will, as briefly as possible, summarize the controlling facts.

Statement of the Case.

In the summer of 1908 three Mexican ladies living in the state of Durango gave to Amador Gonzales, a Mexican resident in the state of Chihuahua, a verbal promise or option to sell him for 35,000 pesos, equivalent to \$17,500 gold, a body of land comprising about 45,000 acres situated in the state of Durango. On September 17, 1908, Gonzales entered into what was termed a *minuto de contrato*, or memorandum of a contract, with one Fulkerson, a resident of El Paso, Tex., whereby he assigned to Fulkerson all the rights he (Gonzales) possessed under the "promise" of the Chavez sisters. Fulkerson had been co-operating with Gonzales to find a purchaser for the land, and the jury found he was the agent of Gonzales.

Some time in the summer of 1908 there came to El Paso from Georgia two brothers, W. W. and G. C. Varn, who it appears had, or were able to control, capital, which they desired to invest in Mexican timber lands. They could not speak the Spanish language, nor understand it when it was spoken, and for that reason engaged one Numa G. Buch-

oz, and one Bernard Schuster, land agents and brokers, to represent them. Buchoz and Schuster and Fulkerson had offices near each other, and all three acted as interpreters and agents of the Varns, and later became their partners.

Some time in August, as nearly as the date can be arrived at from the statement of facts, the Varns and their interpreters and agents and Gonzales, six in all, went, at the expense of the Varns, to inspect the lands, which were bounded on one side for a long distance by land owned by one Shaw. The Varns were shown timber on the Chavez lands, and were shown also, either by mistake or designedly, it appears designedly, much timber of the finest quality as being on the Chavez land, but which was in fact on the Shaw land, and large areas of the Chavez land, which was intersected by inaccessible gorges and canyons, were not shown the Varns at all.

As has been said, the Varns could neither speak nor understand Spanish, and were wholly dependent on Fulkerson, Buchoz, and Schuster for information about the land, and believed the land belonged to Gonzales. After the inspection had been made Gonzales on September 24, 1908, in the city of Durango made a contract with the Chavez sisters, by which they agreed to sell to him, or any person he might designate, their land, which contract was termed an "option or promise of sale," and which was to expire November 4, 1909. The price was to be 35,000 pesos, payable when Gonzales made a deed. Gonzales bound himself to pay semiannually, 1,500 pesos, interest on a mortgage on the land. He was given the right to cut timber paying 100 pesos a carload. If he did not effect a sale, all payments and all the machinery put on the land were to revert to the Chavez sisters. Five days later in the city of Juarez, Mexico, or on September 29, 1908, a contract in most elaborate form was made between Gonzales on the one side and Fulkerson, Schuster, Buchoz, W. W. Varn, and G. C. Varn, in the order named, on the other. By the terms of said contract the *minuto de contrato* between Gonzales and Fulkerson was first annulled, and the contract between Gonzales and the Chavez sisters of September 24, was recited substantially in complete form. Gonzales transferred and assigned to the five other parties his right and shares arising under the contract he had made with the Chavez sisters.

It had been contemplated that only the Varns should be grantees or assignees, but they were told by their interpreters and agents that the contract was so desirable that they, Fulkerson, Buchoz, and Schuster, would take an interest to the extent of one-half, and they and the Varns made then and there

a verbal agreement to become partners in the venture, and the instrument was so executed, Fulkerson taking one-fourth, Buchoz one-eighth, Schuster one-eighth, and the Varns one-half. The price of the "assignment" was \$18,195, represented by one note for \$15,000 gold, due January 1, 1909, with 8 per cent. interest, and one due in two years for \$3,195, bearing the same interest. The "assignees" were to pay the interest Gonzales had promised to pay on the mortgage. It is recited that the instrument was read to the signers in Spanish by the notary, and in English by an appointed interpreter, but the Varns never saw the Chavez sisters contract with Gonzales, and understood he owned the land. The two notes were duly prepared in Spanish, and were signed by Fulkerson, Buchoz, Schuster, and the Varns, and were delivered to Gonzales, and were the notes sued on in this action.

On October 27, 1908, in El Paso, the verbal agreement of partnership above referred to was put into written form, but the recital in it was that the parties were to pay the \$17,500 to the Chavez sisters, and the \$18,195 represented by the notes and \$10,000 in cash, making altogether \$45,695 United States gold. It was specifically recited that to the payment of the \$10,000 cash each of the parties had contributed in the proportion of Fulkerson one-fourth, Buchoz one-eighth, Schuster one-eighth, G. C. Varn one-fourth, and W. W. Varn one-fourth. The \$17,500 to be paid the Chavez sisters was referred to as a debt of Gonzales assumed by the partnership, which appears to support the testimony of G. C. Varn that he believed the lands belonged to Gonzales. The Varns paid their one-half of the \$10,000, and went upon the land and established a camp, and cut out trails, and proceeded to cut timber. When the interest installment became due November 1, 1908, G. C. Varn paid it. He agreed to make certain advances, and even to paying the \$15,000 due January 1, 1909, if the partnership could not do so. The Varns believed that their copartners had paid in good faith their half of the \$10,000, and were to pay their half of the notes, and but for such belief would not have made the contract. The jury so found.

Some time between November 1, 1908, and January 1, 1909, the Varns learned that their copartners and agents had not paid their half of the \$10,000, or, if they did, it it had been returned to them by Gonzales, and that they were not to pay their half of the notes, which arrangement was a secret agreement between them and Gonzales, made when the Juarez contract was executed. The Varns on being so advised, at once sought out Gonzales and charged him with the deception and secret agreement, which he admitted, and offered to surrender the notes if the Varns would pay him \$10,000 Mexican mon-

ey, which they declined to do, but repudiated the contract, and offered Gonzales possession of the land, which he refused to accept, saying he would sue on the notes.

These facts are revealed by the record in practically undisputed form. Though Gonzales and the three interpreters, agents, and partners were on the stand, neither was even asked a question calling for a definite categorical denial of the allegations made by the Varns, on which the defense of fraud was based, and the court found as a fact that the secret agreement was made as alleged.

Opinion.

[1] From the preliminary statement of the case set out above it is too clear to leave room for doubt or debate that the contract which was the basis of the action was void and unenforceable because contrary to public policy. It is practically undisputed that the three of the signers of the contract and notes, Fulkerson, Buchoz, and Schuster, stood in the threefold relation to the two other signers, the Varns, of interpreters, agents and partners, and it is elementary law that in each and all of said relations there rested upon them the obligation to preserve the utmost good faith towards those who were at once their principals and partners. It is equally as clearly shown that they did not observe or perform that obligation, but, on the contrary, secretly conspired with the payee of the note to perpetrate a fraud on the Varns. There is no possible ground in morals or in law upon which an action based upon such a contract can be maintained. It has been so adjudged by the Supreme Court of Texas in the past, and those holdings are approved by the present Supreme Court, and the law is so laid down in the reports of many, if not all the other states and in the text-books. *Seeligson v. Lewis*, 65 Tex. 215, 57 Am. Rep. 593; *Wegner v. Biering*, 65 Tex. 506; *Haswell v. Blake* (Civ. App.) 90 S. W. 1125; *Reed v. Brewer*, 90 Tex. 144, 37 S. W. 418; *Simon v. Garlitz*, 63 Tex. Civ. App. 172, 183 S. W. 464.

"If a contract involves the violation of a penal law, the court will declare it void, and any agreement the object of which is to defraud an individual or two or more individuals is illegal, and it has been held that any contract which involves a fraud on the rights of others is against public policy." *Elliott on Contracts*, vol. 2, p. 8 et seq., and notes.

[2, 3] It was contended by appellee in the Court of Civil Appeals that the appellants ratified the contract, and on that ground alone that court affirmed the judgment. Such holding was, in our judgment, erroneous. The contract was clearly not subject to ratification. However, if it were, there is no testimony in the record sufficient to show ratification. Taking all the testimony for

plaintiff to be true, it as a matter of law was not sufficient to show ratification, while the testimony for the defendants, which was undisputed, shows that they did all they were required to do in a case springing out of fraud, when upon discovery of the secret and void agreement they promptly repudiated the contract and tendered back the property, which tender was refused. *Dawson v. Sparks*, 1 Posey, Unrep. Cas. 745; 2 Parsons on Contracts, 780. The trial court should have instructed a verdict for defendants, and erred in rendering the judgment for plaintiff, and the Court of Civil Appeals erred in affirming that judgment.

We recommend that the judgment of both the district court and the Court of Civil Appeals be reversed, and judgment be here rendered for plaintiffs in error against defendant in error for the \$5,000 paid defendant in error by the Varns, and for the \$750 paid by the Varns as interest on the mortgage, with interest on both of said sums from the date of the respective payments, and for all costs of all courts.

PHILLIPS, C. J. We approve the judgment recommended in this case.

HOUSTON OIL CO. OF TEXAS v. HOLLAND. (No. 153-3116.)

(Commission of Appeals of Texas, Section B. June 16, 1920.)

1. Adverse possession §107—Possession of small field in 640-acre tract held not to show adverse possession of undivided 160-acre tract.

One holding possession for more than ten years of a field 5 to 6 acres in a survey containing 640 acres cannot claim adverse possession to an undivided 160 acres not definitely located, where he exercised no actual possession outside field, and he bought from one who only claimed the field, and owner of survey had no notice of any claim beyond limits of field.

2. Trespass to try title §47(1) — Where pleadings or evidence do not describe tract of land held adversely, no judgment therefor can be given.

Where in trespass to try title to recover a 160-acre tract claimed by adverse possession of a 5½-acre tract included therein, plaintiff showed adverse possession to the smaller tract alone, but the pleadings or evidence did not show its location or give a description thereof there is no basis for a judgment for the smaller tract.

Error to Court of Civil Appeals of Ninth Supreme Judicial District.

Trespass to try title by J. H. Holland against the Houston Oil Company of Texas. From judgment of Court of Civil Appeals (198 S. W. 668) affirming judgment for plaintiff, defendant brings error. Reversed, and cause remanded for a new trial.

H. O. Head, of Sherman, and Parker & Kennerly and Kennerly, Williams, Lee & Hill, all of Houston, for plaintiff in error.

Thomas & Wheat and Tom F. Coleman, all of Woodville, for defendant in error.

SADLER, P. J. J. H. Holland filed suit in trespass to try title against the Houston Oil Company of Texas to recover an undivided 160 acres out of the N. H. Hove (or Hooe) 640-acre survey. He based his right upon the ten-year statute of limitation. He pleaded and the evidence tended to show his possession of a small undefined tract of about 5½ acres of the survey for the ten-year period. Neither in the petition nor by proof is the description of the 5½ acres given. The pleading and evidence wholly failed to show any character of dominion exercised by Holland over any definite portion of the larger survey lying without the fencing by which the 5½-acre tract was inclosed. No actual possession is shown to the outland by Holland. His pleading and the agreement of counsel is tantamount to a disclaimer as to all the land in the survey except 160 acres. The description of the 160-acre tract in the petition is not very definitely given, and only in a general manner, so as to include the 5½-acre tract. However, it is not shown that he did any act impressing his possession on the thus defined 160 acres. The description in the petition is clearly nothing more than an effort to render certain the partition desired by Holland.

It was agreed that the oil company had the record title to the whole of the survey, subject alone to such title as Holland might show under his plea of limitation.

In the state of the record Holland shows title, if at all, to the 5½-acre tract only.

Richardson, from whom Holland purchased, claimed and sold only the 5½-acre tract. Holland does not claim that he bought from Richardson a claim to the 160 acres defined in his petition, or to a definite or indefinite 160 acres out of the Hove. Upon the purchase Holland went into possession of the 5½ acres in continuation of the existing possession held by Richardson. This did not extend beyond the inclosure of the small tract. Holland's possession of this small tract was limited by his purchase to that alone as notice in support of the statute.

Thus holding the small tract, by a simple process of the mind, Holland sought to extend his claim beyond the inclosure to an undefined quantity of land necessary to en-

large his holding to 160 acres. No act is shown which constituted notice to the title owner that such secret intention and claim existed. As said by Judge Gaines:

"There were no 'external circumstances discovering that inward intention.'" *Titel v. Garland*, 99 Tex. 208, 87 S. W. 1152.

[1] The defendant in error fails to show title by limitation to the excess beyond the 5½-acre tract. *Lumber Co. v. Kennedy*, 108 Tex. 297, 126 S. W. 1110; *Titel v. Garland*, 99 Tex. 208, 87 S. W. 1152; *McAdams v. Hooks*, 47 Tex. Civ. App. 79, 104 S. W. 432; *Rice, Executor, v. Goolsbee*, 45 Tex. Civ. App. 254, 99 S. W. 1031.

[2] Neither by the pleading nor by the evidence is the location of the 5½-acre tract shown. No description of this is given. The evidence furnishes no data on which the verdict of the jury or the judgment of the court can be based as to this tract. *Giddings v. Fischer*, 97 Tex. 184, 77 S. W. 209.

The judgments of the Court of Civil Appeals and of the trial court should be reversed, and the cause remanded for a new trial.

PHILLIPS, O. J. We approve the judgment recommended in this case, and the holding of the Commission on the question discussed.

BERGSTEDT v. BENDER. (No. 136-2045.)

(Commission of Appeals of Texas, Section A. June 16, 1920.)

1. Vendor and purchaser ⇨44—Contract held not to have been procured through undue influence.

Contract for sale of lands held on the evidence, not to have been procured through undue influence.

2. Specific performance ⇨8—Remedy within court's discretion.

A decree for specific performance of a contract is not a matter of right, but rests in the sound discretion of the trial court, which discretion is not arbitrary, but judicial, and must be exercised according to the established doctrine and principles of equity.

3. Specific performance ⇨16—Relief denied where contract fair at inception has become harsh and inequitable.

Liberty of contract should not be unduly restricted, and for that reason specific performance will not necessarily be denied, because a contract fair at its inception has since become inequitable through subsequent events, for a court largely judges a contract as of the time of execution, but if there has been a great change in circumstances, whereby the enforcement of the contract would be harsh and inequitable, specific performance will be denied.

4. Specific performance ⇨16—Denied where death of vendor renders contract inequitable.

Where a woman who had a considerable expectancy contracted to sell her homestead, worth nearly \$5,000, for \$1,500, the purchaser agreeing that she might occupy it rent free for life, and that he should pay taxes, held that, where the woman died before the contract was executed, specific performance as against the devisee of the homestead will be denied, and the purchaser left to his remedy at law; for, while the contract may have been fair at its inception, death rendered it inequitable.

Error to Court of Civil Appeals of First Supreme Judicial District.

Suit by W. F. Bender against Louis Bender, in which Peter Bergstedt intervened and answered. A judgment for defendant and intervenor was reversed and rendered by the Court of Civil Appeals (187 S. W. 735), and the intervenor brings error. Judgment of Court of Civil Appeals reversed, and that of district court affirmed.

D. E. Simmons and Jones & Jones, all of Houston, for plaintiff in error.

T. H. Stone and H. E. Stephenson, both of Houston, for defendant in error.

SONFIELD, P. J. On the 26th day of November, 1913, Mrs. Mary Hafer, under her maiden name, Bergstedt, entered into a written contract with W. F. Bender, wherein she agreed to sell and convey to Bender a certain fractional lot in the city of Houston, known as her residence or homestead, upon which she had resided for some 40 years. Under the terms of the contract, Mrs. Hafer was to have the right to occupy the premises without cost to her during her life, such right not to be assigned, nor the premises sublet. She obligated herself to carry insurance on the improvements in the sum of \$1,000 until her death, the policy to be payable to Bender. In the event of the destruction of the premises by fire, the house was to be rebuilt from the proceeds of the insurance, and Mrs. Hafer given the right of occupancy. Bender obligated himself to pay all taxes accruing after the year 1913. He was to pay Mrs. Hafer for the property the sum of \$1,500 cash, \$100 upon the execution of the contract, and the remaining \$1,400 within 60 days from the delivery of a complete abstract of title to the property, provided, the title was good and merchantable. Any defects in the title were to be pointed out in writing by the attorney of Bender, and either party should have 60 days in which to cure such defects. In the event the defects were not cured by either party within that time, then, upon demand of Bender, the \$100 paid by him should be returned, and both parties thereupon be released from all liability under the contract as to each other. A part of paragraph 8 of the contract provides:

"If the title to said property is found to be a good and merchantable title, and second party does not within 60 days after delivery of abstract of title and upon a tender of a warranty deed in accordance with the terms and conditions of this contract by first party pay to the first party the remaining amount, namely, fourteen hundred dollars (\$1,400.00) in cash due hereunder, then first party shall forfeit to herself and keep the said sum of one hundred dollars (\$100.00) this day paid by second party, which both parties hereby agree shall be forfeited as liquidated damages in the event of failure of second party to carry out the conditions of this contract, and thereupon both parties hereto shall be released from all liability hereunder."

Mrs. Hafer died on January 14, 1914. At the March term of the county court of Harris county, 1914, Mrs. Hafer's will was probated, and Louis Bender, named therein as executor, duly-qualified. Peter Bergstedt, a cousin of the testatrix, was the sole devisee under her will.

On April 4, 1914, W. F. Bender filed his petition in the county court of Harris county against his father, Louis Bender, as executor of the estate of Mrs. Hafer, seeking specific performance of the contract. The executor filed no answer, and interposed no objection to the granting of the relief sought. Peter Bergstedt intervened for the purpose of preventing enforcement. The trial resulted in a judgment in favor of W. F. Bender, from which intervener appealed to the district court of Harris county.

Specific performance was resisted on the ground that the contract was a mere option without consideration, and withdrawn before its acceptance; that it lacked mutuality, and was of a character which would not be specifically enforced; further, that the property was not properly described. He also pleaded that the execution of the contract was procured through the exercise of undue influence upon Mrs. Hafer by plaintiff, who overreached and wrongfully persuaded and induced her to execute the contract; that the property was of the reasonable market value of \$5,000, and the consideration agreed to be paid was wholly inadequate.

The cause was submitted to a jury upon the two following issues:

"(1) Did Mrs. Hafer (née Bergstedt) execute the contract which is in evidence before you by reason of undue influence of W. F. Bender operating upon her mind at said time? Answer Yes or No.

"(2) What was the reasonable market value of the premises in controversy in this suit on November 26 and 27, 1913? State the amount you find in dollars and cents."

The jury answered the first question Yes, and the second that the value of the property at that time was \$4,900. Upon these answers the trial court rendered judgment in favor of defendant, Louis Bender, executor, and inter-

vener, Peter Bergstedt. On appeal, the Court of Civil Appeals reversed the judgment of the district court, and rendered judgment in favor of plaintiff. 187 S. W. 735.

The Court of Civil Appeals held there was no competent evidence to raise the issue of undue influence; that the property was properly described, the contract mutually binding, and the consideration adequate in view of the conditions existing at the date of the contract.

[1] In the view we take of the case, and the recommendation to be made with reference to its disposition, we deem it unnecessary to set out a full statement of the evidence. For the purpose of this opinion, the following will suffice:

There is evidence that at the date of the execution of the contract Mrs. Hafer was 70 years of age, and lived by herself upon the property here in controversy. Plaintiff was quite a young man, and conducted a meat market next door to her residence for many years. Mrs. Hafer was injured by a fall about a year before her death. There was evidence that subsequent to her injury she was physically frail, and her mental faculties greatly impaired. Some time prior to the date of the contract, she had executed her will, making intervener her sole devisee, declaring in her will that the property herein involved was the only real estate owned by her. Prior to negotiations ultimating in this contract, she had declined offers to purchase at a price in excess of that agreed to be paid by plaintiff, giving as her reason that she had devised it to intervener. A witness for plaintiff testified that Mrs. Hafer showed him the contract with plaintiff before its execution. He stated to her that the price was too cheap, and offered to make the same character of contract and give her \$1,000 more than she was to receive. The offer was declined, on the ground that she wanted plaintiff to have it. The undisputed evidence established the market value of the property, at the date of the contract, to be \$4,900, as found by the jury. Mrs. Hafer was taken sick on the 7th day of January, 1914, and the abstract to the property was delivered to plaintiff on the following day. From the time of the delivery of the abstract to the date of her death, on the 14th of January, 1914, Mrs. Hafer was too ill to attend to any kind of business. After receiving the abstract, and before her death, plaintiff concluded to consummate the contract. His attorney advised Mr. Tharp, who had acted as attorney for Mrs. Hafer in the matter of the contract, that they were ready to close the deal. Tharp stated that he would take the matter up with Mrs. Hafer, and declined to accept any tender. Mrs. Hafer died without executing a deed.

It must be conceded that there was no direct evidence of the exercise of any undue influence by plaintiff over Mrs. Hafer in ref-

erence to the contract. The exercise of undue influence is rarely susceptible of direct proof, and resort must usually be had to circumstances. In reaching a conclusion, consideration must be given to the age, health, mental condition, and financial status of Mrs. Hafer, her relations with plaintiff, and how far she was dependent upon and subject to his control, together with the opportunity which he had to exercise such influence.

Upon a careful consideration of the record, we concur in the conclusion reached by the Court of Civil Appeals that there was no competent evidence to raise the issue of the exercise of undue influence. The question remains, however, whether the contract is of such character as will be specifically enforced.

Intervener contends that the contract was but an option to purchase, unsupported by any consideration, and subject to withdrawal by Mrs. Hafer at any time prior to its acceptance, and that the undisputed evidence established that she did so withdraw the offer. Further, that the contract is lacking in mutuality, and will not therefore be specifically enforced. We cannot so construe the contract. The contract was one of purchase and sale. By its terms Mrs. Hafer obligated herself to sell and convey, and plaintiff to purchase and accept a conveyance, conditioned only upon the title being good and merchantable. It is true that, in virtue of that part of paragraph 3 hereinabove set out, Mrs. Hafer could not have had the contract specifically enforced against plaintiff; he being given the right of election between the consummation of the purchase and the forfeiture of the money paid. *Moss & Raley v. Wren*, 102 Tex. 567, 113 S. W. 739, 120 S. W. 847; *Redwine v. Hudman*, 104 Tex. 21, 183 S. W. 426. For plaintiff to have declined to take the property, in the event the title was good and merchantable, would have been a clear breach of the contract. But for this provision in paragraph 3 specific performance could have been enforced against him. That provision but marked the limit of plaintiff's liability and the extent of Mrs. Hafer's remedy in the event of a breach. Through this stipulation, Mrs. Hafer divested herself of the right to specific performance, leaving that remedy unimpaired as to plaintiff. The fact that Mrs. Hafer, through the contract, limited her right upon a breach to a forfeiture of the money paid will not prevent specific enforcement at the instance of plaintiff.

[2] Intervener urges that specific enforcement be denied, on the ground that the consideration of the contract is grossly inadequate, and its enforcement harsh and inequitable as to him. A decree for the specific performance of a contract is not a matter of right, but rests in the sound discretion of the court; a discretion not arbitrary but judicial, and exercised under the established doctrines and settled principles of equity. The relief

will be granted or withheld by the court upon a consideration of all the circumstances of each particular case, and no definite rule has been announced by which the action of the court can be determined in all cases. As said in *Willard v. Tayloe*, 8 Wall. 587, 19 L. Ed. 501:

"In general it may be said that the specific relief will be granted when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice, and that it will be withheld when, from a like view, it appears that it will produce hardship or injustice to either of the parties. It is not sufficient, as shown by the cases cited, to call forth the equitable interposition of the court that the legal obligation under the contract to do the specific thing desired may be perfect. It must also appear that the specific enforcement will work no hardship or injustice, for if that result would follow the court will leave the parties to their remedies at law."

[3, 4] It is contended by plaintiff that, viewed in the light of the conditions and circumstances existing at the date of the contract, the consideration was adequate and the terms fair and equitable. While Mrs. Hafer was quite old, it was in contemplation of the parties that she would live for some considerable period, her life expectancy being $8\frac{1}{2}$ years. The cash to be paid her was but a part of the consideration. In addition thereto, she was to have the right of occupancy during her life, free of all taxes; and, had she lived for a period of years, the contract might have become extremely onerous to plaintiff. The contention, if conceded, would be quite convincing urged against the setting aside of an executed contract; but it is not so potent, and is far from conclusive, when urged in favor of specific performance.

It is true that courts of equity will, in large measure judge a contract as of the time of its execution. If fair when made, its enforcement will not necessarily be denied because it has become harsh and inequitable through subsequent events and changed conditions. Courts will not enter into an investigation and determine the wisdom of a bargain made by persons competent to deal with their own affairs. Liberty of contract will not be unduly restricted. Mere hardship resulting from miscalculations or from contingencies which might have been foreseen, and for which plaintiff is not at fault, will not ordinarily prevent a specific enforcement. 25 R. O. L. 224. This principle finds application and illustration in the many cases where, through fluctuation in values, a contract, fair in its inception, becomes harsh and oppressive.

But it is well established that the court, in determining specific enforcement, is not limited to, or entirely governed by, the conditions existing at the date of the contract. Where there has been a great change of circumstan-

es, whereby the enforcement of the contract against a party thereto would be harsh and inequitable, violative of its true intent and spirit, or would not effectuate the purpose of its execution, or where, through such subsequent events the rights of third persons become involved, and an enforcement would be harsh and inequitable as to them, the court, in the exercise of its discretion, may deny enforcement. 25 B. C. L. 253.

As said by Mr. Justice Field in *Willard v. Tayloe*, supra:

"The same discretion is exercised where the contract is fair in its terms, if its enforcement, from subsequent events, or even from collateral circumstances, would work hardship or injustice to either of the parties."

In 2 Story, Eq. Jur. § 750A, the rule is announced that:

"Courts of equity will not proceed to decree a specific performance where the contract is founded in fraud, mistake, undue advantage, or gross misapprehension, or where from a change of circumstances, or otherwise, it would be unconscientious to enforce it."

The doctrine is recognized in *Marks v. Gates*, 154 Fed. 481, 83 C. C. A. 321, 14 L. R. A. (N. S.) 317, 12 Ann. Cas. 120, wherein the court says:

"A contract may be valid in law and not subject to cancellation in equity, and yet the terms thereof, the attendant circumstances, and in some cases the subsequent events, may be such as to require the court to deny its specific performance."

Upon the death of Mrs. Hafer, the title to the property vested in intervener. The relief sought by plaintiff is against him as the present owner. He was not a party to the contract. True, his title vested after its execution, but after-acquired rights of third persons are equitable considerations to be regarded in determining whether the contract should be specifically enforced. *Curran v. Holyoke Water Power Co.*, 116 Mass. 90; 38 Cyc. 619.

Viewed, then, in the light of conditions existing at the date of the contract, and the changed conditions through the death of Mrs. Hafer, should the court decree a specific enforcement? We think not.

It is not contended that \$1,500 is an adequate consideration for property worth, at the date of the contract, \$4,900. The cash consideration, standing alone, would, under the facts of this case, be so grossly inadequate as to warrant a court, not only to refuse specific performance, but, in the event the contract had been executed, to set aside and cancel the deed made in virtue thereof. It is recognized by the plaintiff and by the Court of Civil Appeals that the greater part of the consideration was the right of occupancy of the property by Mrs. Hafer, and its protec-

tion, through payment by plaintiff of all taxes thereafter to accrue, thus insuring to her a home place for and during the period of her life. It cannot be doubted from the record that this was the motive impelling Mrs. Hafer to enter upon the contract. The death of Mrs. Hafer, while the contract was wholly executory, nothing having been done thereunder, save the payment of a small part of the cash consideration and the procuring of an abstract, rendered complete performance on the part of defendant impossible. He could but pay the cash consideration, her death freeing him from the obligations forming the greater part of the consideration. He seeks at the hands of the court, as against intervener, the enforcement of a contract through which he will acquire title to property for a consideration, not only far less than its market value, but far less than contemplated and provided for in the contract. A decree in his favor would not follow the terms of the contract. Conceding the fairness of the contract in its inception, its specific enforcement will, under the changed conditions and circumstances, enable plaintiff to obtain an inequitable and unconscionable advantage in consequence of an unforeseen event, and violate the spirit and intention of the contract. Under such circumstances, a court of equity should not lend its aid, but remand the plaintiff to his remedy at law.

We are of opinion that the judgment of the Court of Civil Appeals should be reversed, and that of the district court affirmed.

PHILLIPS, C. J. We approve the judgment recommended in this case.

SOVEREIGN CAMP, WOODMEN OF THE WORLD, v. BAILEY. (No. 151-2937.)

(Commission of Appeals of Texas, Section A. June 16, 1920.)

Insurance §826(2)—Instruction erroneous in authorizing verdict against insurer without finding on defensive issue.

In an action on benefit certificate, where the fraternal insurer defended on the ground the member met his death while in violation of law, etc., a charge that, if the state of the evidence was such that it could not be determined whether the member on the occasion of his death had made or attempted to make an unlawful assault, and in consequence thereof met his death, verdict should be for plaintiff, was erroneous, authorizing a verdict for plaintiff without requiring a finding on the defensive issue.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by O. F. Bailey, guardian, against the Sovereign Camp, Woodmen of the World.

A judgment for plaintiff was affirmed by the Court of Civil Appeals (183 S. W. 107), and defendant brings error. Judgment of the trial court and Court of Civil Appeals reversed, and cause remanded for further trial.

A. H. Burnett, of Omaha, Neb., R. L. Daniel, of Victoria, and Henry, McCloskey & Robertson, of San Antonio, for plaintiff in error.

Proctor, Vandenberge, Crain & Mitchell, of Victoria, for defendant in error.

TAYLOR, J. Sovereign Camp, Woodmen of the World, a fraternal beneficiary association, issued to W. L. Bailey its certificate for the sum of \$3,000, payable upon his death to Willie Lee Bailey, his minor child. The father lost his life on April 1, 1912.

This suit was by O. F. Bailey, as guardian of the minor, to recover the amount alleged to be due under the certificate. The cause was tried before a jury and resulted in a verdict and judgment for Bailey. The Court of Civil Appeals affirmed the judgment. 183 S. W. 107. Writ of error was granted by the Supreme Court.

The principal defense urged by the association was predicated upon that provision of the certificate, as well as of the constitution and by-laws of the association, to the effect that, in the event the member holding the certificate should meet his death or die in consequence of the violation or attempted violation of the laws of the state or the United States, the certificate should become null and void, and that all rights thereunder should be forfeited.

It was averred in the defensive allegations of plaintiff in error, among other things, that Bailey at the time of his death was engaged in an unlawful assault upon Alvin Holzheuser, and was rudely displaying a pistol, and was attempting to murder Charles Holzheuser; that his acts in shooting at Charles Holzheuser and attempting to murder him were in violation of the laws of Texas and of the United States; that Charles Holzheuser, for the purpose of defending himself and his brother Alvin, shot and killed Bailey.

The court in the fourth paragraph of its main charge instructed the jury that, if they believed the death of Bailey was in consequence of the violation or attempted violation of the law of the state, they should return a verdict in favor of the association; but, if not the result of such violation or attempted violation of law, they should return a verdict in favor of Bailey. The jury was instructed also as to the other alleged violations of law.

The eighth paragraph of the charge is as follows:

"You are further instructed that, if you conclude that the state of the evidence in this case is such that you are unable to make a finding either affirmative or negative upon the issue as to whether or not the said W. L. Bailey on the occasion of his death had made,

or attempted to make, an unlawful assault upon said Alvin or Charles Holzheuser or either, and in consequence thereof met his death, you will find for the plaintiff."

That part of the charge quoted was wrong, in that it warrants a verdict for Bailey without requiring a finding upon the defensive issue. The charge does more than to place upon the association the burden of proof upon that issue. The jury were told, in effect, that a verdict could be reached without a finding upon the issue, either affirmative or negative.

The error in the charge is such, in our opinion, as to require a reversal of the case.

The other assignments of error contained in the application for the writ relate to the refusal of the court to require the Holzheusers to answer certain questions propounded to them which they refused to answer on the ground that they feared the answers would tend to incriminate them. While it is not probable that the question will arise upon another trial of the case, we are of opinion that the Court of Civil Appeals correctly disposed of the assignments raising it in different forms in that court.

We recommend therefore that the judgments of the trial court and Court of Civil Appeals be reversed, and that the cause be remanded for further trial.

PHILLIPS, C. J. We approve the judgment recommended in this case, and the holding of the Commission on the question discussed.

GREENWOOD, J., took no part in the decision of this case.

FREEMAN v. WILSON. (No. 133-2995.)

(Commission of Appeals of Texas, Section B.
June 16, 1920.)

1. Appeal and error \S 2—Petition for writ filed under act governed wholly thereby.

Where petition for writ of error was filed under Laws 1913, c. 55, it is governed wholly by such act.

2. Master and servant \S 264(4)—Allegation of negligence held sufficient to take case to jury on theory presented by evidence.

In view of inclusiveness of general allegations of defendant railway receiver's negligence in furnishing defective pick, plaintiff employé held entitled to have cause determined by jury in accordance with theory presented by his evidence that pick was so defectively tempered that, when struck against a steel rail, it threw off a sliver.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by C. W. Wilson against T. J. Freeman, receiver of the International & Great Northern Railway Company. From a judgment for plaintiff, defendant appealed to the Court of Civil Appeals, which reversed and remanded the cause (149 S. W. 413), whereupon writ of error was sued out by plaintiff to the Supreme Court, which held it was the duty of the Court of Civil Appeals to determine an excess in the judgment (108 Tex. 121, 185 S. W. 993, Ann. Cas. 1918D, 1203), and thereafter the Court of Civil Appeals required remittitur and affirmed (189 S. W. 1199), and defendant brings error. Judgment of the Court of Civil Appeals affirmed, on recommendation of the Commission of Appeals.

Ramsey, Black & Ramsey, of Austin, Wilson, Dabney & King, of Houston, F. C. Davis, Marshall Eskridge, and Hicks & Hicks, all of San Antonio, and John M. King, of Houston, for plaintiff in error.

J. D. Childs, of San Antonio, W. C. Campbell, of Palestine, and James W. Brown, of San Antonio, for defendant in error.

SADLER, P. J. On the 12th day of June, 1911, C. W. Wilson, as plaintiff, recovered a judgment in the district court of Bexar county against T. J. Freeman, receiver of the International & Great Northern Railway Company, for \$20,386.05, from which judgment an appeal was had to the Court of Civil Appeals, and the judgment reversed and the cause remanded. 149 S. W. 413.

The Court of Civil Appeals held that the verdict was excessive, overruling all of the contentions made by the appellant except in this particular. Writ of error was sued out by Wilson, and the Supreme Court (108 Tex. 121, 185 S. W. 993, Ann. Cas. 1918D, 1203) held that it was the duty of the Court of Civil Appeals to determine the excess in the judgment. Thereafter the Court of Civil Appeals required a remittitur of \$8,000, and, on same being filed, affirmed the judgment of the trial court. The appellant filed a motion for rehearing, which being overruled by the Court of Civil Appeals, writ of error was granted to the Supreme Court.

On the trial of the cause, after the plaintiff had rested, the receiver filed a motion asking for an instructed verdict in its favor. This was overruled. After all of the evidence was in, the defendant below requested a peremptory instruction, which was also overruled.

[1] Touching the question of the jurisdiction of the Supreme Court to entertain this case because of want of importance in the questions presented, we desire to call attention to the fact that the jurisdiction to entertain the petition for writ of error is governed wholly by the act of 1913 (Laws 1913, c. 55), as the petition was filed under that act.

The cause is before us on several grounds of error assigned to the judgment of the Court of Civil Appeals. In our view of the case, however, it will be necessary to consider only those assignments relating to the refusal of the trial court to give a peremptory instruction. The disposition of these assignments will be inclusive of the questions presented by other germane assignments. In alleging negligence as a basis for recovery, plaintiff charge:

"That on the 6th day of December, 1909, near Overton, in Rusk county, Texas, he was in the employ of said defendants and temporarily stationed in said Rusk county, Texas, and while in said employ to the carelessness and negligence of defendants, it became necessary for him, in his regular line of employment, to engage at a piece of work for defendants in which it was necessary and was required of him to handle and work with a pick in order to remove cross-ties from the roadbed of said defendants, and in using said pick a piece of steel or metallic substance slivered off from said pick, or from the steel rail, which he struck with said pick, and with great force and violence, and entered the left eye of plaintiff.

"That at said time and place the defendants were negligent in furnishing plaintiff with a pick which was old, worn, defective, blunt, battered, and insufficient, with a crooked, defective, and insufficient handle, which rendered the striking with said pick difficult and uncertain, and defendants were further negligent in then and there failing to provide plaintiff a safe place in which to work, because the embankment was steep and washed out at that place, and in failing to provide plaintiff a sufficient number of men to do the said work, which caused plaintiff and compelled to him to work as a section hand, instead of only requiring him to supervise the said work, and he was therefore, in fact, the same as any other hand, and working under the general supervision of the roadmaster of said defendants, and the plaintiff was by defendants' said negligence required to work at said dangerous place as aforesaid with said defective tool, and the defendants had therefore negligently permitted the grass to grow along the embankment of said place, which concealed a piece of iron, over which plaintiff stumbled at the same time he made his lick with the said pick at one of the cross-ties on said railroad bed of defendants, and missed the said cross-tie, and struck one of the rails, which caused the sliver as aforesaid, which would not have occurred, had said pick been in proper condition."

As we construe the allegations of negligence on the part of the receiver, it was in furnishing plaintiff a pick which, from its condition and from the character of the ground upon which he was required to work, caused him to strike the steel rail, resulting in his injury.

The direct charge is nowhere made in the petition that the receiver was negligent in furnishing the plaintiff with a pick which was improperly tempered, and which by reason of its tempered condition threw off a par-

ticle of steel when coming in contact with the steel rail. In view, however, of the general allegations of negligence, the Supreme Court has indicated that—

"The allegations as to the defective condition of the pick, broad and general as they were, were amply sufficient to rendered competent the proof made as to its particular condition, and that by its use the plaintiff was injured in the manner shown."

On the trial of the case, the only evidence of negligence presented by the record was in furnishing a pick not properly tempered, and so defectively tempered as, when struck against a steel rail, to throw off a "sprawl" or "sliver," which produced the injury to plaintiff. The court submitted the cause to the jury on the theory of negligence on the part of the receiver in furnishing a defective and insufficient pick.

[2] In view, therefore, of the inclusiveness of the general allegations of negligence, the plaintiff was entitled to have the cause determined by the jury in accordance with the theory presented by the evidence.

A very careful consideration of the other assignments discloses no question meriting discussion. We therefore recommended that the last judgment of the Court of Civil Appeals be affirmed.

PHILLIPS, C. J. We approve the judgment recommended in this case.

HILLIARD v. STATE. (No. 5831.)

(Court of Criminal Appeals of Texas. May 26, 1920.)

1. Criminal law §534(2)—Declaration while under arrest leading to discovery of money taken, admissible.

A declaration of one accused of robbery leading to the discovery of money or property taken is admissible, although made while under arrest, without warning, and although induced by promise and not reduced to writing, but it is incumbent upon the state to prove identity of the money found and that taken.

2. Criminal law §517(4)—Proof of identity of money discovered by reason of declaration of accused while under arrest may be made by circumstances.

The proof that money discovered by reason of a declaration of one accused of robbery and under arrest is that which was taken from prosecuting witness, necessary to render the declaration admissible, may be made by circumstances.

3. Criminal law §736(2) — Admissibility of defendant's declaration for jury.

Where the single fact which would render a confession or declaration of one accused of

robbery admissible was the identity of the property found by reason of a declaration or confession with that taken, it was the duty of the court to submit to the jury this question of fact and make the admissibility of the question depend on its solution by the jury; the identity of property found with that stolen being a controverted fact.

4. Criminal law §406(2)—Declaration made without warning while under arrest inadmissible.

The court erred in permitting the sheriff to testify that he obtained a pistol from the home of accused's father and exhibited it to accused, and that he admitted that it was the pistol used in the robbery, the accused then being under arrest, unwarned, declaration not being reduced to writing, and pistol not being found by reason of the declaration.

5. Criminal law §925½(1)—Consideration by jury of information received after retirement that coindictor had been convicted ground for new trial.

The court should have granted a motion for a new trial in a robbery case where the jury in their retirement were informed that a coindictor with defendant had been convicted and his punishment assessed at confinement for five years, and such information was made the subject of discussion by the members of the jury before they arrived at a verdict, and before they reached the conclusion that defendant was guilty.

Appeal from District Court, Matagorda County; M. S. Munson, Judge.

Rooster Hilliard was convicted of robbery with firearms, and he appeals. Reversed.

W. S. Holman, C. M. Gaines, and Styles, Krause & Erickson, all of Bay City, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. Appellant is condemned to confinement in the penitentiary for a period of five years for the offense of robbery with firearms. Appellant and Zara Bouldin were jointly indicted for robbing John Weldon of \$51 in money. The appellant and Bouldin were separately tried. Weldon had in his possession \$51, and while in company with Bouldin at night the robbery occurred. A person not identified presented a pistol, and ordered Weldon and Bouldin to deposit in a hat, which the assailant produced, their money. Bouldin pretended to put in the hat money in his possession, and Weldon deposited \$51 therein.

The theory of the state was that Bouldin and appellant were acting together, and the state depended upon circumstantial evidence to identify the appellant; one of the circumstances relied upon being the declaration of appellant made to the sheriff while under arrest. The declaration was not in writing,

and was not brought within the requirements of article 810, C. C. P. There was a conflict between the testimony of the sheriff and the appellant touching the circumstances under which the statement was made, and with reference to the substance of the statement. It is the contention of the appellant that the declaration was rendered inadmissible because it was a verbal statement made to the sheriff without warning while under arrest, and was induced by promises and persuasion. This is met by the claim that the statement led to the recovery of the fruits of the crime.

Weldon, the injured party, had before the offense received from the sheriff \$53 consisting, according to the sheriff's testimony, of two \$20 bills, and 13 \$1 bills. The sheriff said that appellant told him where he would find the money, and that he, in company with appellant, went to the home of appellant's father and found under the house \$48, consisting of thirteen \$1 bills, a \$10 bill, a \$5 bill, and a \$20 bill. According to the state's testimony, there were no peculiarities about the money which served to identify it. Appellant claimed that before the money was obtained the sheriff described it as having certain peculiarities which were not observable in the money secured. Appellant in his testimony said that the sheriff represented to him that certain witnesses, whom he named, were going to swear to facts which would convict the appellant of the offense, but that, if he could get the money which Weldon had lost, the matter would be hushed up and the appellant released; that he then told the sheriff, in substance, that he had not committed the offense, but that he had some money which he had earned, and which he had hid on the sill of his father's house, and that he would go with him and get the money mentioned, as he was willing to surrender it to secure his release; that the inducement for this was his reliance on the promise of release and belief of the statement made to him by the sheriff that he had witnesses who would prove his guilt, although in fact he had not committed the crime. He supported his testimony as to the ownership of the money by the evidence of his father.

[1-3] If, in fact, the money recovered was that of which Weldon was robbed, the declaration of the appellant leading to the discovery of the money was admissible, although made while under arrest without warning, and although induced by promises, and not reduced to writing. *Jones v. State*, 50 Tex. Cr. R. 329, 96 S. W. 980; *Branch's Crim. Law*, § 222. Since, however, the admissibility of his confession or declaration depended upon the identity of the money found with that which was stolen, it was incumbent upon the state to prove such identity. This proof might be made by circumstances, but, being controverted, it was a question for the jury. *Bagley v. State*, 3

Tex. App. 166; *Hooton v. State*, 53 Tex. Cr. R. 6, 108 S. W. 651; *Lynne v. State*, 53 Tex. Cr. R. 376, 111 S. W. 729; *Doss v. State*, 28 Tex. App. 506, 13 S. W. 788; *Davis v. State*, 68 Tex. Cr. R. 400, 152 S. W. 1096; *Branch's Annotated Penal Code*, § 2482. That the evidence showing the description of the money found and that which was stolen, standing alone, was insufficient to establish the identity is obvious. There was a difference in the aggregate amount and in the denomination of the bills. *Johnson v. State*, 36 Tex. Cr. R. 394, 37 S. W. 424; *Wayland v. State*, 218 S. W. 1068, and authorities therein referred to. The single fact which would render the confession or declaration of the appellant admissible being the identity of the property found with that stolen, and this being controverted, it was the duty of the court, upon request of the appellant, to submit to the jury this question of fact, and make the admissibility of the confession dependent upon its solution by the jury: *Doss v. State*, 28 Tex. Cr. R. 506, 13 S. W. 788; *Davis v. State*, 68 Tex. Cr. R. 400, 152 S. W. 1096; *Branch's Crim. Law*, § 236. The special charges requested upon the subject, while not wholly accurate, we think, in connection with the exceptions to the court's charge and other matters in the record, were sufficient to require the court to give an appropriate instruction to the jury upon the subject.

[4] The sheriff obtained a pistol from the home of appellant's father. Both the appellant and his father testified that the pistol had been placed in the house before the robbery, and had not been removed, and was not used in committing the offense. The sheriff testified that he exhibited the pistol to the appellant, and that he admitted that it was the pistol used in the robbery. This declaration was made while the appellant was under arrest, unwarned, was not reduced to writing, and, in our judgment, was erroneously admitted over the objection of the appellant. As we understand the record, the pistol was not found by reason of any declaration made by the appellant, but the declaration testified to was made after the pistol had been found at the home of appellant's father. *Wiseman v. State*, 33 Tex. Cr. R. 383, 26 S. W. 627; *Musgrave v. State*, 28 Tex. App. 57, 11 S. W. 927; *Walker v. State*, 2 Tex. App. 326.

[5] By motion for a new trial, supported by a statement of facts duly certified and filed during the term, it is made to appear that the jury in their retirement were informed that Zara Bouldin, the coindictée with appellant, had been convicted and his punishment assessed at confinement in the penitentiary for a period of five years; that the same was made the subject of some discussion by members of the jury before they arrived at a verdict, and before they reached the conclusion that appellant was guilty.

This ground of the motion for a new trial should have been sustained. *Tutt v. State*, 49 Tex. Cr. R. 202, 91 S. W. 584; *Morawitz v. State*, 49 Tex. Cr. R. 366, 91 S. W. 227; *Horn v. State*, 50 Tex. Cr. R. 404, 97 S. W. 822; *McDougal v. State*, 81 Tex. Cr. R. 179, 194 S. W. 947, L. R. A. 1917E, 930. Some other questions raised will doubtless not occur on another trial. See *Bouldin v. State*, 222 S. W. 555, this day decided.

The errors pointed out require a reversal of the judgment, which is ordered.

BOULDIN v. STATE. (No. 5835.)

(Court of Criminal Appeals of Texas. May 26, 1920.)

1. Criminal law \S 528—Confession of coconspirator after transaction inadmissible.

A confession of an alleged coconspirator in a robbery case was not admissible as against defendant, where made after the transaction.

2. Criminal law \S 448(11)—Testimony that alleged coconspirator suited description of person described by prosecuting witness inadmissible.

Testimony by a sheriff over objection that an alleged coconspirator suited the description of party described to him by prosecuting witness was inadmissible, being but a conclusion that such coconspirator was the man described, although it would be proper for the prosecuting witness to describe such person to the jury.

3. Criminal law \S 487(1)—Person under arrest not bound by statements of sheriff in his presence.

One under arrest is not bound by anything the sheriff may have said in his presence.

4. Witnesses \S 327—Mental capacity proper subject of impeachment.

Mental capacity of a witness is a proper subject of consideration and impeachment, as bearing on his credibility.

5. Witnesses \S 331½—Insanity in family admissible to show witness' lack of mental capacity.

Insanity in the family of a witness is a proper subject of investigation, where it is sought to show that the witness is insane, or an idiot, to weaken the credibility or strength of his testimony.

6. Criminal law \S 354—Insanity in family admissible to show insanity of accused.

Where the question of insanity is raised upon the trial of a person accused of crime, insanity in the family of the accused is a proper subject of investigation.

Appeal from District Court, Matagorda County; M. S. Munson, Judge.

Zara Bouldin was convicted of robbery with firearms, and he appeals. Reversed and remanded.

W. S. Holman and O. M. Gaines, both of Bay City, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was had for an alleged robbery by firearms. This is a companion case to *Hilliard v. State*, 222 S. W. 553, this day decided. The facts are substantially the same in both cases.

The theory of the state was that appellant and Hilliard robbed a party named Weldon. Weldon testified that on the night he was robbed he was at a cold drink stand and treated appellant, and displayed some money; that they went thence to a house occupied by Hilliard, stopped for a moment or so; that appellant and Hilliard had a conversation; they went thence to another house, stopped a moment, and went to the place of the alleged robbery; that when they reached this place near the depot they stopped to attend a call of nature, when a party came upon them, presented a pistol, and demanded they put their money in a hat which he presented; that appellant placed what money he had in it; and that he (Weldon) did the same thing and they all separated. It seems that Weldon did not identify Hilliard as the party who presented the pistol, but gave a description of his costume. Among other things, he said he was wearing a certain described hat; that when the robber left Weldon remarked to appellant that he was going to the sheriff and have appellant arrested, believing that he was connected with the robbery. This was denied by appellant. They separated. Appellant went home and went to bed. Appellant's testimony is to the effect that Weldon desired to find a woman with whom to spend the night; that they went to the house where Hilliard was stopping to find a woman named Hughes; that when they reached the house they ascertained the fact that she had an engagement with Hilliard; that they then went to another house hunting another woman. When they reached that point they ascertained that she had an engagement, and in both instances the men were present. He says they left, going to another part of the town in search of girls, and reached the point where they were robbed. He describes the acts and incidents of the robbery about as did Weldon.

[1] Later during the night the sheriff went to appellant's home and arrested him. He also went to the house occupied by Hilliard and arrested a man named Harris and carried him to jail. This was on such information as he obtained from Weldon. Hilliard was present at the house at the time of the arrest of Harris and remained. After reaching the jail Harris was not incarcerated, but

was permitted by the sheriff to go free. Subsequently he arrested Hilliard. After arresting Hilliard he obtained what is shown in the record to be a confession from Hilliard under circumstances that would render it clearly inadmissible, except for the fact the sheriff said by reason of the confession he discovered or recovered a certain amount of money in pursuance of this information. It may be stated at this point that this money was not identified as the money taken from Weldon. If so, it was so indefinite that it is a serious question as to whether this was the money taken from Weldon. He also found a pistol later at the residence of Hilliard's father which had been recently discharged. It is asserted by Weldon that the man who robbed him fired one shot after the robbery was committed. It is unnecessary in this case to discuss the preliminaries and the predicate shown by the state for its introduction. Appellant was not present when the confession was made, was in jail, had no connection with it, and the confession did not implicate him. The various questions raised with reference to these matters are not discussed for the broader reason that this confession as it came was not introducible against the defendant. The state's theory was that appellant was criminally connected with Hilliard in the robbery, that they planned it, and that Hilliard robbed Weldon in pursuance of that agreement, and appellant was present. There is no contention that appellant had any of the money taken from Weldon. The evidence in this connection, to say the least of it, is not of a very cogent nature. Appellant was with Weldon when he went to the two houses mentioned, was with him at the time of the robbery, and had had a conversation with Hilliard at the house where the woman Hughes lived, whom he says they went to see to make an engagement for Weldon. This is weak evidence of a conspiracy to rob Weldon, but in any event the conspiracy could not be proved by the confession of Hilliard even had he implicated appellant in his confession. It was but the narration of past events in which Hilliard participated. The acts and conduct of a coconspirator after the transaction are not admissible as a general rule, and under the cases of *Choice v. State*, 52 Tex. Cr. R. 297, 106 S. W. 387, and *Spencer v. State*, 52 Tex. Cr. R. 291, 106 S. W. 386, this character of testimony would not be admissible. See, also, *Draper v. State*, 22 Tex. 401; *Oouch v. State*, 59 Tex. Cr. R. 505, 126 S. W. 868; *Lauderdale v. State*, 31 Tex. Cr. R. 46, 19 S. W. 679, 37 Am. St. Rep. 788; *Branch's Crim. Law*, § 241, p. 133. We are of opinion, therefore, that the confession of Hilliard under the circumstances stated was not admissible against appellant. There are several bills of exceptions with reference to this, but it is

not thought necessary to discuss them further than stated, because this confession was not admissible against appellant.

[2] While the sheriff was testifying, he was permitted over objections to state that Hilliard suited the description of the party described to him by prosecuting witness Weldon. We think this testimony was inadmissible. It was but his conclusion that Hilliard was the man described by Weldon. If Weldon could describe Hilliard to the jury, this was permissible, but the state could not introduce the sheriff's conclusion, formed upon information received from Weldon, that Hilliard suited the description of the man as given by Weldon.

[3] The sheriff was permitted to testify as to what he told Harris after he arrested him. This statement to Harris was made in the presence of the defendant, and the question was asked as to whether the sheriff stated to Harris in appellant's presence whether he would let him go home or not. The sheriff replied:

"Well, he said he didn't know anything about it, was there asleep, and had nothing to do with it. But that wasn't my reason for turning him loose, not what he had to say about it."

In this same connection appellant proposed to prove by the defendant that in his presence the sheriff stated to Harris that he (Harris) was the man who committed the alleged robbery, and that he arrested him because he, the sheriff, believed he was the man who committed the robbery and fitted his description. Without going into a discussion of this matter, we think the sheriff's testimony ought not to have been permitted. Appellant was under arrest and would not be bound by anything the sheriff may have said in his presence. The sheriff's conclusion, and his statement as to that conclusion that Harris was or was not one of the parties implicated, was not legitimate testimony, and especially the act of the sheriff in discharging Harris from custody after Harris made the statements imputed above mentioned. Upon another trial we are of opinion this testimony should not be permitted to go before the jury.

[4-6] There are several bills of exception in the record to the exclusion of testimony offered by appellant. It was the theory of appellant that the prosecuting witness, Weldon, was, if not insane, idiotic or feeble-minded. Appellant should have been permitted to make proof that the witness was idiotic, and therefore incompetent as a witness. The statute provides that insane people shall not be permitted to testify. It was admissible for another purpose. If he was not insane or idiotic so as not to be able to testify, still such testimony could be used as impeachment of the witness upon the same theory that a witness could be shown to be

drunk when the occurrences about which he testified did occur. It was held in an opinion by Judge Hurt in *Meyers v. State*, 37 Tex. Cr. R. 208, 89 S. W. 111, that drunkenness of the party at the time of the occurrences about which he was testifying could be shown, and to the same effect are the authorities generally. It seems to be a well-settled rule that the feeble-minded condition of the witness may be shown to impair or impeach his credit as a witness. See 40 Cyc. 2574 and 2575, and note with collated authorities; 1 Wharton, Crim. Ev. p. 750. It is laid down by these authorities that the mental capacity of the witness is the proper subject of consideration and impeachment as bearing upon his credibility. 40 Cyc. 2573, and note 34. See *Wren v. Howland*, 83 Tex. Civ. App. 87, 75 S. W. 874. It is also laid down by these authorities that lack of intelligence may be shown as tending to discredit the witness as to his credibility and the weight to be given his testimony. 40 Cyc. 2573, note 75. We are of opinion that the court should have permitted this testimony to go to the jury. Appellant also offered evidence to show that the mother of Weldon was an idiot. If it was sought to show that Weldon was insane, the fact that his mother was crazy or an idiot would be clearly the subject of investigation and proof. Insanity in the family of the witness would be the subject of investigation if the question was one of proving the insanity of the witness. This is unquestionably so where the question of insanity is raised upon the trial of a person accused of crime. We see no valid reason why such testimony, being legitimate to show the insanity of the witness or the accused, as the case may be, would not be legitimate to prove as impairing the credibility or strength of the testimony of the supposed insane or idiotic witness.

For the reasons indicated, the judgment will be reversed, and the cause remanded.

DAWSON v. STATE. (No. 5844.)

(Court of Criminal Appeals of Texas. June 2, 1920.)

Criminal law §424(3)—Statement of coconspirator after consummation of transaction inadmissible.

Statement of coconspirator made out of the presence of defendant, after consummation of the transaction and after defendant had been arrested, was not admissible in evidence.

Appeal from District Court, Eastland County; E. A. Hill, Judge.

H. W. Dawson was convicted of theft, and he appeals. Reversed and remanded.

Mays & Mays, of Eastland, for appellant.
Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of the theft of 14 joints of 6½-inch casing of sufficient value to make it a felony.

A bill of exceptions recites that McLemore Dawson a brother of defendant, was charged with the same offense; that he was not present at defendant's trial and did not testify; that Fred Cook, an employé of the Prairie Oil & Gas Company, the party to whom said casing belonged, was testifying for the state; and that the state was seeking to prove by Cook a certain conversation which had taken place out of the presence of the defendant between witness and McLemore Dawson, brother of defendant; this conversation occurred some time after defendant had been arrested on the charge set forth in the indictment in this case; that the conversation was out of the presence of defendant and without his knowledge or consent. The bill is full in its statements, and, after the objections had been urged and overruled, the witness stated:

"The defendant was not present when we had this talk. He [McLemore Dawson] told me that he, together with George Davis and Hosey Davis, went out to the Barnes lease on the afternoon of the 26th of September, 1919, and secured two loads of 6½-inch casing and hauled it to the home of the defendant, and left it on the wagon till some 8 or 9 o'clock in the evening and took it over and unloaded it at the Jew's yard. The defendant and McLemore Dawson were present when they unloaded it. He went out there at the request of his brother and drove his team, and that his brother paid him \$5 per day to drive his team and haul this casing. He told me that he and George Davis and Henry Davis, brother-in-law of the defendant, and the defendant hauled at different times five separate trips."

Objection was again urged to the introduction of this conversation between McLemore Dawson and the witness Cook. This testimony was not admissible. The conspiracy, if any existed, had been consummated, and appellant had been arrested in the case at hand. *Shiffett v. State*, 51 Tex. Cr. R. 530, 102 S. W. 1147; *Overstreet v. State*, 67 Tex. Cr. R. 565, 150 S. W. 630; *Couch v. State*, 58 Tex. Cr. R. 505, 126 S. W. 866; *Bouldin v. State*, 222 S. W. 555, decided at the present term of the court. This was but the statement of McLemore Dawson to the witness Cook of things and matters connected with this alleged violation of the law and appellant's connection with it in appellant's absence and after the consummation of the transaction, and after appellant's arrest. Under these authorities this evidence was inadmissible.

The judgment will be reversed, and the cause remanded.

WATTS v. STATE. (No. 5845.)

(Court of Criminal Appeals of Texas.
June 2, 1920.)

1. Witnesses \S 52(7)—Testimony of defendant's wife as to conduct of deceased toward her available to defendant, but not to state.

In prosecution for murder, where defendant claimed to have been angered by the attentions of deceased to his (defendant's) wife, the wife's testimony as to conduct of deceased toward her was available to defendant, but not available to the state.

2. Criminal law \S 1144(12) — Lower court presumed not to have erred in absence of statement.

In absence of any statement in the bill of exceptions of the proceedings or attendant circumstances such as will enable the appellate court to know, as a certainty, that an error was committed, the court must presume that the trial court did not erroneously sanction the introduction of improper testimony, or permit prosecuting officer to transgress the rules controlling cross-examination of the appellant and his witnesses.

Appeal from District Court, San Augustine County; W. T. Davis, Special Judge.

Sylvester Watts was convicted of manslaughter, and he appeals. Affirmed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. Upon indictment for murder, the conviction was for manslaughter, and punishment fixed at confinement in the penitentiary for a period of five years. That the deceased was shot and killed by the appellant is not controverted. A shotgun loaded with buckshot was used, fired at close range, the shots striking deceased on the side of the face, neck, and shoulder. Circumstances unnecessary to relate were relied upon by the state in support of its theory that the appellant lay in wait for the deceased, and shot him from ambush while he was driving his mules hitched to his wagon. The appellant's theory, developed from his evidence, was that, angered by the attentions of the deceased to the wife of appellant, he armed himself, sought a meeting with deceased, and killed him.

[1] The correctness of the court's charge in the selection of the issues, and the manner of their submission, is not called in question. The bill, complaining of the failure of the appellant to make proof of certain facts which

the evidence suggested were within the knowledge of his wife, discloses no just cause for complaint. The conduct of the deceased toward her was an important and controverted issue in the case. Her testimony upon it was available to the appellant, and not available to the state. The ruling of the trial court was in accord with that announced by this court in *Mercer v. State*, 17 Tex. App. 467, in which it is said:

"Her knowledge of the facts, whatever that knowledge might be, was at his command—was within his reach—and without he produced it, or consented to its production, it was a sealed book, which no human tribunal had the power to open."

Under these circumstances, we think the prosecuting attorney was justified in the remarks complained of. Other cases giving sanction to the rule are collated in *Rose's Notes on Texas Reports*, vol. 5, p. 431.

[2] The bill complaining of the cross-examination of the appellant's witness, George Martin, to the effect that he also went by the name of George Lewis, fails to disclose error. The surrounding facts are not disclosed, and for all that appears the cross-examination may have been entirely germane to his examination upon behalf of the appellant. The same is true with reference to the witness Lee Lacy and the witness Neely Watts, as well as that taken to the cross-examination of appellant. This court must indulge the presumption that the trial court did not erroneously sanction the introduction of improper testimony, or permit the prosecuting officer to transgress the rules controlling cross-examination of the appellant and his witnesses, and this presumption must prevail, in the instant case, in the absence of any statement in the bill of the proceedings or attendant circumstances such as will enable the appellate court to know as a certainty that an error was committed. *Barkman v. State*, 41 Tex. Cr. R. 108, 52 S. W. 73; *Thompson v. State*, 29 Tex. App. 208, 15 S. W. 206; *Spencer v. State*, 61 Tex. Cr. R. 62, 133 S. W. 1049; *Eldridge v. State*, 12 Tex. App. 208; *Cordova v. State*, 6 Tex. App. 447. No phase of the evidence would have warranted a verdict for a lower degree of homicide than that which was accorded appellant, and no violation of the rules of procedure is pointed out which would tend to show that the verdict rendered was not that of an impartial jury in a trial fairly and legally conducted.

The judgment is affirmed.

HERBERG v. STATE. (No. 5708.)

(Court of Criminal Appeals of Texas. June 2, 1920.)

1. Criminal law \S 444—One having supervision of books can testify as to their correctness.

In prosecution of agent for embezzlement by failing to remit proceeds collected for principal, employé of principal who had supervision of the keeping of principal's books can testify to the correctness of the books kept under his supervision.

2. Criminal law \S 400(8)—Employé having supervision of keeping of books not competent to state conclusion as to contents.

In prosecution of agent for embezzlement by failing to remit proceeds collected for principal, principal's employé who had charge of the keeping of its books was not competent to state his conclusions touching the contents of the book in the absence of the production of the books and the verification by him of their correctness, by testifying that the account of particular sale had not been collected.

3. Embezzlement \S 48(4)—Refusal of instruction that deposit of check without fraudulent intent was not conversion held error.

In prosecution of agent for embezzlement of proceeds collected by him for principal, where there was evidence that it was contemplated that a separate remittance was not to be made by agent upon each sale or collection, but that the aggregate amount of the day's business was to be embraced in a single cashier's check, refusal to charge that the deposit by the agent of check received in payment of the account to his credit in the bank, unless done with fraudulent intent, would not be a conversion, *held* error.

4. Embezzlement \S 48(1)—Charge as to conviction if amount was less than \$50 held error in view of charge refused.

In prosecution of agent for embezzlement by failing to remit amount of \$70.10 collected for principal, where the memorandum accompanying the cashier's check sent to the principal by agent contained an item of \$60.50 described as "cash sales collections," the meaning of which was not otherwise expressed, refusal to submit issue of whether the cashier's check remitted a portion of the \$70.10, and to charge that conviction could not be for more than a misdemeanor offense if the amount appropriated was less than the sum of \$50, *held* error.

Appeal from District Court, Floyd County;
B. O. Joiner, Judge.

Gus Herberg was convicted of embezzlement, and he appeals. Reversed and remanded.

Kenneth Bain, of Floydada, for appellant.
Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. [1, 2] The conviction is for embezzlement. The appellant was the agent of a corporation dealing in oil, with a principal office at Ft. Worth, in this state, and local office at Floydada. The method of doing business and keeping accounts was that appellant, in making sales of oil for either cash or credit, was required to keep a record and make reports and remittances; blanks being furnished by the corporation. It was the custom to make a separate record of each transaction; thus a book was furnished on which the sale and the amount was recorded, dated, and signed by the purchaser. This book was made with carbon so that an original and two carbon impressions were taken. The original was delivered to the purchaser, one of the carbons sent to the principal office, and the other retained in the local office. If this sale slip represented a cash transaction, exchange or cashier's check was to accompany. If it represented a credit transaction, a charge was made against the purchaser upon the books of the company at the central office. These slips bore a serial number. On the 17th of August a sale amounting to \$70.10 was made to Pope, and the ticket bore the serial number 292941. On receipt of the ticket the proper charge was made upon the books of the company at Ft. Worth. On the 19th of August appellant collected from Pope \$70.10 in payment of the account made on the 17th of August. Pope made the payment by check, payable to the appellant, drawn on the First State Bank of Floydada. At that time appellant had an account in the same bank, showing a credit balance of \$71.64, and on receipt of the check from Pope it was deposited to appellant's credit together with other funds, making the total deposit on that day \$87.35. Against this account he at once drew a check for \$140.84 with which he purchased a cashier's check payable to the oil company, and which he immediately remitted to the office in Ft. Worth, accompanied by certain tickets designated "cash sales collections," these tickets aggregating \$122. The remittance was also accompanied by memorandum showing credit sales collections amounting to \$18.50. The cash sales collection tickets did not name the purchaser. One of them was for an item of \$60.50. Other than as may be inferred from the tickets accompanying the remittance, nothing is shown by the evidence; that is to say, no direct testimony was given showing any unremitted sales or collections other than the \$70.10, except that a witness for the state was permitted over appellant's objection to testify that no remittance covering the sale to Pope had been made. This witness was an employé of the company, and, while not a keeper of its books, they were kept under his supervision, and we think the circumstances detailed by him were sufficient to permit him to testify to the correctness of the books of account kept

under his supervision. But in the absence of the production of the books, and the verification by him of their correctness, we think it was not competent to state his conclusions touching their contents, and this, we think, was the character of his testimony to the effect that the account of the Pope sale had not been collected. He did not, as we understand it, purport to speak from personal knowledge, but from knowledge of the books which were under his control, available to the state, and which, if their contents were desired, should have been produced. *Moore v. State*, 208 S. W. 918.

[3. 4] The court in its charge instructed the jury, in substance, that if appellant received from Pope \$70.10 for his principal, and "did embezzle, fraudulently misapply, or convert to his own use said money, or any part thereof over \$50, you will find the defendant guilty." He also instructed them, in substance, that if appellant remitted the \$70.10 in payment of the Pope account, or thereafter paid it, to acquit him. The appellant sought to have the jury told that the deposit of the \$70.10 to his credit in the bank, unless done with fraudulent intent, would not be a conversion. We think the circumstances were such as to demand such a charge on request. There was evidence that it was not contemplated that appellant would remit the checks received, but that he would use the funds in the purchase of exchange or cashier's check, and, as we understand the state's testimony, it was not contemplated that a separate remittance was to be made of each sale or collection, but the aggregate amount of the day's business was to be embraced in a single cashier's check. In various ways the appellant criticized the court's charge, among others contending that, if not all, then certainly the greatest part of, the \$70.10 collected from Pope was, on the day of its collection, remitted to his principal, and that the memorandum accompanying the cashier's check for \$140 contained an item of \$60.50, described as "cash sales collections," the meaning of which was not otherwise explained; that it was not competent for the court, as a matter of law, to determine that this item did not include at least a part of the money collected from Pope; and that the charge was incomplete in failing to affirmatively present to the jury the view of the case that would enable them to have determined this matter, and to have drawn, if they would, the inference from the circumstances that the transaction did not evidence a fraudulent appropriation of the \$70.10 to the use of appellant, and particularly that it did not evidence a fraudulent appropriation of an amount thereof exceeding \$50. In view of the record, we think this view of the case should have been submitted to the jury in an appropriate charge, and that they should have been affirmatively told that,

although there was a fraudulent appropriation of a part of the \$70.10, the conviction could not be for more than a misdemeanor offense if the amount thus appropriated was less than the sum of \$50. *Loving v. State*, 44 Tex. Cr. R. 375, 71 S. W. 277; *Day v. State*, 71 Tex. Cr. R. 414, 159 S. W. 1186; *Goodsoe v. State*, 52 Tex. Cr. R. 627, 108 S. W. 388.

The evidence that at the time the appellant remitted the \$140.84 he did not include funds due because of the Pope account or that the remittance did not cover all that was due by him is not so conclusive as to relieve the court from submitting the question to the jury in a manner more comprehensive than was done in the charge given, which was meager and abstract in its nature.

We have examined the other questions presented and arising from the record, and find nothing likely to occur upon another trial requiring further notice.

For the errors pointed out, the judgment is reversed, and the cause remanded.

DAWES v. STATE. (No. 5825.)

(Court of Criminal Appeals of Texas. June 2, 1920.)

1. Criminal law §304(13)—Court judicially knows judges of various districts.

The Court of Criminal Appeals has judicial knowledge that a particular person was not a judge of a given district.

2. Criminal law §1086(3) — Where special judge sits in criminal case, record must show his qualification.

Where special judge sits in criminal case, record must show that he was qualified or authorized to act therein, and that oath of office was administered to him, and, where it does not so show, conviction will be reversed.

Appeal from District Court, Wichita County; P. A. Martin, Special Judge.

Earl Dawes was convicted of felony theft, and he appeals. Reversed and remanded.

T. F. Hunter, of Wichita Falls, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted of felony theft in the district court of Wichita county, and his punishment fixed at two years' confinement in the penitentiary.

[1, 2] This court judicially knows that Hon. P. A. Martin is not judge of the Thirtieth judicial district of this state. We observe that all orders, charges, and bills of exception in this record are signed "P. A. Martin, Special Judge, 30th Judicial District." Nothing

appears in the record showing how any special judge became qualified or authorized to act herein, or that any oath of office was administered to him. The uniform holding of this court seems to be that such facts must appear in the record. *McMurry v. State*, 9 Tex. App. 208; *Thompson v. State*, 9 Tex. App. 649; *Snow v. State*, 11 Tex. App. 99; *Perry v. State*, 14 Tex. App. 167; *Smith v. State*, 24 Tex. App. 297, 6 S. W. 40; *Blanchette v. State*, 29 Tex. App. 46, 14 S. W. 392; *Weatherford v. State*, 28 S. W. 814; *Reed v. State*, 55 Tex. Cr. R. 138, 114 S. W. 834; *Summerlin v. State*, 153 S. W. 890.

For the reason that no such authority anywhere appears in the record, the judgment is reversed, and the cause remanded.

Ex parte ALBRITTON. (No. 5165.)

(Court of Criminal Appeals of Texas. June 2, 1920.)

Habeas corpus \S 44—Court of Criminal Appeals will not award writ, where restraint grows out of civil case.

Where relator violated a restraining order, and was imprisoned for contempt, the Court of Criminal Appeals will not entertain an application for a writ of habeas corpus, for Rev. St. art. 1529, gives the Supreme Court authority to entertain applications for writs of habeas corpus in cases in which the restraint grows out of a civil case.

Original application by W. A. Albritton for writ of habeas corpus. Application dismissed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. This is an original application for writ of habeas corpus. Its disposition has been delayed upon request of counsel for both appellant and state, pending settlement by agreement of a civil suit out of which the injunction, upon the violation of which the contempt was founded, grew.

A restraining order was issued in this civil suit, requiring the relator to refrain from cultivating certain cotton on his premises pending the disposition of the suit. He was adjudged in contempt of the district court rendering the judgment, and from the restraint under the contempt proceedings relief is sought. The relief will not be granted, for the reason that the Supreme Court is by statute given authority to entertain applications for writs of habeas corpus in cases in which the restraint grows out of a civil case. Revised Statutes, art. 1529. In deference to this statute, and the reasons that impelled the Legislature to enact it as stated, in vari-

ous decisions of this court, it has refrained from granting writs of habeas corpus in cases of contempt growing out of the alleged disobedience of an order entered in a civil case. Ex parte Houston, 219 S. W. 826; Ex parte Alderette, 203 S. W. 764; Ex parte Gregory, 210 S. W. 205.

Following this precedent, the application for writ of habeas corpus is ordered dismissed.

Ex parte ALBRITTON. (No. 5166.)

(Court of Criminal Appeals of Texas. June 2, 1920.)

Original application by J. C. Albritton for writ of habeas corpus. Application dismissed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a companion case to Ex parte W. A. Albritton (No. 5165) 222 S. W. 561, this day decided. Without any further discussion, this application will be dismissed, on the reasoning and authorities stated in the opinion in the other case.

The application for habeas corpus is dismissed.

PARHAM v. STATE. (No. 5782.)

(Court of Criminal Appeals of Texas. May 5, 1920. On Motion for Rehearing, June 2, 1920.)

1. Criminal law \S 1054(1)—Court's failure to limit testimony not available on appeal when not excepted to.

Court's failure to limit testimony is not available on appeal, where no exception was taken to court's failure to so do, even though defendant was unlearned in the law, was not represented by an attorney, and did not know how to take advantage of the situation by excepting.

2. Criminal law \S 1168(2)—Failure to limit testimony held not reversible error.

In prosecution for automobile theft, where police officers who had arrested defendant for theft of tool joints testified, court's failure to limit such testimony with reference to the extraneous crime was not reversible error, where defendant pleaded guilty and where the facts showed beyond question that defendant stole the automobile.

On Motion for Rehearing.

3. Criminal law \S 649(3)—Refusal to postpone trial for absence of defendant's counsel held error.

Where defendant's attorney resided in a county other than that in which the case was called for trial, and was engaged in the trial of cases in such other county at the time that the case was called for trial, court's refusal

to postpone trial because of the absence of defendant's attorney, where such postponement would not have operated as a continuance, and where such failure left defendant without any attorney, *held* reversible error.

4. Criminal law §641(1)—Accused entitled to benefit of counsel.

Accused's right, under the Constitution, to have the benefit of counsel, is a valuable right which the courts will strictly enforce.

5. Criminal law §1092(1)—Bills of exception approved subsequent to making of transcript will be considered where transcript was made out before expiration of time for the approval of bills.

Where the transcript was made out and certified by the clerk before the expiration of the period for filing bills of exception, bills of exception approved by the judge subsequent to the making out of the transcript but within the time provided for the filing and the approval of the bills will be considered.

6. Criminal law §1104(6)—Transcript not to be made out until expiration of time for filing bills of exception.

Where time for filing of bills of exception is extended, the transcript should not be made out until after the expiration of the extended period.

7. Criminal law §518(2)—Defendant's statements to officers while under arrest without being warned inadmissible.

Testimony of statements by defendant to police officers, amounting to a confession, made while he was under arrest without being warned and without being reduced to writing, *held* inadmissible.

8. Criminal law §528—Statements to officers by defendant's associates while under arrest held inadmissible.

In prosecution for theft, testimony as to statements, amounting to confessions, made to police officers by two of defendant's associates, separately made while in separate rooms in the jail, *held* not admissible.

9. Criminal law §673(5)—Testimony as to extraneous crime should be limited.

In prosecution for automobile theft, where there was testimony by police officers who had arrested defendant for theft of tool joints, after having driven to scene of crime in the stolen automobile, the testimony of such officers should be appropriately limited in the charge of the court.

Appeal from District Court, Wichita County; P. A. Martin, Special Judge.

Elmer Parham was convicted of theft, and he appeals. Reversed and remanded.

Jno. T. Spann, of Dallas, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged with and convicted of theft of an automobile. When the case was called for trial appellant

presented an application for a continuance, which being overruled he entered a plea of guilty and was awarded by the jury the minimum punishment of two years. The application is not signed by the defendant. There is, however, at the end of the application a statement of the clerk to the effect that it was subscribed and sworn to by the defendant on the — day of November, 1919, and the clerk placed his seal on it on the — day of December, 1919. The days are left blank. The application is based on the absence of counsel, who, he alleges, resided in Dallas, Tex. Our Constitution provides that an accused may be heard by himself or counsel or both, and this right should be accorded him in a proper manner and under appropriate circumstances. The statement as shown in connection with the application is that his counsel was engaged in cases set in court in Dallas county, that they came up about the same time that this case was tried, and that counsel was detained by reason of those cases in Dallas. Under the decisions of this court we are of opinion this is not a sufficient showing. There was no attempt made by appellant to reset his case in order to give his attorney an opportunity to be present. He only sought to continue it for the term. This question has been decided adversely to appellant in *Mason v. State*, 74 Tex. Cr. R. 256, 168 S. W. 115, Ann. Cas. 1917D, 1094, and to the same effect is *Davis v. State*, 69 Tex. Cr. R. 86, 154 S. W. 226, and *Usher v. State*, 47 Tex. Cr. R. 95, 81 S. W. 309. The *Mason Case* is in point. Doubtless had the court been requested to reset this case it would have been granted; at least, there is no attempt on the part of appellant to have the case reset in order that his attorney might be present.

There are two papers in the record purporting to be bills of exception, but neither are signed nor approved by the judge. There is a fourth bill which was reserved to the action of the court with reference to the testimony of two state's witnesses, in that the court failed to limit and restrict the force and effect of their testimony. The substance of their testimony was that appellant and two others came driving to the depot and alighted at the platform and began taking "tool joints." When the boys began to take these tool joints the witness Somerville, who was guard or policeman at the station, arrested them. He was not aware at that time that the auto they were driving was the one with which he was later charged with stealing. The evidence shows that the auto they were driving had been stolen only a few minutes before and for the purpose of going to the depot to get these "tool joints." The object in securing the joints was to get money to pay board. The testimony of the other witness, who was also an officer, was with reference to statements the boys made to him in regard

to these matters. These statements in a general way may be stated to be admissions and confessions with reference both to the taking of the car and the taking of the tool joints. The court did not limit this testimony to any purpose, and after the trial appellant filed an exception to the failure of the court to so instruct the jury.

[1, 2] As the matter is presented it cannot be considered. There was no exception taken to the charge at the time, though the bill recites that the charge was given appellant for inspection. The reason given why an exception was not then reserved was that appellant was unlearned in the law and did not know how to take advantage of the situation by excepting. This would hardly furnish a reason legally; but, in any event, under the circumstances of this case it would not present any serious question we think. Appellant pleaded guilty. The state introduced evidence in accordance with the statute which requires it to be done where pleas of guilty are entered. The facts show beyond any question or debate that appellant committed the theft of the auto, and that he drove to the depot a short distance away, after taking the auto, to get the tool joints and was arrested. The minimum punishment was assessed under a plea of guilty.

Finding no reversible error in the record, the judgment will be affirmed.

On Motion for Rehearing.

[3, 4] On a former day of the term the judgment herein was affirmed. One question in the case was decided on the theory that the application for a postponement, as now claimed, was only an application for a continuance for the term. In the light of the motion for rehearing and a more careful consideration of the record, we are of opinion that we were mistaken with reference to the full import of the application. While it is denominated an application for continuance, and evidently so treated by the trial court, yet there is a request made of the court, if the continuance should be refused, that his absent counsel's presence could be secured the following week. So this application may be considered as one in the alternative for a continuance or postponement on account of the absence of counsel. The showing made by the application is sufficient so far as the absence of counsel was concerned. He resided in Dallas county, and was engaged in the trial of cases in that county at the time that this case was called for trial, and those cases were set at the same term in Dallas county that this case was called for trial in Wichita county. This was appellant's only counsel and upon whom he relied. This case was tried on the 4th of December, 1919. The court did not adjourn until the 28th of the following February. A postponement of the case for the presence of counsel would not

have operated as a continuance. The accused was not defended by any attorney during the trial. After his application was overruled he entered a plea of guilty. The suggestion is that this would not have occurred had his counsel been present and aided in the defense. The Constitution provides that the accused shall have the benefit of counsel if he desires. This is a valuable right and one that has been rather strictly enforced by the courts. We are of opinion, therefore, that we were in error in affirming the judgment from this viewpoint; that appellant was entitled to a postponement that his counsel might be present and represent him.

[5-8] It was noticed in the former opinion that there were two bills of exception in the record which were not approved by the judge. It is made to appear by certificate of the clerk accompanying this motion for rehearing that both bills were approved by the judge subsequent to the making out of the transcript, and the record of the office of the district clerk so shows. As presented, we are of opinion the bills should be considered. It is shown by the record that the court adjourned on the 28th of February. Two orders of extension of time, amounting to 30 days, were granted by the trial judge in which to prepare bills of exception. This extension would have expired about the 28th of March. The transcript was made out and certified by the clerk of the trial court on the 11th of March, and the file mark here shows it to have been filed in this court on the 13th of March, 15 days prior to the expiration of the time allowed by the trial judge for the approving and filing of the bills. The clerk certifies that after he made out the transcript and forwarded it to this court the trial judge approved the two bills in question. Under the order of the trial judge the appellant had to the 28th of March in which to have approved and filed his bills of exception. The transcript should not have been made out until after the expiration of the 30 days. These bills of exception show important matters for the appellant, and we think show erroneous rulings of the trial court. These bills show that the parties were arrested, three in number, connected with the alleged theft, and that they made statements amounting to confessions to the officers, and among others was the confession made by appellant. He was unwarned, under arrest, and the confession was not in writing. It also shows the confessions of two of appellant's associates separately made when they were in separate rooms in the jail from each other. Their testimony was not admissible.

[9] There is another matter that might be mentioned which was discussed in the original opinion. It is this: The court did not limit the testimony with reference to an extraneous crime. Appellant was charged with the theft of an auto. During the same evening or night appellant and his associates were

arrested for the theft of some "joints." This testimony was introduced and the court failed to limit it. There was an exception taken to the charge in the trial court before it was read to the jury. Upon another trial we are of opinion this testimony should be appropriately limited in the charge of the court. It had an important bearing upon the case. The contention is made that in taking the car the parties did not intend to appropriate it but only to use it for the purpose of conveying the joints when taken, and appellant undertook to segregate himself even from the taking of the car. These matters rather emphasize the first proposition, that is, that appellant ought to have had an opportunity for his counsel to be present and assist in the trial of the case.

For the reasons indicated the motion for rehearing is granted, the affirmance is set aside, and the judgment now reversed and the cause remanded.

NARANGO v. STATE. (No. 5829.)

(Court of Criminal Appeals of Texas. May 19, 1920. On Motion for Rehearing, June 16, 1920.)

1. Criminal law §1102—Statement of facts copied into transcript in a felony case insufficient to constitute duplicate.

Under Vernon's Ann. Code Cr. Proc. 1916, art. 844c, requiring the filing of a duplicate statement of facts in the trial court and sending original to the appellate court, the mere copying of a statement of facts in the transcript in a felony case is insufficient, and a statement so copied in the transcript will be stricken from the record.

2. Witnesses §255(3)—Permitting witness to refresh recollection from paper not offered in evidence not error.

In prosecution for theft of property of the value of more than \$50, action of court in allowing prosecuting witness to look at, and refresh his recollection from, a list of property which he had made on a former occasion, where the list was not offered in evidence, nor its contents read, *held* not error.

3. Criminal law §452(1)—Prosecuting witness' testimony as to value of property under his control held not error, in prosecution for theft.

In prosecution for theft of property of the value of more than \$50, involving issue as to value of property taken, admission of testimony by prosecuting witness as to the value of a certain razor enumerated in the indictment as a part of the alleged stolen property was not error, where such razor was under the care, control, and management of prosecuting witness, though he testified that the razor belonged to another party.

4. Criminal law §1169(9)—Admission of testimony held harmless, in view of other testimony given.

In prosecution for theft of property of the value of more than \$50, involving an issue as to the value of the property taken, the admission of testimony as to the value of the property when it was new *held* harmless, where witness also testified as to its value at the time it was taken, and where under such testimony the aggregate value of all the property taken, at the time it was taken, was more than \$50.

On Motion for Rehearing.

5. Larceny §32(5)—Ownership property laid in person having custody of property.

In prosecution for theft of property taken from certain ranch, the allegation of ownership was properly laid in the manager of the ranch, in whose care, control, and management the property had been left by real owner.

6. Larceny §40(2)—Proof of real owner's want of consent not essential, where property is in control of other person.

In prosecution for theft of property from ranch, where allegation of ownership was laid in person in whose care, control, and management the property had been left by the real owner, it was unnecessary, in order to sustain case, to show want of consent and knowledge of the real owner.

7. Criminal law §829(1)—Refusal of instruction covered not error.

Refusal of requested instruction, substantially covered by the charge given, *held* proper.

Appeal from District Court, Schleicher County; C. E. Dubois, Judge.

Jose Antonio Narango was convicted of theft of property of the value of more than \$50, and he appeals. *Affirmed*.

M. E. Sedberry, of Eldorado, for appellant. Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted of the theft of property of the value of more than \$50, and his punishment fixed at two years' confinement in the penitentiary.

[1] We are met on the threshold of the consideration of this case by a motion, made by our Assistant Attorney General, to strike from the record what purports to be a statement of facts, which is copied in the transcript. Such practice; a felony case seems not to be in accordance with our statutes. See Vernon's Ann. Code Cr. Proc. 1916, art. 844c, which requires the filing of a duplicate statement of facts with the clerk of the trial court, and that the original be sent here for our inspection, and the duplicate be kept on file by said clerk. It therefore appears that we must sustain said motion. *Hardgraves v. State*, 61 Tex. Cr. R. 422, 135 S. W. 144; *Slat-ter v. State*, 61 Tex. Cr. R. 243, 136 S. W. 770

[2] Appellant has a bill of exceptions to the action of the trial court in allowing the prosecuting witness to look at, and refresh his recollection from, a list of property which he had made on a former occasion. No error appears in such action. *Gould v. State*, 66 Tex. Cr. R. 122, 146 S. W. 172; *Luttrell v. State*, 40 Tex. Cr. R. 651, 51 S. W. 930; *White v. State*, 18 Tex. App. 57. The list was not offered in evidence, nor its contents read.

[3] Another bill of exceptions was taken to the action of the lower court in allowing the prosecuting witness to testify to the value of a certain razor found in the possession of appellant, and enumerated in the indictment as a part of the alleged stolen property; the ground of objection being that this witness had already testified that said razor belonged to another party, who worked on the ranch. The bill does not negative the idea that such razor was a part of the stolen property, nor that it might have been in the care, control, and management of said witness, who thus became the special owner thereof. The same may be said of the bill complaining of similar testimony as to the value of certain underwear found in appellant's possession. Nor do we think there is any legitimate ground of objection to the question and answer of said witness in regard to his control over certain property, consisting of valves and brass boxes, which were claimed to be a part of said stolen property.

[4] Appellant also has an objection to the testimony of what would be the value of new valves of the kind described by the witness Oglesby, and alleged to have been stolen. The evidence could not have injured the accused, as the testimony of the prosecuting witness, Oglesby, was as to the value of such valves in their condition when taken, and the only effect of such objectionable testimony would be to affect the degree of the offense, as being a misdemeanor or a felony, and, under Oglesby's testimony as to values, the aggregate value of all the property taken was more than \$50.

The record contains three special charges requested by appellant and refused, but in the absence of a statement of facts we are unable to perceive any error on the part of the trial court in refusing the same.

Finding no error in the record, the judgment is affirmed.

On Motion for Rehearing.

Appellant files his motion for rehearing, accompanying the same with the original statement of facts, and asks that it be considered. The motion will be granted, to the extent of considering said statement of facts.

[5, 6] We have examined the special charges of appellant in the light of the facts adduced. Special charge No. 2 sought to have the jury told that certain of the alleged

stolen property belonged to persons other than the alleged owner, and that the case could not be made out without proof of the want of consent and knowledge of the real owners. We think this charge properly refused, for under the facts, as we understand them, these various articles of property were in the care, control, and management of Mr. Oglesby, who was in charge of the ranch at the time, and in whose care said property had been left by the real owners. In such case, the allegation of ownership was properly laid in Mr. Oglesby, and the special charge did not correctly announce the law applicable.

[7] Appellant's special charge No. 3 was correctly refused, because of the fact that the same was substantially equivalent to his special charge No. 1, which was given by the court.

The matters complained of in appellant's bills of exceptions were noticed and passed upon in the original opinion, and we see nothing in the statement of facts to cause us to change our views upon any of them. We have examined the testimony of Mr. Oglesby and Mr. Hill, as contained in the statement of facts, and regret to find ourselves unable to agree with the contention made in appellant's motion that the testimony of Mr. Hill was of such prejudicial character as to require a reversal of the case. The testimony of Mr. Hill related only to the value of certain of the alleged stolen articles when new, and inasmuch as Mr. Oglesby testified as to their values at the time when taken, and the aggregate value fixed by him upon the property exceeds \$50, we are unable to see how the testimony of Mr. Hill was so material as to call for a reversal.

The motion for rehearing will be otherwise overruled, and an affirmance ordered.

PIERCE v. STATE. (No. 5805.)

(Court of Criminal Appeals of Texas. May 19, 1920. State's Rehearing Denied June 16, 1920.)

1. Criminal law §369(8)—Evidence as to defendant's threat to kill prosecutrix held admissible in rape prosecution.

In prosecution for rape, evidence that on day following perpetration of crime defendant had threatened, with gun in his hands, to kill prosecutrix if she told what had occurred, held admissible as against objection that it related to a separate crime.

2. Criminal law §369(8) — Evidence as to other act of intercourse held admissible in rape prosecution.

In prosecution for rape on daughter, where defense was that at time he was charged to have had intercourse with daughter he was merely examining her to ascertain if she had had intercourse with other men, evidence as

to another prior act of intercourse on such daughter held admissible.

3. Criminal law §1092(6)—Bills of exception filed after term time not considered.

"Bills of exception filed after term time cannot be considered.

4. Criminal law §1092(6)—Failure to file bill of exceptions in time no effect upon bill filed within required time, though the bills are to the same effect.

Failure to file bill of exceptions in term time would not affect bill of exceptions filed within the required time, though the bills were practically to the same effect.

5. Criminal law §857(2)—Misconduct of jurors in mentioning previous prosecution of defendant held ground for reversal.

The conduct of one or more of the jurors in mentioning, at a time when the jury stood nine for conviction and three for acquittal, that defendant had been previously tried, and that such trial had resulted in a mistrial because the jury stood nine for conviction and three for acquittal, held ground for reversal.

Appeal from District Court, Falls County; Prentice Oltorf, Judge.

A. L. Pierce was convicted of rape, and he appeals. Reversed and remanded.

Jno. T. Kitching and Robt. F. Higgins, both of Marlin, for appellant.

Alvin M. Owaley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of rape, and his punishment assessed at 7 years in the penitentiary.

The indictment charges rape in three counts—one on a girl under 18 years of age; one on the same girl under 15 years of age; and the other by force, threats, and fraud. The facts show prosecutrix was the daughter of defendant and under 15 years of age. The state's case is that appellant had intercourse with his daughter in a room adjoining that occupied by his wife and son; that he had intercourse with her about the time the family were retiring, and in the same bed was another daughter just younger than prosecutrix, and also a little girl sister, the three occupying the same bed; that appellant went in there, got in bed with this girl, and forced her to have intercourse; that his wife and his son heard the noise; that the son, a boy nearly grown, stated:

"The first thing that attracted my attention was when I heard the racket and the bed popping, and I heard Etta [prosecutrix] bellow. Mamma asked Papa what he was doing in there, and he said, 'I'm not doing nothing,' and Mamma said, 'You ain't got no sense,' and Mamma said, 'You think I ain't got no sense,' and Papa said, 'God damn you, you won't have no sense in a minute if you fool with me.' There

was no light on at that time; it was dark. I told Mamma to light the lamp and let's see what that dad-gum fool was doing in there, and he said, 'God damn you, if you light that lamp, I'll blow your head off.'"

This witness was about seven feet from the door of prosecutrix's room, and the remarks mentioned above were made during the alleged assault of defendant upon prosecutrix.

[1] Appellant met this with testimony to the effect that on one occasion shortly before this occurrence one of the neighbor girls was spending the night at his house, and his daughter, perhaps two daughters, and this neighbor girl had taken a bath and were naked in the room and making a considerable noise, and he heard the visiting girl friend ask his daughter if she had ever "spinned," and she replied that she had "spinned" three times; that he understood this to mean that she had had intercourse with boys on three different occasions; that he then determined to satisfy himself whether or not she had had such intercourse; that on the occasion the girl testified he had gone in the room to examine her to see whether or not she had had intercourse; that he was seeking to examine her private parts to ascertain that fact when the matters occurred about which his wife and son testified, and he also denied having intercourse with her at any time or place. During the night of this occurrence and about midnight the two girls who were in bed at the time, prosecutrix being one, left home and went to a neighbor's off two or three miles; that the next morning early and before daylight appellant and his son Dan, who testified in the case, went in search of them, and finally located and brought them back. The son Dan had a pistol with him. En route back the father called for the pistol and presented it and asked prosecutrix if she had told what occurred, and if she did he was going to kill her. Objection was urged to this testimony because it was a distinct offense, extraneous, and not permissible, and not germane to the case, and detrimental to appellant's rights. We are of opinion the court did not err in admitting this testimony. The matter occurred in connection with the flight of the girl on account of the alleged conduct of appellant towards his daughter. It was germane, and, if it occurred as the girl testified, it bore upon his relations with prosecutrix on the occasion that he mentioned. It was at least admissible, and does not come within the rule which would reject extraneous matters not connected with the offense on trial.

[2] There was also introduced in evidence another act of defendant with the same girl while picking cotton shortly prior to the act mentioned as having occurred in the house

at night. Appellant put up the same defense against that act that he did against the act that occurred in the house, that is, that he was not trying to have intercourse with prosecutrix and did not; that he was trying to examine her to ascertain if she had had intercourse with men. We are of opinion these acts were introducible. There are several of these bills of exception and all to the same effect and purport.

[3, 4] There are two bills of exception reserved to misconduct of the jury. One of them was filed after term time and cannot be considered under the decisions. It embodied some of the facts alleged to have occurred in the jury room after the jury's retirement. The second bill is practically to the same effect and with reference to misconduct of the jury, which was filed in time. The failure to file the first bill of exceptions in term time would not affect the bill of exceptions filed within the time prescribed by statute. In substance, without going into a detailed statement of the affidavits, the testimony of the jurors is to the effect that after they retired one or more of the jurors mentioned the fact that appellant had been previously tried and that the jury stood eleven for conviction and one for acquittal. This resulted in a mistrial. Up to and subsequent to the time this matter was discussed in the jury room this jury stood nine for conviction and three for acquittal. After having the case under advisement for the night the next morning the ballot resulted in the same, nine to three. There is testimony indicating that they had been carried before the court, where they made a statement that the jury was hung without hope of agreement, but they were sent back. After balloting some time the next morning they agreed upon a verdict of seven years. It is also shown there was something said with reference to defendant's failure to prove his good reputation or character, and, had this been shown, it might have had a favorable effect on the case for him. This bill shows also that the jury was informed of the fact that there had been a previous trial, as developed from examination and cross-examination of witnesses as well as questions asked the jury when being impaneled, but there was no evidence as to the result of the former trial, or how the jury stood in their balloting upon the former trial. This occurred in the jury room after retirement for deliberation.

[5] We think these matters are of sufficient importance to require a reversal of this judgment. The jury stood nine for conviction and three for acquittal until after these matters occurred. Some of the jurymen said it did not affect them in their verdict; that they reached the verdict irrespective of this testimony and these statements. We are of opinion that this testimony and these state-

ments and this conduct are of such a nature as to require us to reverse the judgment.

The judgment is therefore reversed, and the cause remanded.

LANKFORD v. STATE. (No. 5526.)

(Court of Criminal Appeals of Texas. June 2, 1920.)

1. Criminal law \S 721½(2) — Conduct of state's attorney in referring to failure of defendant to call wife erroneous.

In a prosecution for incest, where a witness on cross-examination denied having made a statement to the wife of defendant, held that, where there was nothing else to show that she knew of the transaction, etc., comment by the prosecutor on the failure of the defendant to put his wife on the stand was improper.

2. Criminal law \S 721(6) — Argument of prosecutor erroneous as reference to failure of defendant to testify.

In criminal prosecution, where the only other witness to the crime was prosecutrix, statement by the district attorney that defendant, instead of putting his wife on the stand, was content to rely on his plea of not guilty, was improper as a reference to the failure of the defendant to take the stand himself.

Appeal from District Court, Hood County; J. B. Keith, Judge.

Jasper A. Lankford was convicted of incest, and he appeals. Reversed and remanded.

Henry Zweifel, of Granbury, and Thompson, Barwise, Wharton & Hiner, of Ft. Worth, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The indictment charged appellant with having committed incest with his daughter on the 19th day of July, 1918. Her testimony is to the effect that on that day they went from their residence in Hood county to the town of Cleburne to place her in a sanitarium to have one of her ovaries removed by surgical operation. They went in a one-horse buggy. Upon reaching a certain gate her father got out of the buggy to open the gate, and while at the gate he assisted her out of the buggy. They went behind it and stood up in the middle of the road and had intercourse in that position. To this she says she did not consent. Her testimony further indicates that she protested to her father. She says her father was six feet tall, while she was only five feet in height. When this occurred, they went to the town of Godley, in Johnson county. After reaching the town she communicated

this matter to a Mrs. Shotwell and Dr. Yeater. Dr. Yeater examined her, the substance of his testimony is that her private parts showed to be enlarged as if they had been accustomed to being penetrated, and he found a dried substance upon her drawers which he took to be seminal fluid. He made no microscopical examination of it, and could not tell whether it was or was not a seminal discharge, and that it could only be determined by the use of the microscope. Dr. Dabney also testified with reference to this matter. These physicians agree in their testimony that the character of this substance could not be determined otherwise than by a microscopical examination, and that it could by this means be determined. They both testified that a discharge from the private parts of the girl would make the same impress and would have about the same appearance as seminal fluid. That there might be a slight difference in color and effect, but the difference could not be told without the investigation mentioned. This investigation was not made, and when the defendant purposed to have it made the state's prosecuting officers declined to permit it. A brother of prosecutrix went to the point that she indicated as the place of the intercourse to examine to see if foot tracks could be found in the road at that point. His testimony is to the effect that there was nothing to indicate such footprints, and he found no evidence of them at the place pointed out by the girl. The father took her from Godley to Cleburne and placed her in a sanitarium. The operation was not performed. There is evidence that she was given to masturbation and had been for a long time. This she admitted, and also evidence that long-continued masturbation produces weakness of the mind, weakness of the body, and sometimes insanity in some form or another, and especially produces hallucinations in which the masturbator would imagine things occurred, which in fact did not occur. There is a great deal of testimony describing the effect of masturbation, which we deem unnecessary to state.

[1] It is also reserved for revision that after the jury had been impaneled the wife of defendant was called by the state and sworn as a state's witness. She was not used as a witness by the state. During the examination of Dr. Dabney, the only witness placed upon the stand by the defendant, and upon cross-examination, he was asked if he had not told the wife of the defendant that her daughter was a good girl and had not had frequent penetrations. This the doctor denied. The wife was not offered as a witness, but the matter was left in that condition. The doctor had testified that the girl was confirmed in her masturbation habits, and gave various reasons and facts and circumstances for his conclusion, and this was substantiated to some extent by admissions of

the girl herself. During the argument the district attorney adverted to the fact that the wife was there as a witness and could have testified, but the defendant did not see proper to place her upon the witness stand. As a general proposition, the state may take advantage in argument of the fact that the wife knew facts, and it was within the power of appellant to place her upon the stand, and he did not do so. There is another line of decisions, however, that the state cannot use the wife's testimony against her husband, nor use her as a witness. There is another rule of law clearly recognized that, where a fact is not authorized to be shown directly, it cannot be introduced by indirect means. The same rule that would exclude the direct testimony would also exclude the indirect testimony to prove the same fact.

In *Moore v. State*, 45 Tex. Cr. R. 234, 75 S. W. 497, 67 L. R. A. 499, 108 Am. St. Rep. 952, 2 Ann. Cas. 873, the district attorney placed the wife upon the stand as a witness and proved by her that the defendant had married her, the substance of all of which was that he had so married her to prevent her testifying against him, as she had been prior to his marriage an important state witness. Objection was urged to all this, and she was tendered as a witness to the defendant. The judgment was reversed. For a discussion of that question see the opinion in that case. That case has been somewhat modified by subsequent opinions, but they all seem to follow the first line of opinions above mentioned; that is, that the state may take advantage of the failure of defendant to place his wife on the witness stand, and discuss that matter before the jury. If the subsequent cases are thought to modify the *Moore Case*, supra, to that extent they are correct, but that rule does not apply in a case where the facts and circumstances are as depicted by this record. The girl placed her mother in such position that she knew nothing of these transactions. She had not before informed her of the conduct of her father. Of course, after the last transactions became public the wife would know about it. It was not contended that the wife knew any of the facts and circumstances concerning either of the transactions, and it seems that the state desired to place defendant in the attitude of refusing to permit her to testify by placing her in the attitude where she could contradict or sustain Dr. Dabney. Of course, the state could not place her upon the stand to contradict Dr. Dabney, and defendant did not, and, whether she was his wife or not, the defendant was justified in reaching the conclusion that it was not necessary, because Dr. Dabney denied making such statement. If the state had any legitimate testimony by which it could prove Dr. Dabney had made such statement to appellant's wife, they might use such testimony.

but could not use the wife's evidence for that purpose. They did not offer her as a witness, but simply left the matter in that condition. Upon another trial these things should not occur.

[2] In this connection the district attorney, among other things, in his argument stated:

"But, instead of putting his good wife on the stand, he was content to sit still and rely in this case solely and alone on his plea of not guilty and put no witnesses on the witness stand except Dr. Dabney."

This is a quotation from the speech. Objection was urged to this speech because it was an allusion to the failure of defendant to testify. We are of opinion this contention is correct. There was no one present, under the girl's testimony, except herself and her father. There was no other witness who could testify as to those immediate facts. Dr. Dabney was the only witness placed upon the stand, and enough of his testimony has been mentioned to show why he became a witness. This court in *Vickers v. State*, 69 Tex. Cr. R. 628, 154 S. W. 578, said:

"They tell you the prosecuting witness has not been corroborated; they will tell you no one saw the act of intercourse, except the two. 'Tis true that no one was present at the act of intercourse but these two; 'tis true that Ollie Walston testifies that no one was present, when the defendant told her to take the turpentine, except herself and the defendant; but, gentlemen, she had testified to both of these transactions, and they have not dared to put a witness on the stand to contradict her testimony in any particular."

Judge Harper, writing the opinion, said:

"These remarks were excepted to, and, if they do not challenge the attention of the jury to the fact that defendant had not testified, we are unable to understand the English language. Prosecuting officers should not thus seek to indirectly call the attention of the jury to the fact that a defendant has not testified in the case. This is a right given in law, but he is not bound to avail himself of that privilege; and, if he is willing to rest his case on the weakness of the state's case, he has a right to do so."

On rehearing Judge Harper uses this language:

"The other contention, that we erred in holding that it was error for the prosecuting officers to refer to defendant's failure to deny that he had sexual intercourse with his stepdaughter, after careful and thoughtful study of the record and the law applicable thereto, we are more thoroughly convinced, if anything, that this was such error as it alone ought to result in a reversal of the case. In this case the state's counsel called attention to the fact that no one was present when the act of intercourse took place, if it did take place, other than the prosecuting witness and appellant; that the prosecuting witness swore positively

that it did take place, and appellant did not deny it. Language could not be used that would more forcibly impress that fact on the jury's mind, and it apparently was done to aid in securing a conviction of defendant."

The following cases may be cited in support of this conclusion: *Miller v. State*, 45 Tex. Cr. R. 517, 78 S. W. 511; *Williams v. State*, 48 Tex. Cr. R. 75, 85 S. W. 1144; *Flores v. State*, 60 Tex. Cr. R. 25, 129 S. W. 1111; *Wallace v. State*, 46 Tex. Cr. R. 341, 81 S. W. 966; *Dawson v. State*, 24 S. W. 414; *Barnard v. State*, 48 Tex. Cr. R. 111, 86 S. W. 760; *Washington v. State*, 77 S. W. 811; *Wingo v. State*, 75 S. W. 29; *Shaw v. State*, 57 Tex. Cr. R. 474, 123 S. W. 691.

For the errors discussed the judgment will be reversed, and the cause remanded.

WALKER v. STATE. (No. 5715.)

(Court of Criminal Appeals of Texas. April 7, 1920. Appellant's Rehearing Denied June 16, 1920.)

1. Animals \Leftrightarrow 34—Criminal liability under tick eradication law defined.

Tick Eradication Law (Acts 35th Leg. [1917], c. 60 [Vernon's Ann. Civ. St. Supp. 1918, arts. 7314-7314q]) does not require allegation and proof that cattle of accused were infected with ticks, or that they have been inspected, in order to sustain a prosecution thereunder.

2. Animals \Leftrightarrow 34—Statute contemplates free facilities for dipping cattle.

Tick Eradication Law (Acts 35th Leg. [1917], c. 60, § 3 [Vernon's Ann. Civ. St. Supp. 1918, § 7314d]), as amended by Acts 36th Leg. (1919), c. 44, shows a legislative intention that facilities for the dipping of tick-infected cattle should be furnished at public expense, so that one required to pay a charge for the use of the facilities provided cannot be prosecuted for failure to dip cattle as ordered.

Appeal from Comanche County Court; Jno. P. Hoff, Judge.

John Walker was convicted of violating the Tick Eradication Law, and he appeals. Reversed and remanded.

Y. W. Holmes, of Comanche, for appellant.
Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted for violating the Tick Eradication Law in the county court of Comanche county, and given a fine of \$25.

It appears that Comanche county is in zone No. 1, as fixed by the terms of chapter 60, Acts of the Regular Session of the Thirty-Fifth Legislature (Vernon's Ann. Civ. St. Supp. 1918, arts. 7314-7314q) known as the "Tick Eradication Law," and that on March

5, 1919, a quarantine was fixed upon said county by proclamation of the Governor, under the provisions of sections 9 and 10 of said act (sections 7314g, 7314h). Thereafter, and in August, 1919, appellant was duly notified to appear and dip his cattle at a certain named vat, and upon his failure to comply this prosecution was instituted.

[1] We do not think it necessary under the 1917 act, to allege or prove that the cattle of accused were infected with ticks, or that they had been inspected, as was held under the 1913 statute, in the McGee Case, 194 S. W. 652, and other authorities cited by appellant. An inspection of one, or any number less than the whole, could not determine that a herd of cattle were free from ticks; nor would an inspection of a herd at a given date determine that the premises or range occupied by said cattle were free from ticks, nor that such herd might not, under ordinary conditions, be again infected by going upon an infected range, or by having infected cattle cross or come upon their range. As we understand it, the purpose of this law is to require the cattle of this state to be so treated as that fever-carrying ticks, etc., will not attach themselves to such cattle, whenever by accident or necessity the opportunity for contagion arises, and that to attain this end the Legislature has seen fit to make obligatory, within the terms of the statute, the dipping of all cattle in this state in the kind and character of solution fixed by authority of the agency established for the execution of the law, to wit, the live stock sanitary commission of Texas. The power to make this law is confided to the legislative branch of the government, and so long as its terms are not shown to be unreasonable, or their execution so arbitrary as to seem oppressive, we must uphold it. We find nothing in the act of 1917 which requires an inspection of the premises or cattle as a condition precedent to the dipping of cattle, when properly notified so to do.

[2] But one other question will be discussed. Section 3 of said chapter 60 (section 7314d) was amended by chapter 44, Acts of the Regular Session of the Thirty-Sixth Legislature, so as to read as follows:

"It shall be the duty of the county commissioners' courts to co-operate with and assist the live stock sanitary commission in protecting the live stock of their respective counties from all malignant, contagious, infectious or communicable diseases, whether such diseases exist within or outside the county, and otherwise protect the live stock interests of their counties. It shall be the duty of said commissioners' courts to co-operate with the live stock sanitary commission and the officers working under the authority or direction of said commission in the suppression and eradication of fever-carrying ticks, and all malignant, contagious, infectious or communicable diseases of live stock; provided when it becomes necessary to disinfect any premises, county, or subdivision of the county infected with fever-carrying ticks,

anthrax, hog cholera, glanders, foot and mouth diseases, bovine tuberculosis or contagious abortion, under order of the live stock sanitary commission, the county judge of the county where said premises are located, shall have such disinfecting done at the expense of the county, and according to the rules and regulations of the live stock sanitary commission, and the said commissioners' courts are hereby authorized and empowered and directed to appropriate moneys out of the general fund of their counties for the purpose of constructing or leasing necessary public dipping vats within their counties, and for the purchase of dipping material, and for the constructing of any other facilities and for the purchasing of any other materials for the hire of labor necessary to destroy the diseases and the carriers herein mentioned. Provided that for permanent improvements funds may be expended out of the county permanent fund."

This seems clearly to indicate the intention of the Legislature to make the matter of tick eradication in the several counties one for which the expense should be provided out of the various county funds. The expressions "shall have such disinfecting done at the expense of the county," and "the said commissioners' courts are hereby authorized and empowered and directed to appropriate moneys out of the general fund of their counties for the purpose of constructing or leasing necessary public dipping vats within their counties, and for the purchase of dipping material, and for the constructing of any other facilities and for the purchasing of any other material for the hire of labor necessary to destroy the diseases and the carriers herein mentioned," would seem to us to place beyond dispute the fact that after the taking effect of such amendment of 1919 such disinfecting, dipping, etc., was to be at the expense of the counties. On his trial it was shown that a charge of 25 cents per head was fixed at the vat where appellant was notified to dip his cattle. One of his defenses was that he could not be required to pay this charge, and that he could not be compelled to dip his cattle until the county had prepared public facilities; and he asked a special charge to the effect that he could not be convicted unless it was shown from the evidence that public facilities, without charge, were provided. This special instruction the trial court refused. Said amendment of 1919 went into effect in June of that year, and was effective in August, when this prosecution was instituted. We are unable to conclude otherwise than that such defense was valid, and that said charge should have been given. That the Legislature intended to make this a county expense is apparent from their language. As to whether they had the power to direct such expenditure of county funds is a question not before us.

For the error mentioned, the judgment of the trial court is reversed, and the cause is remanded.

MAYES v. STATE. (No. 5794.)

(Court of Criminal Appeals of Texas. April 21, 1920. On Motion for Rehearing, June 23, 1920.)

1. Criminal law §265—Defendant, under bond at return of indictment, not entitled to two days' delay to plead, after demanding copy of indictment.

Under the statute, where defendant was at large under bond when indictment was returned, and had not been in jail since executing his first bond, and so was entitled to demand a copy of the indictment at any time, he could not delay demanding it till case was called, and then have two days to plead to it.

2. Criminal law §455—Nonexpert can testify to wounds.

Any one who had seen the wounds could testify to their being wounds, and could describe them, without the testimony being subject to the objection of being conclusions and opinions of the witness; it not taking an expert to describe a wound.

3. Assault and battery §84, 87—Evidence of trouble the day before assault admissible on malice and motive.

Evidence of trouble the day before, between the party assaulted and defendant, claimed to have committed the assault, is admissible to show malice and motive.

4. Witnesses §48(1)—Relative to competency, term of service in penitentiary not time between conviction and time of testifying.

Relative to competency of witness convicted of felony, his term of service in penitentiary is not to be considered time occurring between the conviction and the time of his testifying.

5. Criminal law §168(3)—Defendant's witness being allowed to testify, rulings on questions as to competency unavailing.

Rulings on questions relative to competency of defendant's witness because of conviction of felony are unavailing, in view of his having been allowed to testify.

6. Assault and battery §84—Defendant's discharge from employment, because of prior trouble with assaulted person, admissible on malice.

As bearing on malice, it may be shown that as a result of the trouble, the day before the assault, between the person assaulted and defendant, charged with the assault, defendant had been discharged from his employment.

7. Criminal law §1091(10)—Bill of exceptions unavailing, where it cannot be understood to which part of recited evidence objection is made.

A bill of exceptions, so indefinite that it cannot be fully understood what was its purpose and to which part of the testimony set out, part of which, at least, was admissible, objection was urged, will not avail.

On Motion for Rehearing.

8. Criminal law §1159(5)—Conviction not to be disturbed because of conflicting evidence between identity and alibi.

Where there is sufficient evidence to identify defendant as the party committing the assault, conviction cannot be disturbed because of conflicting testimony tending to show he was at another place at the time.

9. Assault and battery §92—Evidence of identity of assailant held sufficient.

Evidence held sufficient to identify defendant as the person committing an aggravated assault.

Appeal from District Court, Grayson County; F. E. Willcox, Judge.

Otis Mayes was convicted of aggravated assault, and appeals. Affirmed.

Jas. D. Buster and C. T. Freeman, both of Sherman, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for aggravated assault.

[1] When the case was called for trial, before announcing ready, defendant filed a motion stating that he had not been served with a copy of the indictment, and asked that he be so served, and requested that he be granted two days after such service before being required to plead to the indictment. The indictment charged him with assault to murder. The bill further recites that the motion was presented to the court on the 9th of December, 1919, and that he was served with a copy of said indictment at five minutes after 11 o'clock the same morning. Appellant was arrested under warrant issued from the justice court on the 16th day of July, 1919, and was confined in jail until the 11th of August, 1919, at which date he was released upon bond. The indictment was filed on the 12th day of September, 1919. Upon being notified of that fact, he made his appearance bond shortly afterward, without further being actually imprisoned. Since making these bonds he has been at liberty, and was at the time that he presented his motion.

Appellant contends that he was entitled under this statement to have copy of the indictment served upon him and two days thereafter in which to prepare for his defense. In support of this he cites us to *Martin v. State*, 80 Tex. Cr. R. 108, 188 S. W. 1000. We are of opinion that this case does not support his contention. *Martin* was indicted on the 23d of May, 1916, was arrested the same day, and gave bond. A copy of the indictment was not served upon him. When the case was called for trial six days later, appellant filed a motion stat-

ing that he had not been served with a copy of the indictment, and requested that the officers be required to deliver him a certified copy, and that he then be granted two days in which to plead to the indictment. Had appellant been in jail at the time of the return of the indictment, his motion would have been well taken, or had he been at large, and not under bond, at the time of the return of the indictment, his motion would have been well taken; but in this case appellant was under bond at the time of the return of the indictment, and had been under bond for about a month. It seems from the bill of exceptions he voluntarily entered into bond, without being actually in custody under the indictment.

Under the statute there are two phases of this question of service of the indictment. One is where it was requisite when insisted upon by the accused before he can be placed upon trial, but in such instance he must either be in custody at the time of the return of the indictment, or if at large at the time of the return of the indictment and not under bond, then the service is required by the statute to be served upon him, and upon this he can insist unless he in some manner waives such service. *Venn v. State*, 218 S. W. 1060, recently decided. The other phase to the statute is that, where the party is under bond at the time of the return of the indictment, he may demand a copy, and it would be error to refuse it; but in such case it is not obligatory upon the clerk to issue or the sheriff to serve such copy, unless a request has been made for such copy. The statute seems to draw a distinction between where the party is under bond at the time of the return of the indictment and where such is not the case. This statute is in harmony with the Bill of Rights, which provides that the accused is entitled to have a copy of the pleadings bringing an accusation against him. In this particular case we find no error in the ruling of the court. Appellant was under bond at the time of the return of the indictment, and had not been in jail since executing his first bond. He had a right to demand a copy at any time, and here upon his demand he was at once served with a copy. This was in accordance with the law as we understand it. See *Revill v. State*, 218 S. W. 1044, decided at the present term of the court.

[2] A bill of exceptions was reserved with reference to some matters brought out from the assaulted party, Stepp, while testifying for the state. This was over the objection of the defendant. The bill of exceptions is quite lengthy, the substance of which is that Stepp was permitted to testify to the wounds inflicted upon his head and the character of the wounds. Two of the wounds, one behind the right ear and one on top of the head, were inflicted, according to Stepp's tes-

timony, by the defendant with a blunt instrument. The second wound knocked him senseless. He described these wounds, and also that there was a third wound that was inflicted upon him without his knowledge; that is, while he was unconscious. The objection seems to be based upon the general proposition that these were but conclusions and opinions of the witness, and in support of this we are cited to *Conde v. State*, 33 Tex. Cr. R. 10, 24 S. W. 415. We do not understand that case to be in point or support the proposition. The witness in the *Conde Case* testified that he saw the body of deceased, and that it was bloody and had a cloth of some character over the face, where the wounds were supposed to have been inflicted. Under those circumstances that witness could not state that the wounds were inflicted by a gunshot. It was but a conclusion, for he did not see the wounds. Had he seen the wounds, the proposition would have been different. It does not take an expert to describe a wound. The testimony elicited, as we understand this bill of exceptions, from Stepp, was that he was struck these blows, and they inflicted wounds upon his head. Any witness could have testified, who had seen the wounds, to the fact that they were wounds, and could have described them. There are other cases cited, besides the *Conde Case*, but they are to the same effect.

[3] Another bill of exceptions was reserved to testimony in regard to a previous trouble between the assaulted party, Stepp, and defendant, occurring something like 24 or more hours before this difficulty. This occurred at a station called Gunter. The occurrence and some of the details of what occurred between defendant and Stepp were given. This is not an extraneous matter, or an extraneous offense, as here applicable. This testimony was introduced to show the relation between the parties and the feeling of appellant toward Stepp. Evidence that shows motive or malice may not be regarded as extraneous in cases of this sort. This was the inducing cause, urged why appellant made the assault the following night upon Stepp. We are of opinion this testimony was admissible to show malice and motive.

[4, 5] Another bill of exceptions recites that, while the witness Barr was on cross-examination by the state, he was permitted to testify that he had been charged with and convicted of a felony in McLennan county, and that that felony was assault with intent to murder. Thereupon defendant took the witness, and upon redirect examination proved by him that this was in the year 1907, and that he was convicted of assault to murder and allotted 10 years in the penitentiary. He was then asked by defendant if he had been pardoned. Upon the state's objection, the answer was not permitted; the objection

being that, if he had been pardoned, the pardon would be the best evidence. The appellant was then permitted to further examine the witness, and prove by him he did not remember how long he had been out of the penitentiary, but said, "About 4 years." The witness, however, was permitted to and did testify. Appellant's contention is that this was too remote; that it had been more than 7 years since witness' conviction. There is no evidence in regard to his course of conduct after he had been released from the penitentiary, presumably under the pardon. We are of opinion there was no error in the ruling of the court in regard to this matter. His term of service in the penitentiary should not be regarded in the time occurring between the conviction and the time of his testifying. It may be presumed that the state began this cross-examination of the witness to ascertain whether or not he had been pardoned, with a view of disqualifying him as a witness, had he been in the penitentiary. The court decided this matter against the state, and the witness testified. In order to disqualify or render incompetent the witness, it was necessary to produce the pardon. This not being done, he was permitted to testify, and here the matter ended.

[6] Another bill of exceptions recites that the state was permitted to prove by appellant that on account of the difficulty at Gunter with Stepp he was discharged from the railway service, and that this discharge occurred in connection with that trouble. While the act of the discharge by the railroad would not be, perhaps, admissible as acts of a third party, it was introducible in this case to show that on account of this discharge appellant had conceived malice towards Stepp, and that the difficulty with him was the occasion of such discharge. Whether it was the act of the railroad or not, defendant and Stepp were so mingled up with it, and the discharge so connected with the difficulty, that if appellant conceived malice towards Stepp it may have been a cause for his attack upon him. The jury could so regard it. This matter was so connected with it that it was admissible, not as an act of the railroad people, but as a basis why he felt ill will toward Stepp as being the cause of the discharge.

[7] There is another bill of exceptions, but it is so long and complicated that we are unable to understand exactly what part of the testimony set out in it was objected to and what was not. Much of the testimony was admissible, if not all of it. This court would not be called upon to take a lengthy bill of exceptions, and cull from it such matters as might not be introducible, when much of the testimony so narrated is admissible. The bill is so indefinite that we are unable to understand fully what was the purpose of the bill and to which part of the testimony

objection was really urged; therefore it is not further discussed.

Finding no material error in the record, if error at all, we are of opinion the judgment should be affirmed; and it is accordingly so ordered.

On Motion for Rehearing.

[8, 9] On a former day of the term the judgment herein was affirmed. The motion for rehearing brings in review only the sufficiency of the evidence to support the conviction. The punishment was \$500 and 120 days in jail. On account of the punishment, and the insistence of appellant that the evidence is not sufficient, we have given this case a careful revision from the viewpoint now presented by appellant.

The question presented with reference to want of sufficient evidence is the identity of the attacking party. The assault occurred at night, somewhere between 12:15 and 12:45. Appellant introduced evidence of an alibi. This was sufficient, had the jury believed it, to have authorized an acquittal. It is not the purpose of this opinion to review the testimony bearing upon alibi. The conviction depends upon the sufficiency of the testimony to identify appellant as the attacking party. If this is sufficient, this court would not feel justified in reversing. Where there are two fact theories, one which justified the verdict, and the other upon which the jury could have acquitted, it is the exclusive duty of the jury to decide. In view of that rule, and under the contention of appellant, some of the pertinent testimony will be collated.

There had been trouble between appellant and the assaulted party at a little station called Gunter on the train en route from Ft. Worth to Sherman. Both men were railroad employes. Appellant was not an employe on that particular train, but the assaulted party, Stepp, was. Quoting from Stepp's testimony, after narrating the trouble, he says:

"We came on to Sherman, and I do not know whether the defendant came on that train. I did not see him any more. We got to Sherman about 7:30 a. m. on the morning of the 16th of July, and I did not see the defendant during that day. It was along about 12:30 on the morning of the 17th when I next saw him, as near as I remember, and that was just before he struck me in the back of the head. That was at the roundhouse in Sherman, Grayson county, Tex. I was oiling the engine around, preparing the engine for the trip. I had oiled the right side, and came around on the left side of the engine—that is, the fireman side of the engine—to oil that side, and I was oiling the eccentric there, and I heard some little noise behind me. I didn't know what it was, but anyway I looked back over my shoulder like, and kind of turned my shoulder a little bit, and he struck me over the right ear. He didn't

get a very good lick from that, but enough to kind of stun me, to knock me out of balance. And the next lick I got was on top of the head with some kind of blunt instrument. I couldn't see what it was exactly; looked more like a brake club or coupling pin. That is the last thing I remember of that night. In oiling the engine, we have an oil can in the right hand, if the man is right-handed, and a big torch in the left hand for light. I am right-handed, and at that time I had the oil can in my right hand and the torch in my left hand. The torch is made of tin, and so big around at the bottom, and kind of funnel-shaped. It is about 12 inches around at the bottom, and about 4 inches at the top, with a spout for a wick that contains oil—coal oil—to make a light. The torch has a handle to hold to, and makes a light about the size of a man's head; makes a very good light, if you have got oil in it. I had a good light, a very good torch, at that time; a man could see how to read orders by that torch any time at night. At the time I turned around and saw the defendant on my left, I had the torch, and it gave me light enough to see the defendant, and there was also an arc light there, too, that also gives light. The defendant was dressed—the best I remember, he had on a black hat, and had on a kind of blue overalls, it looked like, if I am not mistaken, his working clothes. The first lick that he struck me was over the right ear; there is a scar there, and there is one on top of my head, too; you can feel it, besides that one in my forehead. The first blow back of my head was more of a glancing lick than a direct blow. I kind of ducked my head. The first blow knocked me down partly, and staggered me. It was a very little while after that first blow until I was staggering that I was struck another blow on top of the head, and there is a very long scar up there, about six inches. * * * I couldn't say that I was angry with the man after the trouble was over at Gunter, but I did not see the man any more until the morning of the 17th, about 12:30 o'clock, as near as I remember. I have no means at all of guessing the time of day as 12 o'clock; only we are called for 12:45, and 118 is due here at 12:15, and I was just talking to the engineer as he came in on the 118. I could not say whether 118 came in on time that night, or whether it was 5 or 10 minutes late. * * * I know that this is the man who struck me. I could not be mistaken about it."

This witness stated he had not told anybody until the day before he was testifying as to who it was that struck him. Up to that time he denied knowing who it was; that he first told Mr. Gafford that he knew appellant was the man who struck him. Further testifying he states:

"At the time I heard the noise and looked around, the best I remember the party was about three feet from me—three or four feet, I couldn't say the exact distance. I was facing north, and he was south of me; as nearly due south as I could state. I was oiling the engine, and was standing, you might say, erect. I was oiling the eccentric. I was not oiling any one thing when I heard this noise, but I

was generally oiling the engine. I was actually emptying oil from my oil can on some part of the engine when I heard the noise. My lamp was in my left hand. I could not say how far the lamp was from the point of the engine that I was oiling; it was over two feet; it might have been closer; that is very hard to say, exactly the distance a hand would hold a lamp from the engine. As to how long it was after I glanced backward before the blow was struck, I will say that it was just immediately, I looked around, and the blow was struck. In other words, the act of glancing backward and the receipt of the blow on the right side of my head was about at the same instant, and as I saw the blow coming I ducked my head like that, and caught the blow right over the right arm. I seen him as I looked over my shoulder, and I ducked my head just about the same time, or just immediately afterwards. In other words, at the time I heard the disturbance, the blow was in motion, and was in the act of falling upon my head, but had not quite reached my head at that time, as I saw him. * * * At the time I saw the man who was making this blow, he had already begun the stroke, and I saw him just a moment before it hit. I saw the man who hit me, and the blow was in motion. That is the answer I gave you a while ago. I am not a bit in the world mistaken about that. The best I remember the man had on a black hat. He had on a black hat, a medium size hat; as to whether it was a derby, a stiff hat, or soft hat, I did not examine it, and I could not say whether it was stiff, soft, or what it was. It was not a straw hat."

On the identification of the defendant this is, in the main, the evidence. There was no question of the fact that Stepp was assaulted by some one, and that his skull was fractured, and he was rendered unconscious until perhaps in October—at least a considerable length of time. If this evidence is sufficient to identify appellant as the assaulting party, the judgment should be affirmed, so far as that question is concerned. The witness is positive as to the identity of the defendant. The jury believed Stepp's testimony as to the identity of the appellant as the assaulting party. With this evidence in the record, we would not feel justified in saying the jury was not authorized to disbelieve appellant's alibi. Appellant introduced evidence which, if believed by the jury, would have tended to show that he was at a different place. He claimed he was at the depot, something like three-quarters of a mile from the place of assault, at such time as he could not have been at the roundhouse and committed the assault. The time fixed is largely a matter of deduction, drawn from circumstances and incidents upon which the witnesses base their conclusion. This was all before the jury. We are of opinion that, as this case is presented, we would not be justified in reversing on the question submitted and discussed.

The motion for rehearing will therefore be overruled.

SHRUM v. STATE. (No. 5712.)

(Court of Criminal Appeals of Texas. April 21, 1920. On Motion for Rehearing, June 16, 1920.)

1. Homicide \S 340(3)—Failure to mention defendant's right to shoot, from viewpoint of manslaughter, if he suffered pain from being shot, not erroneous.

In a homicide case, where defendant's testimony tended to show that he shot in self-defense, and manslaughter was brought in issue by testimony indicating that defendant was the aggressor, defendant cannot complain, where the court correctly charged on his right of self-defense, that it did not specifically mention that he had the right to shoot, from the viewpoint of manslaughter, if he suffered pain, etc., on being shot, for such an instruction would have been an undue limitation on the right of self-defense.

2. Criminal law \S 823(6)—Where court gave instruction as to right to picket, etc., failure of main charge to treat the subject not error.

In a prosecution for homicide, where defendant, a striker, killed a guard, defendant cannot complain that the main charge failed to treat of his right to picket, etc., where his request dealing with the subject was given.

3. Homicide \S 300(7)—Evidence sufficient to present issue of provoking difficulty.

In a prosecution for homicide, evidence tending to show that defendant provoked difficulty held sufficient to authorize the court to limit the right of self-defense by charging on the provoking of the difficulty.

On Motion for Rehearing.

4. Criminal law \S 1124(4)—Where affidavit as to newly discovered evidence did not appear in the record, the matter will not be reviewed.

Where an affidavit containing alleged newly discovered evidence claimed to be attached to the motion for new trial did not appear in the record, denial of defendant's motion on the ground of newly discovered evidence will not be reviewed on appeal.

5. Criminal law \S 424(5)—Acts of defendant's companions after murder held admissible.

Where defendant accompanied by two other strikers went to a point where persons in the master's employment were at work, and as result of a difficulty killed a guard, testimony by a police officer that when he arrived at the scene he arrested one of defendant's companions, who had the big end of a billiard cue in his hand, was admissible as part of the res gestae, despite defendant's contention that he and his companions went to scene of homicide for purpose of peacefully picketing, and that they were assaulted; the state being entitled to introduce contradicting evidence that defendant's companions attacked person working with bludgeons.

6. Criminal law \S 424(5) — Evidence that, when police arrived, defendant's companion was armed with club, admissible.

Where defendant, who with other strikers had gone on an alleged picketing expedition, etc., shot deceased, a guard, the fact defendant's companion had dropped the billiard cue, and picked it up just as police arrived, did not render inadmissible testimony that the companion had the cue in his hand; it being the state's version that defendant and companions went to the scene of the difficulty and began attacking persons at work.

7. Criminal law \S 423(3)—Testimony that defendant's companion began attacking persons at work held admissible.

Where defendant, a striker, killed a guard, testimony that defendant's companion, who accompanied him to the scene of the difficulty, on arriving there attacked persons at work with bludgeons, was admissible.

8. Criminal law \S 1091(8)—Bill of exceptions must show that there was not testimony justifying remarks of counsel.

Bills of exceptions, complaining that remarks by counsel were unsupported by the evidence, must show that there was no evidence which justified the remarks, and are insufficient, where the statements of counsel were not verified, otherwise than by statement of court that he instructed jury not to consider the remarks; the mere objection that the testimony did not justify the remarks not being sufficient.

9. Criminal law \S 413(2) — Where defendant fled from scene testimony that he offered to allow a friend to surrender him inadmissible.

Where, after the shooting, defendant left the scene of difficulty, going to his parents' home, some miles distant, and defendant explained his flight by testimony that his mother was ill, testimony that he told the friend who was carrying him away that he would allow the friend to surrender him and collect the reward was properly rejected as a self-serving declaration.

Appeal from Criminal District Court, Dallas County; C. A. Pippen, Judge.

Al Shrum was convicted of manslaughter, and he appeals. Affirmed.

Mike T. Lively, Puckitt, Mounts & Newberry, Oscar H. Calvert, and Baskett & De Lee, all of Dallas, for appellant.

Alvin M. Owale, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for manslaughter; the term of punishment being assessed at three years in the penitentiary.

The court charged upon murder, manslaughter, self-defense, and provoking a difficulty. The charge on self-defense was from the standpoint of apparent and real danger as presented to defendant's mind at the time of the occurrence. This included, not only the danger from an attack by deceased, but

also another party who was with him. The jury was informed that, if defendant's life was in danger from either standpoint, he would be entitled to his protection under the law of self-defense. The charge to the jury was not limited to the act of deceased, but included those who were acting with him, if such facts were shown. The theory of the defense was that he was shot at and shot by two men, deceased being one and aided by another party, both firing shotguns; that they were in a truck owned by the electric company, for whom the deceased and others were working; that these parties had been employed by the company, and in such employment were working in the business of the company; and that their employment arose out of the fact and on account of a strike by those who had been theretofore employed by the company. There was a strike by other employes, and what defendant terms a sympathetic strike by others engaged in same character of work, but not embraced among the strikers, and that those who were favoring the strike, and aiding and engaged in it, did what they called "peaceful picketing"; that is, they would go to the employes of the company, who had taken the places of the strikers as employes, and talk with them and persuade them if they could—at least, sought to persuade them—to quit working for the company and join in the strike. There had been some trouble arising between the employes of the company who were substituted for strikers and the strikers. The company also employed parties who are denominated guards, and they were armed.

On the morning of this trouble appellant and two others went to the scene of the difficulty for the purpose of engaging in this peaceful picketing. Defendant carried a shotgun, and it seems from the record the other two carried bludgeons. Upon arriving at the scene of the trouble, and where the employes were at work, two of the parties left the car, in which they accompanied appellant, and engaged in trouble or difficulty with one or more of the employes, striking with a club. This seems to have precipitated the difficulty, and the shooting began; several shots being fired. Appellant was standing at his car at the time of the difficulty, and his contention is, supported by his evidence, that while standing there he was shot at by deceased and another man, who was in a truck owned by the company, that they struck him in two or three places, and that he returned the fire, killing the deceased, and that there were a number of shots fired. The theory of the state was that appellant, as soon as he reached the point where his car was stopped, just across the street from the truck and the employes of the company, jumped from his auto and shot deceased, and the shooting became general, and that

the two other men who went down the street engaged in a difficulty with another employe of the company; that these three men went from a point in the city to where these parties were at work, and immediately upon arriving there this series of difficulties occurred—the state's theory being that they went for that purpose, and that they were all participants or conspirators in what was done. Appellant testified he carried his gun to protect himself in case of trouble, as there had been trouble between the guards employed by the company and some of the "peaceful picketing" strikers, and that he carried this gun to defend in case an attack was made upon him by those people.

[1] An exception was reserved to the court's charge on manslaughter, because it did not specifically mention that appellant had the right to shoot, from the viewpoint of manslaughter, if the shots of the others produced pain or bloodshed. We are of opinion this contention is without merit. If, as appellant contended, he was fired at by the other two parties from the truck with double-barrel shotguns at close range, and he fired in return to protect his life, the question would be purely self-defense, and to have carved out of this testimony as a fact that he was struck several times, and make that the cause of manslaughter, would have resulted, upon exception, in a reversal of the case, if the court had limited his right of self-defense by such charge on manslaughter. There was no question of the fact that the shooting occurred. The issue between them was, Who began this shooting? The state's evidence clearly shows appellant began shooting at once upon reaching the scene, and the employes or guards shot in self-defense. His theory was that, when the difficulty occurred down the street where his two comrades struck the employe with a billet, this produced the occasion of the shooting, and that he was then acting in self-defense; that he was not engaged in nor acting in concert nor agreement with those who struck the men down the street. His defensive theory seems to exclude the idea of assault on him for any other purpose except that of killing him by shooting him with a couple of shotguns. This was a direct attempt from his viewpoint to take his life, the parties being in such relation to his person that it could be done, and but for the protection of the auto he would have been killed. This would exclude aggression on the part of appellant, and place it entirely upon deceased and his companions. If the state was right, it would place the aggression on the part of appellant in connection with their purpose in going out there, and this difficulty between his two companions and the men engaged in the trouble when they were struck with the clubs. The court, however, charged on manslaughter.

ter, favorably to defendant, and the jury found in his favor, acquitting him of murder. The charge on self-defense, in this connection, was based upon the proposition and theory that appellant was shot by deceased and his companions at close range, and with shotguns, and that they continued to shoot, and did fire several shots. It occurs to us, if the charge specified pain and bloodshed under such circumstances, it would have been an unsafe limitation upon appellant's right under his theory, and would practically have deprived him of his self-defense theories.

Nor do we think there was any merit in appellant's contention that the court limited self-defense as only against the deceased. The court expressly instructed the jury that he had a right to shoot in self-defense, not only against deceased, but any other person who was engaged in shooting at him. Exception by appellant to the charge is not sustained by the expressions in the charge. The court instructed the jury that appellant had the right of self-defense if assaulted by deceased or any other person, etc.

[2, 3] Another exception was reserved to the charge because it did not inform the jury appellant had the legal right to go to the scene of the killing for the purpose of picketing or talking to the employes of the company, in order to induce them to quit work and join in the strike. The court in the main charge did not so instruct the jury, but gave appellant's requested instruction presenting not only that question, but further that he had the right to arm himself, etc., and to go to the place where the trouble occurred, and to defend himself against any attack that might be made upon him, and that such action would not abridge his right of self-defense. His theory of the case was, and he so testified, that he went there to peacefully talk to these people and to induce them to quit work, and in so doing armed himself to protect his person from any assault that might be made against him. The charge as given is in accordance with the rule laid down in *Shannon v. State*, 35 Tex. Cr. R. 2, 28 S. W. 687, 60 Am. St. Rep. 17. This case has been followed by numerous cases. He also gave another special charge, requested by appellant, that although he went with Rob Roy and Bohanan to the place of the trouble, and that though they engaged in a combat with a employe of the company, he (appellant) would not be responsible unless such conduct was a part of the agreement to do what was done, and that if they engaged in an independent enterprise of this sort without his concurrence or knowledge, that he would not be responsible for it, and the jury should find him not guilty from that viewpoint, if they found the facts as indicated in the charge. He also instructed the jury that, if appellant shot originally in self-defense, he had a right to continue to

shoot until all danger was passed. Nor do we think there was error in the court's charge upon the issue of provoking a difficulty. We think this question was in the case, as shown by the testimony, even that introduced by the appellant. The only reason why this question was not in the case would arise from the fact that appellant was the aggressor from the beginning and pushed the difficulty to its final conclusion. This he denied, claiming that, while he went there, he did not go for the purpose of bringing on the difficulty, but to defend himself in case it was brought upon him without legal excuse. The court's charge on provoking a difficulty, we think, was called for by the facts, and it was a correct charge; that is, it charged both the theory of provoking a difficulty for the purpose of killing, or for the purpose of not killing. Upon this theory of the case manslaughter became an issue, and not only was it an issue, but provoking the difficulty was in the case by reason of the facts pertaining to self-defense. The facts authorized the court to limit and abridge the right of self-defense by a charge on provoking the difficulty, if the jury should take that view of the testimony. The evidence suggested the issue. We are of opinion that this case was fairly tried, and without reversible error.

The judgment is affirmed.

On Motion for Rehearing.

On a former day of the term the judgment herein was affirmed. It is now urged that the court committed error in various and sundry ways in the affirmance. It is not the purpose of this opinion to review the questions decided in the original opinion with reference to charges.

[4] Appellant complains that the court was in error in not reversing the judgment on the ground of newly discovered evidence as shown by the affidavit of Parkinson attached to the motion for a new trial. We have examined this motion for new trial, and fail to find such affidavit signed by Parkinson. This matter was examined before the original opinion was written. As we understand the original presentation of the case to this court claimed newly discovered testimony was supported by the affidavit of Harrington. We failed to find an affidavit of Harrington in the record, and the question was not discussed.

[5] There is a bill of exceptions to the introduction of testimony of the witness Askins, a police officer, who testified that he went to the scene of the killing; that it took him about three minutes after he received the call to ride to the scene of the difficulty; that when he arrived he arrested a man by the name of Rob Roy, who had on a soldier's uniform, and also had the big end of a bil-

liard cue in his hand. The court says he admitted this as a circumstance to identify Rob Roy as the person who struck Allen Le Croy with a billiard cue. The evidence shows that appellant, Roy, and Bohanan went in a car driven by appellant to the scene of the homicide, as appellant says, for the purpose of "peacefully picketing." There seems to have been a strike on hand, and their purpose was to induce these people to join the strike. The assaulted parties were in the employ of the telephone company. Immediately upon reaching the scene, the state's theory of the case is that Roy and Bohanan alighted from the car, went down a short distance to where Le Croy and Ballard were at work for the telephone company, and that Le Croy was struck by Roy with the butt end of a billiard cue or a club, and that Ballard was struck at by Bohanan, and at the time this occurred appellant fired upon and killed Fisher. A few minutes afterwards Officer Askins arrived and arrested Rob Roy. He had the big end of a billiard cue in his hand. This testimony was admissible, even as a part of the *res gestæ*. Appellant seems to predicate his idea of the inadmissibility of this testimony upon the theory that he and his friends only went out there on a peacefully picketing mission, and not for the purpose of engaging in serious trouble, unless they were attacked by the employes of the telephone company. That was their view of the case, but it afforded no ground of objection to the state's testimony which showed the contrary. These were matters for the consideration of the jury, and not the subject of objections to the admission of testimony.

[6] There is also a suggestion that after Roy struck Le Croy and knocked him down, that he dropped the billiard cue, and just about the time that Askins undertook to arrest him he picked it up. We do not think this affords any objection to the introduction of the testimony. It would make no difference so far as the attack upon Le Croy was concerned whether he afterwards threw the billiard cue down.

[7] It is also urged as error that the state was permitted to show that the two parties carried by appellant in his car to the scene of the tragedy went to where Le Croy and Ballard were at work near by and assaulted them with clubs; one striking Le Croy and the other striking at Ballard. The judge would not certify to the correctness of the alleged statement set out in the bill of exceptions as shown by his qualification. He says the evidence was ample to show that the matters occurred as indicated. We are of opinion there could be no valid objection to the introduction of this testimony. This was but part of the testimony relied on to show the converse of appellant's contention of peaceful picketing. It was admissible for

the state to show that these parties who went to the scene of the trouble in the car with appellant left the car immediately upon it stopping at the point it did stop, and in going to and making an assault upon these two employes of the telephone company, as evidence from which the jury might conclude the parties were acting together.

[8] It is also insisted that the court erred in not reversing the judgment because of remarks indulged by counsel for the prosecution. The court qualifies this bill by stating that he instructed the jury not to consider the same. The statements imputed to counsel in the bill of exceptions are not verified, otherwise than by the statement of the judge that he instructed the jury not to consider the remarks. The bill does not verify the statements. It is true that they urged as ground of objection that the testimony did not justify the remarks, but these are only stated as grounds of objection, and not as matters of fact. Grounds of objection will not be treated as statement of facts. The bill must show, if it is desired to have the matter reviewed, that there was no testimony which justified the remarks imputed to counsel.

[9] There is another matter urged by appellant. After the fatal difficulty appellant immediately left the scene, and during the day went to Cedar Hill 18 miles from the city of Dallas, he says, to visit his parents. After making this visit and en route on his return to the city of Dallas he was in a car with a Mr. Caffey. Caffey called his attention, he says, to the fact there was an offer of \$500 for his arrest. Appellant then offered to prove that he told Caffey that, if he (Caffey), would take him to the sheriff's office that he would surrender in order that Caffey might obtain the \$500 reward. Caffey did not see proper to do so. Appellant desired to introduce this; the purpose for which it was sought, as we understand the bill, was to explain his going to the country to see his parents. This would be a self-serving declaration made to Caffey, which in no way is explanatory of his going to Cedar Hill, but an offer to benefit Caffey, if Caffey would take him to the sheriff's office. It did not explain, or attempt to explain, why he left the scene of the tragedy and went to the country. He did explain his visit to the country, which was admitted on the theory that he went to see his parents; that his mother had been sick, and he went to see her.

We have mentioned these matters, because counsel urge in their rehearing they were of moment. We did not think so upon the original hearing, and did not discuss them, and upon a review of the matters we are still of opinion there is no merit in any of the contentions.

The motion for rehearing will be overruled.

HASLEY v. STATE. (No. 5836.)

(Court of Criminal Appeals of Texas. June 2, 1920.)

1. Indictment and information §71—Indictment for burglary must allege necessary facts with certainty.

Indictment for burglary must allege whatever is necessary to be proved with such certainty as will put the accused on notice and enable him to plead the judgment rendered in bar of subsequent prosecution for the same offense.

2. Burglary §22—Indictment alleging building was under the "control" of specified person held sufficient; "management."

In prosecution for burglary of a mule barn, averment that the building was under the control of specified person held sufficient as against objection that it should have been alleged to be owned, occupied, and controlled or put under the care, control, and management of such person; "control" and "management" being synonymous, and control meaning to manage, govern, to have authority over, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Control; Management.]

3. Criminal law §511(2)—Evidence showing defendant's connection with crime is sufficient corroboration of accomplice.

If there is other evidence independent of that of the accomplice which tends to connect the accused with the commission of the crime, the corroboration of the accomplice is sufficient.

4. Criminal law §511(2)—Evidence in corroboration of accomplice testimony held to sustain conviction.

In prosecution for burglary, evidence independent of that of accomplice, tending to connect defendant with the commission of the crime, held sufficient to sustain conviction.

5. Burglary §46(5)—Refusal of requested instruction as to the management and control of the barn burglarized held proper.

In prosecution for burglary of mule barn, alleged to have been under the control of manager of the plantation, refusal to instruct to acquit defendant if the barn was under the care, control, and management of specified person held proper under evidence that such person was a mere employé under the manager.

6. Criminal law §814(5)—Larceny §8—Instructions unnecessary unless evidence raises issue; control not necessarily exclusive in one person.

Care, control, and management are not necessarily exclusive in one person, but may be joined in several, within the comprehension of the law of theft; and, unless the evidence raises the issue of exclusive care, control, and management in some person other than the one named as the owner in the indictment, it is not necessary to present such issue to the jury.

7. Criminal law §829(1)—Requested charge covered by main charge properly refused.

Refusal of special charge, which was almost verbatim the language of the main charge given by the court, was proper.

8. Burglary §33, 34—Evidence as to who employed and discharged men upon plantation, admissible on question of ownership and control of property and building.

In prosecution for burglary of mule barn, involving issue of whether person named in indictment had control, evidence of such person as to who employed and discharged the men who worked on the place held admissible on question of ownership and control of the property taken and the building burglarized.

9. Criminal law §1153(3)—Order of testimony discretionary with trial court.

The order of introduction of testimony is almost wholly discretionary with the trial court, and appellate court will not review its action, unless it is made to appear that injury had probably resulted.

10. Witnesses §236(2) — Questions purely ancillary not subject to objection that they are immaterial.

Questions that are purely ancillary, and which only form a part of some predicate and lead up to the matters at issue, are not subject to the objection that they are immaterial, unless they contain something hurtful within themselves.

11. Criminal law §419, 420(1)—Admission of hearsay held reversible error.

In prosecution for burglary, defended on ground of alibi, where certain witness had testified for defendant on such issue, the admission of testimony as to conversation with such witness' mother, in the absence of such witness and the defendant, tending to impeach the testimony of such witness, was reversible error; testimony of such conversation being hearsay.

12. Witnesses §406—Cannot be impeached by proof of conversation between other persons in absence of witness and party for whom he testified.

A witness cannot be impeached by proof of a conversation between two other persons at which neither he nor defendant for whom he testified were present, even though one of them made statements in such conversation which would tend to show that the testimony given by such witness was not true.

13. Witnesses §389—Evidence of statement by a witness inadmissible for impeachment, where making of statement is admitted.

If a witness unequivocally admits making statements, proof as to the making of such statements is inadmissible for impeachment purposes; but if the matter is not clear, or is partially admitted or denied, such impeaching testimony is admissible.

Appeal from District Court, Matagorda County; M. S. Munson, Judge.

Ben Hasley, Jr., was convicted of burglary, and he appeals. Reversed and remanded.

Jno. E. Linn and Styles, Krause & Erickson, all of Bay City, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted of burglary in the district court of Matagorda county, and his punishment fixed at two years' confinement in the state penitentiary.

[1, 2] A motion to quash the indictment is based on the fact that there was no other description of the house in question, save and except that it was then and there under the control of F. J. Spence. If it is necessary in a burglary indictment that it be alleged that the house in question is owned, occupied, and controlled, or is under the care, control, and management of any person, then the motion should have been sustained. The direct question does not seem to have been up in this state, within our knowledge. There appears nothing in our burglary statutes, other than those relating to the burglary of a private residence, which in terms requires any averment of occupancy, ownership, or other description of the house alleged to have been burglarized. It is necessarily true, however, that an indictment for this offense must conform to the general requirement that whatever is necessary to be proved must be alleged, and also that there must be such certainty in the allegation as will put the accused on notice, and enable him to plead the judgment rendered in bar of subsequent prosecutions for the same offense. If the averment that the house in question was then and there under the control of F. J. Spence individualizes the house, and would enable the accused to plead in bar the judgment rendered, this would seem to meet the demands of the law. Examining our authorities, we find that we have upheld indictments where the description of the house was that it was "occupied and controlled by." *Pyland v. State*, 33 Tex. Civ. App. 382, 26 S. W. 621. Control means to manage, to govern, to have authority over, etc. *Anderson v. Stockdale*, 62 Tex. 64. Control and management are synonymous. *Youngsworth v. Jewell*, 15 Nev. 45. In the *Lamater Case*, 38 Tex. Cr. R. 249, 42 S. W. 304, the trial court charged the jury that a person who is in direct control of the house, and has the exclusive management and control of the property therein, is in law the occupant of said house, and the owner of such property. In an opinion handed down by the present presiding judge of this court this charge of the lower court was upheld. In the instant case, the house in question was a mule barn, the same being a building about 150 feet long by 20 feet wide, and having a harness room at one end, and a feed room at the other. This building was located upon

the farm of a Mr. Stoddard, who seems to have had several other farms and much other business; each of said farms being intrusted to the management of a local manager, who was charged with the duty of looking after all of the affairs of the same, including the employment and discharge of men who had various duties to perform under the direction of the local manager of the particular farm. Mr. F. J. Spence was the manager of the farm on which was located the mule barn in question, and the burglarized building was occupied on the night in question actually by the harness and mules; but the same was under the control of Mr. Spence. We think a plea in bar of any subsequent prosecution would needs be upheld under these facts, and that the allegation of control of the house was all that was necessary, and that the motion to quash was properly overruled. We think the house alleged to have been burglarized was sufficiently described to identify it. What we have said will also dispose of the contention that the trial court should not have charged the jury that the offense was made out, if it showed burglary of a house then and there under the control of F. J. Spence.

Appellant urges the insufficiency of the evidence to corroborate the accomplice, and insists that the trial court should have granted his request for an instructed verdict of not guilty. As stated, the premises alleged to have been burglarized was a mule barn, and it was shown in testimony that most of the harness was kept in the harness room at one end of said barn, but because of lack of room some of said harness was hung on pegs out in the barn. It was stated that the mule barn was open, but that every night the harness room, which had only one door, was closed, and the door fastened by a peg which fitted into a staple. It was testified that said door was so closed and fastened on the night in question. Some harness was taken from both the open shed and out of the harness room. On the morning after the alleged burglary, an examination disclosed that 17 collars, 12 bridles, 10 lines, and 7 sets of harness were missing. A search for some evidence as to how the property was taken disclosed the fact that near a corner of the barn lot, a hack or light wagon had been hitched the night before, the indications being that the team had stood at said place for some time, the ground being much trampled. A peculiarly large track, showing no heel to the shoe, and part of the sole gone, was observed, and also another and different track was testified to at the place where the hack had been hitched. Witnesses took the trail of this hack, and followed it for several miles; there having been a very recent rain, which enabled them to easily follow the tracks. The witnesses, following the trail, finally

came to a place where the hack stopped, which was near a pasture belonging to appellant; and, at a point a short distance away from the place where the hack stopped, most of the alleged stolen harness was found. The hack was then traced from the point where it stopped to appellant's house, and from there to the home of one Shannon.

Albert Dadrick was placed on the stand by the state, and in his testimony stated that he went with the appellant, at appellant's solicitation, on the night in question, and assisted him in the removal of the harness, and accompanied him from the place where the harness was stolen, along various roads, crossing the Tres Palacios river, and on up Wilson Creek bottom, where, according to Dadrick, the parties concealed the harness in a thicket, at which place he said they separated, he (Dadrick) going on to the home of some kinsman named Smith, and appellant taking the hack and team on with him. This witness said the hack and the team, which was composed of two gray mules, belonged to Shannon, and was borrowed by appellant from Shannon on the Sunday afternoon preceding the night of the burglary. This witness further testified that as he and appellant drove the hack along on the night of the burglary, at the Tres Palacios bridge, they met some men in a buggy, and that they, he, and appellant had to back their hack off the bridge. He also testified that a little later his party passed Mr. Legg and Mr. Spoor. The state placed upon the stand the witnesses Legg and Spoor, both of whom testified that on the night of the burglary, between 11 and 12 o'clock, they were passed on the road by two negro men in a hack, the team being composed of gray or grayish animals; and one of the witnesses described the animals as mules. The state also placed on the witness stand Jim and Tom Allison, who testified that they were in a buggy, and met two negroes on the bridge over the Tres Palacios; that the negroes were driving a hack, and that the witness helped back said hack off the bridge. One of these men remembered that the negroes were driving a pair of gray animals, and the other remembered that the occasion was Sunday night, January 26, 1917, which was the night of the burglary. The state also introduced a witness named Moore, who testified that on Sunday, the 26th of January, at the request of appellant, he went to the house of one Shannon, and hooked up a team of gray mules to a surrey, which he brought back to appellant's house, and that the appellant and the accomplice Dadrick got into the surrey and drove off, and that he saw said outfit in the possession of a negro named Slim Davis, who worked for appellant, early the next morning, and that the team looked like it was about played out.

[3, 4] The only rule known to us by which

to test the sufficiency of evidence to corroborate an accomplice is the well-known one that if there be other evidence, independent of that of the accomplice, which tends to connect the accused with the commission of the offense, the corroboration will be sufficient. The evidence here detailed seems to us to sufficiently corroborate the accomplice Dadrick. It not only shows that the hack used in the transportation of the alleged stolen property was that of Shannon, but that it was borrowed by appellant the afternoon preceding the night of the burglary; that two negro men participated in the burglary, and thereafter accompanied said hack along the road down to appellant's pasture, where the property was hidden, and that the hack was driven from said point to appellant's house, and from there back to Shannon's. Both the appellant and Dadrick were negroes. In our opinion, this evidence tends to connect the appellant with the commission of the offense.

[5] Appellant asked a charge to the effect that if the care, management, and control of the barn was in Gibbs the jury must acquit. The evidence showed that Mr. Spence, who was the local manager of said plantation, had employed Mr. Gibbs to work around the barn, and that Mr. Gibbs' duties were to see to the feeding of the stock, that the harness was kept in proper places, the doors shut, etc. The other hired men put away the harness of their individual teams, and got the same out in the morning, and Gibbs had no right of disposition thereof, or power to give or refuse consent to the removal of the harness. We think it clear that Mr. Gibbs was but the hired servant, charged with the custody, under the supervision of Spence, and that there was no evidence supporting any other theory, so as to make it needful to give the special charge asked. *Moore v. State*, 59 Tex. Cr. R. 361, 128 S. W. 1115; *Lockett v. State*, 59 Tex. Cr. R. 531, 129 S. W. 627; *Suggs v. State*, 65 Tex. Cr. R. 67, 143 S. W. 183; *Hogg v. State*, 66 Tex. Cr. R. 252, 146 S. W. 195.

[6] Care, control, and management are not necessarily exclusive in one person, but may be joint in several, within the comprehension of our law of theft; and, unless the evidence raises the issue of exclusive care, control, and management in some person other than the one named as the owner in the indictment, it is not necessary to present such issue to the jury.

[7] Appellant asked a special charge on the corroboration necessary in the case of an accomplice, which appears to be almost verbatim the language of the main charge on that point, and which was properly refused because covered by the charge as given.

[8] The objection to the question of the state to the witness Spence as to who employed and discharged the men who worked on the place, and his answer that he did, is with-

out merit. No injury could possibly result to appellant if the matter was really irrelevant, but we think this evidence admissible, as bearing on the question of ownership and control of the property taken and the house burglarized.

[9] Objection was made to certain testimony of the witness Glover as to tracks—that same was offered after the appellant had closed his case, and was not in rebuttal. Under our practice, the order of introduction of testimony is left almost wholly to the discretion of the trial court, and we would not review his action unless it was made to appear that injury had probably resulted, which was not true in the instant case.

[10] Deputy Sheriff Jordan was asked by the state if he had an attachment for the witness Harry Sykes, to which question he answered affirmatively. He was then asked if he made any effort to serve same, which he also answered in the affirmative. This was all objected to upon the ground of immateriality, and that it was prejudicial to appellant. It is evident that the questions were but a part of, and leading up to the conversation had by said Jordan with the witness Sykes, when he was served with said attachment, upon the language of which conversation the state was seeking to impeach Sykes. We are unable to see anything in the said questions and answers which could cause any possible injury. Questions that are purely ancillary, and which only form a part of some predicate, and but lead up to the matters at issue, are not subject to the objection that they are immaterial, unless they contain something hurtful within themselves.

[11, 12] Appellant has a bill of exceptions to the testimony of the state witness Lawson Jordan, as to statements made to him by Harry Sykes' mother. It appears from the recitals of the bill that Jordan went to the home of Mrs. Sykes, inquiring for her son Harry. The witness was directed by state's counsel to tell what Mrs. Sykes said to him on that occasion, to which objection was made that such testimony would be hearsay, and also without any predicate, and inadmissible. The trial court overruled the objection, and the witness answered that Harry Sykes' mother told him on Tuesday afternoon, of January 13, 1920, that Harry was not there; that he had been gone about three weeks, and she did not know where he was. This testimony was hearsay and inadmissible. Harry Sykes had testified rather strongly for the appellant, his testimony, if true, showing him to have been in the county of the prosecution at the time

of the alleged burglary. Mrs. Sykes, the mother of Harry, and the party with whom the alleged conversation was had, was not a witness in the case. It was not claimed that appellant was present when this supposed conversation took place between Jordan and Mrs. Sykes, and we are unable to perceive any theory upon which the testimony could have been held admissible. We are of opinion that Harry Sykes could not be impeached by proof of a conversation between two other people, at which neither he nor appellant were present, even though it be admitted that one of them made statements in such conversation which would tend to show that the testimony given by Harry Sykes was not true. This evidence was not only inadmissible, but capable of harm to appellant.

We think the statements of the district attorney, made in the presence of the jury, relative to certain matters which he sought to bring out concerning the witness Harry Sykes, were improper, but as it appears from the bill of exceptions that the trial court sustained the objection, and, as the case must be reversed, we conclude that such matter will not again arise.

[13] There is also a bill of exceptions, complaining that the state was permitted to introduce certain impeaching statements of the witness Jordan as to various conversations had by him with the witness Sykes; it being stated in the bill of exceptions that the witness Sykes had not denied, but had admitted, the matters and statements upon which the supposed impeachment rested. The rule is well established that, if the witness unequivocally admits making the statements, that ends the matter, and there is no need of proof further; but, if the matter is not clear, or is partially admitted or denied, then such impeaching testimony is admissible. What we have just said applies to the testimony of the witness Jordan as to conversations had with witness Sykes, as detailed in bill of exceptions No. 9. What Sykes said to Jordan out of the presence of the appellant could not become admissible, except it be as to some matter material in this case, which was made admissible by reason of the fact that an apt predicate therefor had been laid in the form of questions propounded to Sykes, and by him denied in whole or in part.

The matters complained of in the argument of state's counsel will probably not occur upon another trial.

For the errors mentioned, the judgment of the trial court will be reversed, and the cause remanded.

MESSIMER v. STATE. (No. 5760.)

(Court of Criminal Appeals of Texas. May 26, 1920. Rehearing Denied June 23, 1920.)

1. Witnesses \S 277(2)—Defendant may be cross-examined as to whether his witnesses were present by whom acts attributed by deceased's alleged declarations to himself could be proved.

Where defendant in homicide, claiming reasonable belief that deceased was armed and making a demonstration to attack, relied in part on alleged declarations of deceased to him that deceased was the aggressor in difficulties with named persons, the state on cross-examination of him could ask whether such persons, by whose testimony as to such attacks he could support his case, were present, or whether an effort had been made to secure their attendance.

2. Homicide \S 188(1)—Defendant, relying for belief of impending attack by deceased on alleged declarations by deceased of acts by him, could prove the acts.

It is permissible, though not necessary, for defendant in homicide, claiming reasonable belief that deceased was armed, and making a demonstration preparatory to attack, and relying in part on alleged statements of deceased to him that deceased had been the aggressor in difficulties with named persons, to support this by evidence of such attacks on such persons having been made.

3. Criminal law \S 721½(2)—State may comment on defendant's failure to avail of privilege to prove acts attributed by deceased's alleged declarations to himself.

The state could comment in argument, on failure of defendant in homicide, relying in part on alleged declaration of deceased to him of difficulties with named persons in which deceased was the aggressor, to avail himself of his privilege of proving by others the specific acts of violence attributed to deceased by his alleged declarations.

4. Criminal law \S 695(2)—Unless obviously inadmissible, objection that evidence is irrelevant, immaterial, and prejudicial too general.

Objection to evidence that it is irrelevant, immaterial, and prejudicial is too general, unless obviously the evidence is inadmissible for any purpose.

5. Criminal law \S 1091(4)—Bill of exceptions to admission of evidence over general objection must show surrounding circumstances.

Bill of exceptions to admission of evidence over objection that it is irrelevant, immaterial, and prejudicial must, unless the evidence is obviously inadmissible, show the surrounding circumstances making it inadmissible.

6. Witnesses \S 277(5) — Cross-examination that accused on apprehension of danger did not appeal for protection when deceased brought out gun held not harmful.

Evidence adduced on cross-examination of defendant in homicide, relying on a reasonable

apprehension of danger; that he did not appeal to any one for protection when deceased brought a gun out is not obviously irrelevant and harmful.

7. Witnesses \S 277(1)—Accused subject to cross-examination like others.

Accused, having offered himself as a witness, is, in general, subject to the same rules of cross-examination as other witnesses.

8. Criminal law \S 404(2)—Door admitted in evidence held sufficiently shown in same condition as at homicide.

That condition of a screen door through which defendant fired was the same when it was introduced in evidence as at time of homicide held sufficiently shown.

9. Criminal law \S 1087½—Record held not to show opinion of witness was admitted.

Viewed in the light of testimony in the statement of facts held that the record, fairly construed, did not bear the interpretation that, as complained in bill of exceptions, the opinion of witness was taken as evidence.

10. Criminal law \S 829(5)—Requests on self-defense covered by instructions given, need not be repeated.

There was no error in refusing special charges on self-defense which merely embraced, in varying phraseology, the same subject-matter covered by the main charge and other special charges given.

11. Criminal law \S 858(3)—Allowing jury to take a door introduced in evidence permissible.

Permitting the jury to take in their retirement a door introduced in evidence was not error (Code Cr. Proc. 1911, art. 751).

12. Criminal law \S 720(6)—Counsel may draw deductions from and comment on evidence.

Remarks of counsel in argument which are legitimate deductions from and comment on various phases of the evidence are permissible.

Appeal from District Court, Potter County; Henry S. Bishop, Judge.

J. H. Messimer was convicted of murder, and appeals. Affirmed.

L. S. Kinder of Plainview, and Reeder & Reeder, of Amarillo, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. The conviction is for murder with punishment assessed at confinement in the penitentiary for five years.

[1-3] Appellant introduced evidence to the effect that deceased bore the general reputation of a violent and dangerous man, also that it was the custom and habit of the deceased to go armed; that the deceased had threatened to arm himself and attack the appellant, and shortly before the homicide appellant had seen a pistol among the effects of

the deceased, and believed him to be armed with a pistol and in the act of removing it from his pocket for use against the appellant at the time the fatal shots were fired. In his testimony the appellant related various conversations with the deceased, in which the deceased told of difficulties in which he had been engaged, and in which he had been the aggressor, naming some of the parties with whom he was engaged. On cross-examination of the appellant, he was asked by state's counsel whether he had in attendance upon the trial the persons named by deceased as having been injured by him in the various difficulties mentioned. The appellant answered that he did not. This question and answer were permitted over the objection of the appellant, and the ruling is made the subject of complaint on this appeal. In substance, this contention is that appellant was under no duty to produce the witnesses, and that their testimony to specific acts of violence by the deceased would not be admissible, and that the ruling tended to discredit the appellant's right of self-defense. We are referred to the case of *Clifton v. State*, 46 Tex. Cr. R. 18, 79 S. W. 824, 108 Am. St. Rep. 983, wherein the rule announced is that the effort of the sheriff or other persons to procure the attendance of a witness is not provable as a circumstance against the accused on trial. That rule, where the question is capable of casting suspicion upon the accused, or corrupting a witness or suppressing his testimony without proof thereof, is a sound one, and has been frequently applied. *Funk v. State*, 208 S. W. 513. Its application in the present instance is not apparent. Touching the effect of the failure to call a witness who is present or available, we are aware of no rule inhibiting the use on the trial of the failure of either the accused or the prosecution to use an available and competent witness who was present, unless it be one who is privileged from testifying. *Corpus Juris*, vol. 16, p. 541, § 1023. The matter in hand, however, is the proposition that the case must be reversed because the prosecution asked the appellant, while testifying as a witness, if certain persons, whom he named, and who would probably know certain facts, were present, or whether an effort had been made to secure their attendance. The record does not indicate that the prosecuting officers knew, prior to the time that appellant gave his testimony, of any of the difficulties, between the deceased and others, to which appellant referred. It was not the reputation of the deceased that was involved. It was his mental attitude toward the appellant, and the existence of reasonable grounds upon the part of the appellant to dread him and fear an attack from him. The deceased was unarmed when he was shot. Appellant seeks to justify the homicide upon his reasonable belief that the deceased was armed, and that he was

making a demonstration preparatory to attack. Under such circumstances many instances are found in the books in which the specific acts of violence by the deceased, known to the accused, may be proved. Among these are *Hampton v. State*, 65 S. W. 527; *Poer v. State*, 67 S. W. 500; *Brunet v. State*, 12 Tex. App. 521; *Johnson v. State*, 28 Tex. App. 26, 11 S. W. 667; *Crass v. State*, 81 Tex. Cr. R. 314, 20 S. W. 579; *People v. Harris*, 95 Mich. 87, 54 N. W. 648; *State v. McIver*, 125 N. C. 645, 34 S. E. 439; *State v. Belrd*, 118 Iowa, 474, 92 N. W. 694; *State v. Shadwell*, 22 Mont. 559, 57 Pac. 281.

Clearly, appellant was not obliged to prove the acts were done in order to avail himself of the effect upon his mind of the specific acts of violence committed by the deceased, and coming to the appellant through the declarations of the deceased. He had the privilege of relying upon proof of these declarations, but, under the circumstances, we think he was not confined to proof of these declarations. He might have supported them by the evidence of third parties who could relate first-hand knowledge of the acts of the deceased. *Dodson v. State*, 44 Tex. Cr. R. 200, 70 S. W. 969; *Spangler v. State*, 41 Tex. Cr. R. 430, 55 S. W. 326; *Hysaw v. State*, 69 Tex. Cr. R. 562, 155 S. W. 941; *Bullock v. State*, 73 Tex. Cr. R. 419, 165 S. W. 199. In *Hysaw's Case*, *supra*, it is said, where the accused testifies on the trial that he knew or had information concerning specific acts of violence of the deceased, "then he would be permitted to go further and prove by others, who know the facts, the said specific acts of violence without going into the details thereof." It is further said in the case, in substance, that when the appellant avails himself of this privilege, the state may rebut the theory presented by counter evidence or by cross-examination.

The rule concerning threats in homicide cases is somewhat analogous. The accused may act upon his information that threats against him have been made by the deceased. He is not confined to his information, however, and may prove that the threats were actually made, and upon this issue the prosecution may introduce controverting facts. In the light of the record and the authorities, we are of the opinion that the bill of exceptions in question presents no error either requiring or justifying a reversal of the judgment, and are also of the opinion that the appellant, not having availed himself of the privilege of proving the specific acts of violence attributed to the deceased otherwise than by the declarations of the deceased to the appellant, cannot justly complain of the reference to such failure in the argument of the case.

[4-7] From bill of exceptions No. 4, taken to the cross-examination of the appellant, we quote:

"You did not appeal to any one for any protection when he brought that gun out there, did you?" The defendant objected to this question on the ground that same was wholly irrelevant and immaterial, and might be prejudicial to the defendant."

To the answer that he did not, objection was urged upon the same ground, and the court verbally requested to instruct the jury to disregard it. Mr. Branch, in section 208 of his Annotated Texas Criminal Statutes, says:

"An objection to the evidence admitted that it was immaterial and irrelevant and prejudicial to the defendant is too general to be considered, unless obviously the evidence would not be admissible for any purpose"—citing the case of McGrath v. State, 35 Tex. Cr. R. 422, 34 S. W. 127, 941, and numerous others.

This is not an arbitrary rule, but is related to and in aid of the reasonable and necessary requirement that a bill of exceptions to require consideration must sufficiently set out the proceedings and attendant circumstances to enable the appellate court to know certainly that an error was committed. Thompson v. State, 29 Tex. App. 208, 15 S. W. 206; Barkman v. State, 41 Tex. Cr. R. 108, 52 S. W. 53; Spencer v. State, 61 Tex. Cr. R. 62, 133 S. W. 1049; Eldridge v. State, 12 Tex. App. 208; Cordova v. State, 6 Tex. App. 447, and other cases in Branch's Annotated Texas Penal Code, § 207. The burden on appeal is upon the appellant to show that the ruling complained of was erroneous and material. The correctness of the ruling is presumed, unless the contrary appears from the bill of exceptions. Vernon's Texas Crim. Statutes, vol. 2, p. 537, note 21.

The bill in question fails to set out facts other than those disclosed by the quotation, and is inadequate to inform the court of the surrounding circumstances, and to make it plain that the evidence was not admissible upon some issue, or made admissible by some phase of the procedure upon the trial. The question and answer, in our opinion, are not obviously improper and harmful. On the merits of the question we are referred to Newman v. State, 70 S. W. 951, in which this court expressed its disapproval of the question put to the accused on cross-examination:

"Did you file any complaint before any justice of the peace or any other officer authorized under the law to receive complaints, charging deceased with making serious threats against your life, or asking that he be placed under a peace bond, after you heard of the threats against you by deceased?"

This question was much more specific than the one under consideration, and the objections addressed to it more comprehensive, and doubtless on review its materiality as impairing the appellant's right was made to appear by a bill of exceptions. Without

challenging the correctness of the decision in that case, as the matter was presented and applied to the record, we think the holding does not establish a rule of evidence which should be extended so as to embrace the facts disclosed by the bill in the present case and characterize them as obviously irrelevant and harmful. It often happens that the acts and declarations of the accused in a homicide case, where the issue of self-defense arises, become admissible in his behalf. Koller v. State, 36 Tex. Cr. R. 496, 38 S. W. 44; Smith v. State, 46 Tex. Cr. R. 284, 81 S. W. 936, 108 Am. St. Rep. 991; Pratt v. State, 50 Tex. Cr. R. 233, 96 S. W. 8; Anderson v. State, 214 S. W. 356; Branch's Annotated Texas Penal Code, § 1929; Everett v. State, 30 Tex. App. 682, 18 S. W. 674; Thomas v. State, 40 Tex. Cr. R. 562, 51 S. W. 242, 46 L. R. A. 454, 76 Am. St. Rep. 740. The jury were called upon to determine mainly from the testimony of the appellant whether, as viewed from his standpoint at the time the shot was fired, he was under a reasonable apprehension of danger. Having offered himself as a witness upon this issue, cross-examination which would lead to its solution was relevant and proper. Mr. Wharton, in his work on Evidence, § 55, vol. 1, says:

"In homicide, evidence is relevant to show the good faith of the defendant who pleads that he was acting in self-defense after recent threats by the deceased to take his life and when some overt act accompanies such threats."

The state of mind of appellant was in question. Howard v. State, 25 Tex. App. 601, 8 S. W. 921; Pratt v. State, 50 Tex. Cr. R. 232, 96 S. W. 8; Branch's Annotated Texas Penal Code, § 1929. The evidence available in the instant case was almost exclusively the testimony of the appellant. On this issue, we are of the opinion that the inquiry made, as developed by the bill, was not so obviously improper and hurtful as to entitle the appellant to have the judgment set aside. Touching the scope of cross-examination of the accused when he offers himself as a witness, Mr. Branch, in his Annotated Texas Penal Code, citing many decisions of this court, states the conclusion deduced therefrom as follows:

"When defendant takes the stand as a witness he is subject to the same rules as any other witness. He may be contradicted, impeached, discredited, attacked, sustained, bolstered up, made to give evidence against himself, cross-examined as to new matter, and treated in every respect as any other witness testifying in behalf of defendant, except where some statute forbids certain matters to be used against him, such as proof of his conviction on a former trial of the present case, his failure to testify on a former trial or hearing, and the like." Huffman v. State, 28 Tex. App. 177, 12 S. W. 588; Branch's Annotated Texas Penal Code, § 147.

The deceased leased his farm to the appellant, making certain reservations. A controversy between the deceased and other persons developed, and ripened into a suit over a strip of land claimed by the deceased. A fence was put around this land by the appellant, in the absence of the deceased, and a gate was made in the fence, inclosing land of deceased. This, according to appellant's theory, did not meet with the approval of the deceased, and he became quarrelsome and offensive by reason thereof. He was boarding at the home of the appellant. The homicide took place in the morning. According to appellant's testimony, while he was milking the deceased came into the lot with his left hand in his hip pocket, and said, "Maybe, by God, you want to start something this morning," to which appellant replied, "No, I don't want to have any trouble with you, but I have asked you to stay out of my house, and I want you to stay out; don't come in there any more at all." Deceased replied that "by God" he would come in there when he got good and ready, and if appellant tried to stop him he would shoot hell out of him. The appellant, according to his testimony, had previously provided himself with shotgun shells to fit his Winchester gun; and after he finished milking he went to his room, loaded his gun, and sat down on the bed, and while there saw the deceased approaching on horseback, and, after hitching his horse, upon foot. Appellant said:

"Mr. Ward looked like he was looking at me as he approached. After he got pretty close I moved from where I was sitting on the bed, and he was coming towards me, looking at me. I raised up, and as I did that Mr. Ward reached towards his pocket with his right hand. I grabbed my gun and shot him twice—shot fast, as quick as I could. The screen door was between us. I shot him because I thought he was going to shoot me. I thought this from threats that he had made and from the signs that he was making at the time."

[8] During the cross-examination of the appellant, the screen door through which the shots were fired was exhibited and used. The use of the door and its introduction in evidence are complained of upon the ground that the identity of the condition of the door at the time of the trial with that at the time of the homicide was not established. Without rehearsing in detail the evidence touching the condition of the screen door at the time of the trial as compared with its condition immediately after the shots were fired, we have examined the record, and find nothing that would justify sustaining the contention made. It appeared from the testimony of the witness Bailey that he reached the premises a very short time after the deceased was killed, and while his body was lying upon the ground, and remained there until the sheriff arrived. Subsequently, on another day, the appellant pointed out to the witness the place from

which the shooting was done, the position of the deceased, and the holes in the screen door through which the shots were fired. When the appellant was on the stand he identified the door, and said:

"I suppose these two holes are in about the same condition they were just after the shots were fired. I don't know as I looked at it afterwards and examined it. They look like they are in the same relative position now as they were at that time."

The sheriff testified that he examined the door about 11 o'clock in the morning, the homicide having taken place about 9, and that he observed no difference in the condition of the door as it was exhibited upon the trial and its condition at the time mentioned.

[9] Bill of exceptions No. 6 recites that while Mrs. Durham was on the witness stand she was asked on cross-examination the following question:

"Now, counsel for defendant asks you if you knew what was said and what happened inside of that barn when Ward went in after his saddle. Tell the jury whether or not there was time enough for anything much to have happened"

—to which she replied: "No; there wasn't." This was objected to as calling for an opinion. The bill is too meager to enable us to decide whether or not the evidence was admissible or hurtful. None of the surrounding facts are set out. Viewed in the light of the testimony of witness Mrs. Durham in the statements of facts, which we have examined, the bill discloses no error. The witness stated on recross-examination that when she made the statement complained of she misunderstood the question, and said that she did not know what happened while Ward was in the barn. We think, fairly construed, the record does not bear the interpretation that the opinion of the witness was taken as evidence.

[10] Various charges were requested upon the subject of apparent danger. The general subject of apparent danger was embraced in the main charge, and in addition thereto the theory of apparent danger arising out of communicated threats. The subject of self-defense seems to have been submitted in an unexceptional way in the main charge; in fact, no exceptions were addressed to this. Two of appellant's special charges on that subject were given. One informed the jury that if the appellant feared an attack from the deceased, he had a right to arm himself and purchase shells. The other was in the following language:

"You are further instructed that if you believe from the evidence in this case, viewing it from the standpoint of the defendant at the time, that immediately before the killing of the said George Ward by the defendant, the deceased was advancing towards the defendant, and made a demonstration as if to draw a weapon, and from the conduct and manner of the deceased

and the demonstration made by him, if any, and the defendant's knowledge of the character and disposition of the deceased, and the defendant was caused to have a reasonable expectation or fear of death or serious bodily injury, and that the defendant, acting under such reasonable expectation or fear and while such reasonable expectation or fear continued, shot and killed deceased, or if you have a reasonable doubt as to such facts, then you will acquit the defendant, although you may believe from the evidence that the deceased in fact had no weapon at such time, and that the defendant was in truth in no danger from an attack by the deceased."

In view of the court's charge on the subject of self-defense and the special charges given, there was no error in refusing other special charges, which embraced in varying phraseology the same subject-matter.

The suggestion that special charge No. 14, while incorrect as a legal proposition, was sufficiently pointed to call the court's attention to the omission in the charge to instruct the jury upon the right of the appellant to continue to shoot is met by other parts of the record. On the subject in the main charge the jury was told that the appellant was, under no circumstances, required to retreat, and in special charge No. 1, given at the request of the appellant, the jury was told, in substance, that if his life appeared in danger "he had a right not only to shoot and kill, but to continue to shoot at deceased so long as the appearance of danger existed in the mind of the defendant."

[11] Permitting the jury to take in their retirement the door which was introduced in evidence was not error. Article 751, Code Cr. Proc.; *Holder v. State*, 81 Tex. Cr. R. 194, 194 S. W. 163; *Chalk v. State*, 35 Tex. Cr. R. 116, 32 S. W. 534; other cases listed *Vernon's Texas Crim. Statutes*, vol. 2, p. 566.

[12] We fail to find in the remarks of counsel such infringement of the right of legitimate argument as would be calculated to taint the verdict with passion or prejudice. In the light of the expressions on the subject often made by the court, we, without quoting them, express the conclusion that the remarks criticized were legitimate deductions from and comments upon various phases of the evidence.

Impressed with the view that the record discloses no errors authorizing a reversal of the judgment, its affirmance is ordered.

STOPPELBERG et al. v. STOPPELBERG.
(No. 6381.)

(Court of Civil Appeals of Texas. San Antonio. May 19, 1920.)

1. Evidence §222(3)—Admission of defendant admissible as against him.

In action for partition by a widowed daughter-in-law and sister-in-law against her moth-

er-in-law and brother-in-law, testimony that the brother-in-law had told the witness that certain of the personal property involved belonged in equal parts to him and his brother, plaintiff's husband, held admissible as between plaintiff and the brother-in-law.

2. Appeal and error §931(6) — Testimony heard by judge without jury presumed to have been properly applied.

Where a case is tried before the judge without a jury, the presumption will prevail that testimony was used only on the point and between the parties to which it could legally apply, particularly where there is sufficient competent evidence to sustain the judgment.

3. Discovery §70—Refusal to admit testimony of party who failed to appear for taking of deposition within discretion of court.

In view of a defendant's failure to appear for taking of her deposition on interrogatories pursuant to Rev. St. art. 3680, it was within the discretion of the trial court to refuse to allow her to testify, and to allow plaintiff to introduce the interrogatories to her in rebuttal of defendant's evidence, pursuant to article 3685.

4. Discovery §54—Notice of filing of interrogatories to parties or attorneys not required.

Under Rev. St. art. 3682, notice to parties in a suit or their attorneys of filing of interrogatories in order to take their depositions is not required, and failure to issue such notices was not evidence of a design to intrap defendants.

5. Husband and wife §262(1)—Land bought during marriage presumed to have been community property.

There is a presumption that land bought by a husband during the existence of the marital relation between himself and his wife was community property, and the burden was on the wife, sued, after her husband's death, for partition, to establish that it was her separate estate even though the deed was executed to her.

6. Husband and wife §255—Payment for land by wife from insurance on life of husband did not destroy community character.

Payment of the balance of the purchase money on a tract of land purchased by a husband out of insurance money on his life by his surviving wife to whom the deed ran did not destroy the community character of the property and stamp it as separate estate.

7. Partition §87—Charge against heir of proportionate part of purchase money of community property held proper.

In a daughter-in-law's suit for partition, where the court properly decreed certain land to be community property of defendant mother-in-law, who had paid part of the purchase price with her own funds, it properly charged the daughter-in-law with her proportionate part of the purchase money paid by defendant mother-in-law.

8. Husband and wife §258—Separate estate must reimburse community for proper improvements made in good faith.

Where improvements on a wife's land were made with community funds of husband and

wife, after the husband's death a daughter-in-law, widow of a son, was entitled to her share in such improvements as against her mother-in-law, under the rule that the separate estate of one member of the community must reimburse the community for any proper improvements made in good faith on separate estate with community funds; but, since no such claim should be permitted to affect or jeopardize the title to the land, a lien for such funds cannot be fixed on it.

9. Husband and wife \Rightarrow 49½(8) — Evidence held to show husband intended to make gift of land to wife.

In a daughter-in-law and sister-in-law's action for partition against her mother-in-law and brother-in-law, evidence held insufficient to show that the deceased father-in-law intended to make a gift of certain land to the mother-in-law, his wife, when purchasing it.

Appeal from District Court, Bastrop County; R. J. Alexander, Judge.

Action by Minnie Stoppelberg against Bertha Stoppelberg and another. From the judgment, defendants appeal. Judgment reformed, and, as reformed, affirmed.

The Bowers, of Giddings, for appellants. Maynard & Maynard, of Bastrop, for appellee.

FLY, C. J. This is an action for partition of property, real and personal, and for damages arising from a conversion of certain personal property, instituted by appellee against Bertha Stoppelberg and John Stoppelberg. The appellants are mother and son, and appellee, a widowed daughter and sister, in law. The property sought to be partitioned consisted of five tracts of land, seven bales of cotton valued at \$1,050, 4,500 pounds of seed cotton, 200 bushels of corn, two tons of unbaled hay, and two tons of fodder. The property, alleged to belong to appellee alone and to have been converted by appellants, consisted of cattle, hogs, automobile, horse, piano, two organs, motorcycle, bicycle, buggy, and set of harness. Appellants answered that four of the five tracts of land, described in the petition, were the separate property of Bertha Stoppelberg, and that lot No. 1, block 17, in the city of Galveston, sought to be partitioned, belonged one-third to appellee and two-thirds to appellants; that all the personal property sued for was the separate property of Bertha Stoppelberg, except one bicycle and one motorcycle. Appellants filed a cross-action against appellee for conversion of two bales of cotton, one silver railroad watch, one small cooking stove, and one chest of blacksmith tools. No jury was demanded, and the trial judge rendered judgment in favor of appellee for a one-eighth interest in and to two tracts of land, one of 147.6 acres, and the other of 145 acres; for one-sixth

of the Galveston lot; for one-half of seven bales of cotton, seed cotton, corn, tops, and fodder, all of the value of \$1,830, and for the other personal property sued for, and for \$250, her interest in improvements on the 82½-acre tract, and rendered judgment in favor of Bertha Stoppelberg for the 82½-acre tract and for \$80.87½, being one-eighth of amount of purchase money paid by the said Bertha Stoppelberg on the 145-acre tract.

The findings of the court are sustained by the evidence. They show that Bertha Stoppelberg was the widow of Henry G. Stoppelberg, who died intestate in 1905, leaving as his heirs appellants and Paul Stoppelberg, the husband of appellee. Paul Stoppelberg, to whom appellee was married on September 11, 1918, died intestate on October 17, 1918, and at his death owned the personal property described in the petition, with the exception of one horse, one buggy, one set of harness, one piano scarf, one open-face silver watch, one tool chest, and one stove, which belong to appellants. He also died possessed of a one-fourth interest in and to the 147½- and 145-acre tracts, which he inherited from his father, who owned a one-half interest therein at the time of his death; Bertha Stoppelberg owning the other half. Two-thirds of the Galveston lot was the community property of Bertha Stoppelberg and her deceased husband; the other third being the separate property of her said husband. Bertha Stoppelberg paid \$695 on the purchase price of the 145 acres of land, after her husband's death.

[1, 2] The court permitted William Schroeder to testify that John Stoppelberg, one of the appellants, had told him that certain of the personal property belonged, in equal parts, to him and his brother, Paul Stoppelberg, and that action is made the basis of the first assignment of error. No doubt the testimony was admissible as between appellee and John Stoppelberg, and, being tried before the judge, without a jury, the presumption will prevail that it was used only on the point and between the parties to which it could legally apply. Appellee had alleged that she and John Stoppelberg jointly owned the cotton, sorghum, and corn tops, and Schroeder testified that John Stoppelberg told him, not that all the personal property but that the last-mentioned property, was owned in equal parts by him and Paul. Appellants seem to ignore the fact that the admission was made by one of the parties, and cites authorities on declarations made by third parties to sustain the assignment. The presumption will prevail that the trial judge considered it as bearing upon the case against John Stoppelberg, especially as there is sufficient competent evidence to sustain the judgment. *Lindsay v. Jaffray*, 55 Tex. 626; *Cole v. Noble*, 63 Tex. 432. This rul-

ing disposes of the second assignment of error, which complains as to like declarations made by John Stoppelberg and Paul Stoppelberg as to the personal property mentioned. The court stated in his findings of fact that he had excluded from his consideration all declarations made by Paul Stoppelberg. He had the right to use the declarations of John Stoppelberg as affecting disputes between him and appellee. It was proved that Bertha Stoppelberg had admitted that the property belonged to John and Paul. In her depositions, taken as confessed, she admitted the same thing.

The findings of the court show that on January 27, 1919, interrogatories to Bertha Stoppelberg were filed by appellee, and a commission issued to take her depositions. Efforts were made to obtain her depositions from time to time, but the officer failed to obtain the same, although her house was visited, and a subpoena and attachment issued for her. Appellee introduced her testimony and rested as did appellants also. Appellants afterwards asked to be allowed to introduce evidence, and when Bertha Stoppelberg was introduced as a witness in her own behalf, and was asked questions covered by the direct interrogatories, appellee objected, and asked that said interrogatories be taken as confessed. The objection was sustained, and the witness was not permitted to answer questions covered by the interrogatories. The court found that Bertha Stoppelberg "failed and refused" to answer the interrogatories, and the notary public to whom the interrogatories were delivered certified that Bertha Stoppelberg and John Stoppelberg denied him admission to their house, and declined and refused to appear before him. The interrogatories were filed six months before the trial, and a subpoena was served on Bertha Stoppelberg on January 28, 1919, commanding her to appear and answer the interrogatories, and she was tendered a fee for her attendance, but she failed and refused to attend. An attachment was then issued for her, but she could not be found by the officers. Appellants filed a motion after she was not allowed to testify to matters about which the interrogatories were propounded, and then a motion was filed that Bertha Stoppelberg be allowed to answer the interrogatories at that time. The motion was sworn to by Bertha Stoppelberg, in which she stated that she was 70 years of age, and did not obey the summons to appear and answer the interrogatories because she was sick and in mental distress at the recent death of her son, Paul, but went to Giddings to consult with her attorneys about answering the interrogatories, and was seized with influenza, and was not able to answer the interrogatories, and then went to Houston for treatment, and was not able to answer until her trial came off. As to refusing the notary

public admission to her house and refusing to appear before him, no answer was attempted. No time to consult with attorneys was requested. The returns of the officers are not contradicted, and no testimony was introduced by appellants to sustain their motion. As said by this court in *Weinert v. Simang*, 29 Tex. Civ. App. 435, 68 S. W. 1011:

"A number of cases have been cited by appellant to show that the court should have set aside the certificate of the officer and have permitted appellant to testify, but none of them hold that this court has the authority to determine that the action of the court in deciding against appellant on his motion to suppress the certificate in the first instance and to have another hearing on it in the second instance was erroneous, in the absence of a statement of the facts upon which the motion was tried."

The interrogatories are authorized by Rev. Stats. art. 3680, and taking them as confessed is authorized by article 3685. The finding of the trial judge would be sustained in the face of the affidavit, as the court could reject its contents if he desired. It was not supported by evidence. There was nothing tending to show any attempt to intrap appellants in taking the depositions.

[3] It was clearly within the discretion of the court to refuse to allow Bertha Stoppelberg to testify and to allow appellee to introduce the interrogatories to her in rebuttal of appellants' evidence. No abuse of discretion has been shown in this case. *Jones v. Wright*, 92 S. W. 1010; *Railway v. Morris*, 144 S. W. 1163; *Ayers v. Harris*, 77 Tex. 108, 13 S. W. 768; *Bounds v. Little*, 79 Tex. 128, 15 S. W. 225; *Railway v. Robinson*, 79 Tex. 608, 15 S. W. 584.

[4] Bertha Stoppelberg disclosed in her motion that, while she was so sick and mentally distressed that she could not go to Bastrop to answer interrogatories, she was able to go to Giddings to consult her attorneys, and her sickness did not prevent her from going to Houston and remaining away until July 10, 1919, when the case was tried, when she was able to go to Bastrop and offer to testify. Her own motion tended to show that she was evading the answering of the interrogatories. In the cases cited by appellants, evidence was introduced to show that there was no willful refusal to answer the interrogatories. Appellants relied alone on their motion to vacate the official certificate of the notary public. The law does not require notice to parties to a suit, nor to their attorneys, in order to take their depositions, and a failure to issue such notices was not evidence of a design to intrap appellants. Article 3682, Rev. Stats. They knew about the matter, and refused to answer the interrogatories. The third, fourth, fifth, and sixth assignments of error are overruled.

[5-7] The 145-acre tract of land having been bought during the marital relation be-

tween Bertha Stoppelberg and her deceased husband, the presumption obtains that it was community property, and the burden was upon her to establish that it was her separate estate. The fact that the deed was executed to Bertha Stoppelberg did not destroy the presumption that the property was community. Payment of the balance of the purchase money on the 145-acre tract out of insurance money on the life of the deceased husband by the surviving wife did not destroy the community character of the property, and stamp it as separate estate. The court properly decreed the property to be community, and charged appellee with her proportionate part of the purchase money paid by Bertha Stoppelberg. *Allen v. Allen*, 101 Tex. 362, 107 S. W. 528; *Hayworth v. Williams*, 102 Tex. 308, 116 S. W. 43, 132 Am. St. Rep. 879; *Moore v. Moore*, 28 Tex. Civ. App. 600, 68 S. W. 59; *Miller v. Odom*, 152 S. W. 1185. The deeds did not state that the property was the separate estate of the wife. According to the testimony of John Stoppelberg, his father agreed to furnish the money to pay for the 147 acres of land. There was no agreement that either tract of the land would be the separate property of the wife. There was no testimony tending to impress the character of separate property upon the land. If the \$600 was given by the husband to the wife to pay for the land, there was no testimony tending to show that it was the separate money of the husband. The testimony was too vague and unsatisfactory to remove the presumption that the property was community estate. The seventh and eighth assignments of error are overruled.

The ninth, tenth, eleventh, and twelfth assignments of error are overruled. There was testimony tending to support the judgment of the court as to the cotton bales, the seed cotton, and other personal property.

[8] The question of the homestead rights of Bertha Stoppelberg in the 82½-acre tract of land is sought to be raised in the brief of appellant, but not in pleadings or proof. The improvements on the land were made with community funds, and appellee was entitled to her share in the same. It is the well-settled law of Texas that the separate estate of one member of the community must reimburse the community for any proper improvements made in good faith upon the separate estate with community funds. *Furrh v. Winston*, 66 Tex. 521, 1 S. W. 527; *Schmidt v. Huppmann*, 73 Tex. 112, 11 S. W. 175; *Maddox v. Summerlin*, 92 Tex. 483, 49 S. W. 1033, 50 S. W. 567; *Bullock v. Sprowls*, 54 S. W. 657, affirmed by Supreme Court, 93 Tex. 188, 54 S. W. 661, 47 L. R. A. 326, 77 Am. St. Rep. 849; *Summerville v. King*, 98 Tex. 332, 83 S. W. 680, affirming 80 S. W. 1050. In all of these cases, however, it is asserted that no such claim would

be permitted to affect or jeopardize the title to the land. If that be the law, then the lien to secure the interest of appellee in the 82½ acres of land, the separate estate of Bertha Stoppelberg, was improperly fixed on that land.

The cases which appellants claim hold, where it is shown that the consideration in a deed taken in the name of the wife was the separate property of the husband, the presumption will arise that the husband made a gift to the wife, whether the recital in the deed shows it or not, do not so hold. They hold that where the evidence shows that the purchase money was the separate property of the husband, which he gave to the wife, the presumption of a gift to the wife of the land would arise, although the deed did not so recite.

[9] In this case the only testimony tending to show that the husband intended to make a gift of the 147 acres of land to Bertha Stoppelberg is the testimony of John Stoppelberg, a defendant, and, of course, interested party. He testified:

"I was not present with my mother when she bought the tract of 147 acres of land from Meyer, the second tract. I was not present at the time the deed was executed. As to whose money paid for that land, my mother paid for it. I don't recollect how much she paid for it; I think it was \$600. I know why the deed was made to my mother. It was made to her because father said he did not want to pay the land off; that if she wanted to pay she could buy and he would furnish the money. The deed was made to Bertha Stoppelberg."

No inkling is given as to when and where the father made the declaration, nor to whom it was made. If made when the trade was consummated, John Stoppelberg was not there, and it is so inconsistent as to be unreasonable for the husband to say that he did not want to pay for the land, but that the wife could buy and he would furnish the money. That might be a loan, but not a gift to the wife, and it might be separate property or money belonging to the community, that he was lending. The evidence was too vague and unsatisfactory to be credited, and evidently it was rejected by the trial judge. The deed from Meyer recites the payment of \$600 on November 1, 1899. In order to rebut the legal presumption that the property was paid for with community funds, the only testimony is the vague and indefinite assertion of one of the appellants that at some time and some place, not designated, the husband had said he would not pay for the land, but would let his wife have the money. The evidence was ignored, and it should have been ignored.

According to the theory of appellants, the husband of Bertha Stoppelberg bought no land, although he seemed to have the money, but gave his wife free rein in dealing in real

estate on her own responsibility and for her own separate use and benefit. She had no money, but was compelled to look to his pocket while living and to insurance on his life after his death for the payments made on what is claimed to be her separate estate. What the idea was for taking the different deeds of conveyance in the name of the wife remains unexplained. Different motives might be assigned for such conduct of a husband, but it is unnecessary to indulge them, and all that is proper to presume is that the property was bought for the community and placed in the name of the wife.

The judgment will be reformed so as to eliminate the lien granted on the 82½-acre tract, and, as reformed, will be affirmed.

NEWCOM v. FORD. (No. 2280.)

(Court of Civil Appeals of Texas. Texarkana.
May 20, 1920.)

1. Gifts \S 34—Conditional promise to give not enforceable.

A conditional promise to give a thing or forgive a debt is not enforceable.

2. Contracts \S 147(1) — Nature determined with reference to intention.

The nature of a transaction should be determined with reference to the intention of the parties.

3. Vendor and purchaser. \S 50—Deed and purchase-money note to be construed together.

Where a note constituted the consideration for a deed, the deed and note should be construed as if they were parts of one and the same instrument.

4. Gifts \S 5(2)—Evidence held to show sale of land and not a gift.

Where land was conveyed and a note taken for the price and the deed contained a recital that if the grantor died before the note was due then he willed the note to the grantee, the transaction was not a gift of the land or of the note to the grantee, but a sale of the land and an agreement to pay therefor conditioned on the grantor living until maturity of the note.

Appeal from District Court, Harrison County; P. O. Beard, Judge.

Action by Mrs. Lula P. Newcom, administratrix of J. E. Ford, deceased, against Charlie Ford. From a judgment for defendant, plaintiff appeals. Affirmed.

This was a suit by Mrs. Lula P. Newcom, as administratrix of the estate of J. E. Ford, deceased, against Charlie Ford, to recover the amount of a promissory note made by the latter, dated August 21, 1915, whereby he undertook three years thereafter to pay to said J. E. Ford or order \$525. It appeared from

recitals in the note that it was for the purchase money of 11¼ acres of land conveyed by the payee to the maker thereof, and that a vendor's lien had been retained on the land to secure its payment. The suit was to foreclose that lien also. In his answer Charlie Ford alleged that—

The deed made to him "provides that, if J. E. Ford should die before the note became due, then the note was to be willed or given by J. E. Ford to this defendant; that J. E. Ford died on 3d day of July, 1918, and note became due on 21st day of August, 1918, after the death of J. E. Ford. Wherefore the note sued on became the property of the defendant and became canceled."

The trial was to the court without a jury. It appeared from a recital in the deed from J. E. Ford to Charlie Ford admitted in evidence that the consideration therefor was the note sued on, and the deed contained another recital as follows:

"If I die before this note is due then I will it my nephew Chas. Ford."

The appeal is from a judgment that the administratrix take nothing by her suit.

John W. Scott and Wm. Lane, both of Marshall, for appellant.

Geo. Prendergast, of Marshall, for appellee.

WILLSON, C. J. (after stating the facts as above). [1-4] As we view the record, the judgment is not erroneous unless it is true, as appellant insists it is, that the provision in the deed to appellee set out in the statement above in its legal effect was a mere promise of J. E. Ford if he died before the note matured to give it to appellee. Of course, if that was the effect of the provision, the judgment is wrong, for a conditional promise to give a thing or "forgive" a debt is not enforceable. 12 R. C. L. 832, 944, 950. But we do not agree that was the effect of the provision. The nature of the transaction should be determined with reference to the intention of the parties, and in determining that the deed and note should be construed as if they were parts of one and the same instrument. *Dunlap's Adm'r v. Wright*, 11 Tex. 598, 62 Am. Dec. 506. So construing them it is reasonably plain, we think, that the transaction was a sale of the land by J. E. Ford and not a gift thereof or of the note to appellee. What J. E. Ford agreed to do was to convey the land to appellee; and what appellee agreed to do was not unconditionally to pay said Ford any sum of money for the land, but to pay him \$525 therefor if said Ford was alive three years from the date of the deed. It is clear, we think, that said Ford did not expect appellee to pay, and that appellee did not expect to pay anything for the

land if said Ford should not live as long as three years. For aught the record shows to the contrary, appellee may not have been willing to bind himself unconditionally to give as much as \$525 for the land, and may have been induced solely by the agreement that he need not pay anything for it if J. E. Ford died within three years to bind himself to pay said sum for it if said Ford lived that long.

The judgment will be affirmed.

NEWCOM v. FORD. (No. 2282.)

(Court of Civil Appeals of Texas. Texarkana. May 20, 1920.)

1. Vendor and purchaser \S 280(2)—In action on vendor's lien note, general denial sufficient to support judgment.

In an action on a vendor's lien note, a general denial was a sufficient pleading to support a judgment for defendant, assuming that a special plea that the note was turned over to defendant with the understanding that the debt would be satisfied if the vendor died was insufficient.

2. Pleading \S 378—General denial puts every material allegation in issue.

A general denial operates to put in issue every material fact alleged in plaintiff's petition.

3. Appeal and error \S 750(4)—Sufficiency of evidence cannot be raised by assignment of error attacking the pleading.

The sufficiency of the evidence to support the judgment must be raised by an assignment of error attacking the evidence and not the pleading.

4. Vendor and purchaser \S 280(3)—In action on vendor's lien note, general denial entitled defendant to explain possession of note.

In an action on a vendor's lien note where plaintiff by a supplemental petition alleged that defendant had possession of the note through mistake and that he owed the note and had not paid it, evidence to explain his possession and show that it was not through mistake was admissible under a general denial.

5. Gifts \S 43—Maker of note not liable when holder delivers it to him as a gift.

Where a vendor taking a vendor's lien note for the price subsequently delivered it to the vendee with the expressed purpose and intention of making an immediate gift thereof, the vendee was not in possession of the note through mistake as alleged in an action thereon, but was the owner of the note and not liable for its payment.

Appeal from District Court, Harrison County.

Action by Mrs. Lula P. Newcom, administratrix of J. E. Ford, deceased, against Sam Ford. From a judgment for defendant, plaintiff appeals. Affirmed.

Appellant, as administratrix of the estate of J. E. Ford, deceased, sued the appellee on a vendor's lien note executed by appellee to J. E. Ford and to foreclose the lien on 12½ acres of land. The petition also alleged that the note sued on "was through mistake turned over to the said Sam Ford by the said J. E. Ford." The appellee answered by general denial and by special plea "that the note was turned over to the defendant before the death of J. E. Ford with the understanding that in the event J. E. Ford died that the debt would be satisfied." The appellant by supplemental petition replied "that if the note was delivered to the defendant that same was delivered through mistake and with no intention that same should become the property of defendant without payment," and that no consideration passed from Sam Ford to J. E. Ford for the delivery of the note. The trial was before the court without a jury, and judgment was entered in favor of the defendant.

J. E. Ford conveyed to appellee a tract of land containing 12½ acres of land, in consideration of \$500 evidenced by a promissory note payable to J. E. Ford or order, dated August 21, 1915, and due three years after date. J. E. Ford, it appears, "delivered this note back to Sam Ford about two weeks after it was made." J. E. Ford was at the time in feeble health, and continued so until his death on July 2, 1918. Sam Ford was a nephew of J. E. Ford, and they lived about 400 yards from each other. The note remained in the possession of Sam Ford from the date of delivery to him until the trial of the suit. It was proven that J. E. Ford had stated to the certain named relatives "that he had given Sam Ford his note," and "that he had given Sammy his note back, as he had as soon for him to have the place as anybody else, because he had a big family and was not able to pay for it."

Scott & Lane, of Marshall, for appellant. Hall, Brown & Hall, of Marshall, for appellee.

LEVY, J. (after stating the facts as above). The first assigned error does not afford, it is concluded, as ground for reversal of the judgment, and it should be overruled.

[1-5] By the second assigned error it is insisted that the pleadings of the appellee were not sufficient to support a judgment for the defendant. The appellee filed a general denial and a special plea. It can be assumed, in passing upon the assignment of error, that the special plea is subject to a general demurrer, as claimed by the appellant, and

that there was a general denial as a legal pleading of the defendant. The general denial would, it is thought, be a sufficient pleading in this case, as in all cases, to support a judgment for the defendant. A general denial operates to put in issue every material fact alleged in the plaintiff's petition. The sufficiency of evidence to support the judgment rendered is another question, required to be raised by an attack on the evidence and not the pleading. In the instant case, though, a material fact alleged in the petition and required to be proven by the appellant was that appellee was in possession of the note "through mistake," and that appellee owed the note and had not paid it. The general denial allowed the appellee to explain his alleged possession of the note, that it was not "through mistake" as alleged. And looking to the evidence, which is not required by the assignment, it appears without contradiction that J. E. Ford, payee of the note, delivered the note to Sam Ford, the maker, in about two weeks after its execution, with the expressed purpose and intention of making an immediate gift thereof. The evidence only went to show an absolute and not a conditional gift. If J. E. Ford made an absolute gift of the note to Sam Ford, then Sam Ford would not be in possession of the note "through mistake," but would be the owner thereof, and would not be liable for payment of the same.

The judgment is affirmed.

FORD et ux. v. NEWCOM. (No. 2284.)

(Court of Civil Appeals of Texas. Texarkana.
May 20, 1920.)

Appeal from District Court, Harrison County; P. O. Beard, Judge.

Action by Mrs. Lula P. Newcom, administratrix of J. E. Ford, deceased, against Ed Ford and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

F. H. Prendergast, of Marshall, for appellants.

Scott & Lane, of Marshall, for appellee.

HODGES, J. Mrs. Lula P. Newcom filed this suit as administratrix of the estate of J. E. Ford, deceased, against the appellants Ed Ford and his wife, Nellie Ford. The suit was based upon a promissory note executed by Ed Ford and wife April 25, 1911, payable to the order of L. N. Ford and secured by a mechanic's lien on a house and lot. The defense urged in the court below was that the note did not belong to the estate of J. E. Ford, deceased, but was the property of L. N. Ford, the father of the appellant Ed Ford, and that it had been settled before the suit was filed. In a trial before the court a judgment was rendered for the plaintiff for the sum of \$219.24.

In this appeal only one assignment is urged: That the evidence did not support the finding by the court that the note sued on belonged to the estate of J. E. Ford, deceased. It is true that the testimony upon that issue was conflicting; but, after a careful examination of the entire statement of facts, we have concluded that the judgment should be affirmed, and it is so ordered.

McCOLLUM et al. v. McMANUS et al. (No. 8446.)

(Court of Civil Appeals of Texas. Dallas.
May 15, 1920.)

Injunction \S 118(1)—Petition to enjoin inspectors from dipping cattle good as against demurrer.

A petition of cattle owners to enjoin live stock inspectors from requiring the dipping of cattle, alleging that plaintiffs stock would be seriously crippled and bruised, and that there would be a total or partial loss of milk or butter as to milch cows, held good as against demurrer.

Appeal from District Court, Henderson County; John S. Prince, Judge.

Suit by W. D. McCollum and others against C. W. McManus and others. Judgment for defendants, and plaintiffs appeal. Reversed and remanded.

W. L. Faulk and Miller & Miller, all of Athens, for appellants.

RAINEY, C. J. W. D. McCollum and about 175 others, as plaintiffs, brought this suit against certain parties, live stock inspectors for Henderson county, and alleged, in substance, as follows:

"That the plaintiffs reside in Henderson county, Tex., and that the defendants reside in Henderson county, Tex.

"For cause of action plaintiffs show to the court that they are the owners and caretakers of cattle, horses, and mules, located on their respective premises in said Henderson county, Tex. That they have been the owners of said stock for a long time, and are now the owners of said live stock, consisting of cattle, horses, and mules, as aforesaid, and they are being kept by the plaintiffs on their respective premises in Henderson county, as aforesaid.

"That the defendants purport to be and are pretending to act as official live stock inspectors in and for Henderson county, Tex., and are being paid a salary as such pretended inspectors by the commissioners' court of said county, except the defendant McManus, who is receiving his pay from the state government, the amount being \$185 per month, said inspectors, receiving for their services \$85 per month from the commissioners' court of Henderson county, Tex. That each inspector receives \$85 per month as aforesaid.

"That the defendants are claiming the right,

power, and authority as inspectors to compel plaintiffs and all others, citizens of Henderson county, who own or have such live stock under their control, to dip said live stock in certain vats constructed by defendants and the county authorities of Henderson county, Tex., in June, July, August, and September, 1918, and located at various points in said county, and that after the constructions of the vats the defendants filled them with a mixture of fluid, chemicals, and poison, and began calling upon and demanding that plaintiffs and all other citizens owning or controlling live stock in Henderson county, Tex., should immediately drive their stock to the vats and dip them into said mixture and poison, and threaten and stated that all who did not comply with said demand would be arrested, prosecuted, and fined for their failure or refusal so to do. That the vats are about 18 or 20 feet in length and from 3 to 5 feet wide, and constructed in excavation about 7 or 8 feet below the surface of the earth, with a narrow chute leading to one end of the vats, and through which chute the defendants compelled, and are still attempting to compel, plaintiffs and other citizens to drive their stock, and to cause them to jump or fall a distance of several feet into the vat with great force and violence.

"That on the account of the character, quality, and quantity of the fluids, chemicals, and poison placed and maintained in the vat by the defendants, and the manner employed by defendants in forcibly compelling plaintiffs and other citizens to drive their live stock into the vats, great damage has already been inflicted on plaintiffs and other citizens, and that unless the unauthorized and unlawful conduct of defendants is restrained by the court said defendants will continue to employ said means and methods in the future as they have in the past, and will continue in their demands to forcibly compel plaintiffs and other citizens to drive their stock into said vats, and that unless restrained the defendants will thus cause the plaintiffs and said other citizens to suffer irreparable injury. That the dipping of said stock was without their consent and contrary to their wishes, and was caused by the demands, notification, and threats of defendants.

"That the live stock so dipped were bruised, skinned, crippled, and injured because of the manner of the construction of said vats and chutes, and on account of forcing the animals to jump or fall into the same, and because of the quality and quantity of said liquid and poison in the vats.

"That the defendants so conducted said operation and work as to cause said live stock to swallow and inhale said poison, causing them to be almost strangled to death and rendering them weak, stiff, and sick; numerous cattle of plaintiffs and other citizens being thereby crippled and injured and some killed. The numerous and valuable milch cows were thereby crippled and killed.

"That many of said cows were so injured and poisoned they dried up in their milk to one-half of the quantity they had theretofore been giving, causing their bags and teats to be injured, in some instances causing the milk of the cows to be unnatural and bloodshot, wholly unfitting it for family use, also decreasing the amount of butter realized by plaintiffs in proportion to

the decrease in milk. That plaintiffs were depending on their milch cows for all the milk and butter necessary for their family, and that the damage they have suffered in this particular is serious. That defendants not only brought about the dipping, but stated that they would accept no reason or excuse for a failure to comply with their demands.

"Plaintiffs further show to the court that said live stock were healthy at the time of the forcible dipping, and did not have splenic fever, and did not have any other malignant, contagious, infectious, or communicable disease whatever, and were not affected with any agency or condition for the transmission of splenic fever, and did not have upon them any fever-producing ticks, and had not been exposed to said condition, all of which was well known to defendants, or could have been known to them had they used proper diligence. That before the defendants called dipping and injuries they had never inspected said stock, and had not found said live stock with splenic fever or fever-producing ticks, but nevertheless they insisted and persistently demanded that plaintiff and other citizens should drive their live stock into said vats of liquids and poison, and threatened that all who refuse or fail to do so would be reported by them to the constable or sheriff, and that the defendant and said officer would enter the premises of those who disobeyed, and then forcibly take and drive their live stock away from the control from such owners and then force such stock into said vats. Plaintiffs further show to the court that they are now being prosecuted in the county court of Henderson county, Tex., and being harassed in every way possible by the said defendants.

"Plaintiffs further show to the court that the defendants claim and contend that the plaintiffs are amenable to the law, and are entitled to be prosecuted in the criminal court for failure to dip their live stock, even though they are free from disease and free from ticks.

"Plaintiffs further show to the court that the defendants do not claim that said live stock had splenic fever, or that they had made an inspection or had found fever-producing ticks upon said cattle, but claimed and asserted that they had the power and authority to compel the dipping of cattle, horses, and mules in Henderson county, Tex., even though said live stock were in a perfectly healthy condition.

"Plaintiffs further show to the court that they protested against the conduct of the defendants, and requested them to inspect the live stock of plaintiffs before requiring them to be dipped. But that defendants arbitrarily refused to comply with such reasonable request, and failed and refused to examine or make any inspection whatever, but proceeded to carry out the forcible dipping of live stock, although not a condition existed in law or fact that warranted forcible dipping. That the stock of some of the plaintiffs had been dipped once, and the stock of other plaintiffs had been dipped several times; and that defendants are demanding that all of said stock be dipped again, and as often in the future as defendants shall demand, and at least every two weeks; and that defendants have threatened that they in connection with the sheriff or constable will forcibly dip the stock or they will prosecute them in the criminal court who refuse to comply

with said demands; and that unless restrained by the court the defendants will execute said threat, and that the defendants are now causing the plaintiffs to be arrested and prosecuted in the courts; and that in carrying out said forcible dipping they will cause the live stock of the plaintiffs and others to be injured, poisoned, crippled, and killed, to the great damage of the owners.

"Plaintiffs further show to the court that at least 1,000 head of cattle, horses, and mules (principally cattle) have been damaged by said dipping in Henderson county. That the defendants are notifying plaintiffs and other citizens that all of their cattle, horses, and mules must be dipped in said vat, although said live stock are not affected with any disease or character whatever; that defendants have made no inspection of said animals, and if the demands and threats of defendants are carried out plaintiffs and each of them will suffer thousands of dollars of damage on account of the fact that their horses, cattle, mules, etc., will be injured, crippled, poisoned, and damaged. That the said defendants have caused an expense to Henderson county taxpayers a sum of money which amounts to more than \$10,000 since the 1st of June, 1919.

"Plaintiffs further show to the court that the said trespasses and wrongs were without authority of law, and that any statute attempting to authorize such invasion of personal rights would violate the Constitution of the state.

"Plaintiffs further show to the court that two elections, or at least one, has been had in Henderson county, Tex., to determine whether live stock should be dipped, and said election or elections resulted against the enforcement of such a law in Henderson county. That by some sort of order passed by the commissioners' court of Henderson county, Tex., or some other body, said tick law has been put in operation in Henderson county, Tex., or rather a pretended operation of said cause has been put in operation in said Henderson county, Tex.

"Plaintiffs further show to the court that the defendants have no right to disturb these plaintiffs. That the defendants are now demanding and insisting that plaintiffs and other citizens should submit their live stock to the dipping process again, and at frequent intervals in the future, and threatening that, if said demands are not complied with, all who refuse obedience will be arrested, prosecuted, and fined.

"Plaintiffs further show to the court that the expense account will bankrupt the taxpayers of Henderson county, Tex., if the defendants are permitted to destroy the property of the plaintiffs and to continue to spend the funds of Henderson county as they have heretofore done.

"Plaintiffs further show to the court that the voters of Henderson county voted twice, or at least one time, on the question of whether or not the county should adopt the provisions connected with the dipping law, that at each of said elections, and at least at the last election, said voters refused to adopt or to bring Henderson county within the terms of the statute governing the eradication of ticks. That in the face of the action of the voters the said law destroyed local self-government in this: It permits the law to become effective when the people vote against the same, and when said law is declined by the vote of the

people. That by reason of this, the statute controlling the matter is invalid and void.

"Plaintiffs further show to the court that the defendants have threatened, and are now threatening, that in the event the plaintiffs and said other citizens over Henderson county fail to comply with said demands and threats the defendants will then call out the peace officers, and in connection with the defendants forcibly enter the peaceable premises of plaintiffs and said other citizens, and take from their possession their milch cows and other live stock and drive them to said dipping vat, and then by force and without the consent of the owners of said live stock that they will dip said cows and live stock again and as often as they see proper, and the defendants have stated and represented to these petitioners and to said other citizens that unless such demands are complied with they will cause the plaintiffs and said other citizens to be reported and to be arrested and fined in the courts, and plaintiffs represent that unless the defendants are restrained they will enter the premises of plaintiffs and said other citizens in connection with some peace officer selected by them, and in connection with said peace officer that the defendants will drive said live stock to said dipping vat, and will cause them to jump, fall, and plunge into said poison, and will cause valuable live stock belonging to said plaintiffs and other citizens to be injured, damaged, and crippled in said vats, and will cause said live stock to inhale and swallow said poison, and will cause the milk of said milch cows to be decreased in quantity one-half, as aforesaid, and the loss of butter in proportion, and will cause valuable live stock of plaintiffs and other citizens to be made sick, stiff, and helpless, and will cause them to die, all to the great damage of petitioners and to said other citizens of Henderson county, Tex.

"Plaintiffs allege that said forcible dipping of the milch cows of the plaintiffs and said other citizens has decreased the amount of milk and butter they would have realized from them to the extent of one-half, and even more below the normal amount, and that this is a serious damage to them and to their families; and that in the forcible dipping of the milch cows of A. A. Darden, said cows were cut and injured and rendered sick and almost helpless. That a cow of the plaintiff Frank McLeon was killed, and that an unborn calf, belonging to the plaintiffs Coy Elledge and J. V. Hornsby was killed, and the cows rendered sick and stiff, and their bags and teats were torn, injured and poisoned, and one of his calves crippled. That the milch cows of the plaintiffs J. L. Guthrie and T. B. Elledge were injured, damaged, and made sick, and their bags and teats injured and torn, and were rendered so painful and swollen that he had to tie his milch cows in order to draw milk from them. J. K. Derden lost the breeding of two cows, and one lost her milk.

"That a cow of plaintiff Joe Parker was killed by said dipping and poison. That the cows of the plaintiff Ellis Williams were rendered sick and weak on account of said dipping and poison. J. P. McKey lost one yearling.

"That the cows of the plaintiff Sebe Tindel were injured and damaged; their bags and teats cracked, torn, and blistered. That they

suffered so much pain from the inflictions of said injuries that he had to tie his cows in order to forcibly withdraw the milk from their bags.

"That all of the plaintiffs had cattle that lost in their milk and were damaged by reason of said dipping, and were seriously injured and rendered sick by said dipping and poisons, and their milk made bloodshot and unfit for use, and compelling the plaintiffs and their families to do without milk for a number of days, although they had been realizing enough theretofore for their own consumption, in addition to a sufficient amount to sell a number of customers.

"That all of said cattle were practically dried up in their milk. That cattle of other citizens living in Henderson county were also dried up in their milk and injured, that are not plaintiffs herein. That there is attached hereto a list of cattle damaged and marked 'Exhibit A.'

"That the following parties did not submit their live stock to said forcible dipping in the said vats, because they say that they know that valuable cows and cattle of their neighbors and of numerous citizens over Henderson county had been seriously injured and damaged, and in many instances killed, and they say that their own live stock had not been inspected by any inspector, and that no condition existed in law and in fact that required them to submit to the injury or destruction of their property, and consequently they have escaped damages by reason of the fact that they have not complied with said unlawful demands. Brooks Rodgers had one horse killed; Roll McClur had one cow killed; Jim Barton one calf killed; Bill Foster had one cow killed.

"Plaintiffs charge and respectfully represent to the court that the defendants, emboldened by their past conduct and misled by a misconception of their official power and authority, are now actually notifying these plaintiffs and other citizens of Henderson county that all of their horses and mules and cattle must be dipped in said dipping vats in like manner with the cattle that have heretofore been dipped, and yet plaintiffs say that their horses and mules are in a healthy condition, and are not affected or suffering from any disease of any kind or character whatever, all of which is well known to the defendants, or could have been known by them had they used proper legal diligence. Said horses and mules are not infected with glanders or anthrax or any other disease, and yet, notwithstanding the fact that no condition exists either in law and in fact that would warrant the defendants in compelling the dipping of said horses and mules, yet they have made said demand without even an inspection or examination of any kind whatever.

"Plaintiffs say that if the defendants are permitted to carry out such unlawful threats and proposals that valuable mules and horses of these plaintiffs, and of hundreds of other law-abiding citizens of Henderson county will be forcibly driven to the said dipping vats and will be injured, damaged, and crippled, causing each of the plaintiffs and other citizens to suffer thousands of dollars of damage, as they have been made to suffer with respect to their cattle, the forcibly driving and dipping of the said cattle, horses, and mules into said vats

would not only injure and cripple them, but would be practically useless afterwards for any purpose whatever.

"Plaintiffs respectfully represent to the court that the trespasses and injuries above described were without authority of law, and that there is no valid statute in this state that would warrant the infliction of such injuries, and that, even if the Legislature had attempted, or were to attempt, to authorize such invasion of personal rights, such a statute would be in violation of the Constitution of this state, and they here now allege that said injuries were inflicted, not only without a warrant of a law, but in violation thereof.

"Plaintiffs further show to the court that there is no such law in force in Henderson county, Tex., to-day, and has never been, that authorized or permitted the forcibly dipping of said live stock, or that authorized or permitted the infliction of said injuries. They here and now distinctly allege that the act of the Legislature under which the defendants claim to have action and to be acting now would not have justified such trespasses, injuries, and damage, even though it had been adopted in Henderson county, Tex., but the plaintiffs say that it has never been adopted by the voters of Henderson county, Tex., and has no application whatever with reference to the dipping of said cattle in said vats, or with reference to tick eradication under the supervision of local authorities.

"Plaintiffs represent the statute under which the defendants claim to be acting while making provisions for the payment of salaries of said inspectors, who are the defendants in this suit, plaintiffs are informed and believe, and upon said belief so represent the fact to be, that the defendants are receiving out of the funds of Henderson county, Tex., a salary each of \$85 per month, except the defendant McManus, who is receiving a large salary out of the state government, yet said statute makes no provision for the payment of damages sustained by the citizen for his live stock injured or killed on account of said inspection, and on account of the forcible dipping of their live stock in the poisons placed in said vats by these defendants, and they are informed and believe, and upon such information and belief represent, that said inspectors are under no bond for the payment of the damages they inflict upon the citizens, and that no publication has been made officially in any newspaper of Henderson county, Tex., of any quarantine notice, quarantining the premises of any of these plaintiffs, or of said other citizens whom they represent. That there are a number of newspapers published in said Henderson county.

"Plaintiffs charge that said defendants are seeking to compel plaintiffs and many other citizens of Henderson county to submit to the dipping of their cattle, horses, and mules this week, and at frequent intervals in the future, and are threatening, in the event said demands are not complied with, to invade the premises of plaintiffs and said citizens and forcibly take away their milch cows and calves and their horses and mules and drive them to the said vats filled with said poisonous liquids immediately, and are threatening that unless the plaintiffs and other citizens comply with

said demands that they will be arrested, prosecuted, and fined in the courts, and plaintiffs allege that unless the court restrains such unlawful trespass and wrong that said injuries will be inflicted, and plaintiffs and other citizens whom they represent will each be compelled to suffer thousands of dollars of damages in the next few weeks, and they now come representing themselves and said citizens upon the facts and allegations in this petition, and pray that this court issue its most gracious writ of injunction, restraining these defendants and all others from forcibly dipping or injuring their live stock (which are not affected with any fever, or fever-producing ticks), and restraining them and all others from invading the premises of plaintiffs for said unauthorized and unlawful purposes, and that the court grant such other and further relief in law and equity as the plaintiffs may show themselves entitled to.

"Premises considered, plaintiffs pray that the defendants be restrained from further interfering with these plaintiffs' live stock, and from serving notice on these plaintiffs to dip their live stock, and from filing complaints in the court against these plaintiffs for refusing to dip their said live stock or prosecuting them in the courts, and that the defendants be restrained from further interfering with these plaintiffs in any manner whatever, or with their said live stock; and that they be prohibited or enjoined from requiring these plaintiffs to dip their said live stock, or from testifying in the courts against these plaintiffs in connection with said cases, or from disturbing these plaintiffs in any manner in the court or out of the court or their live stock for general and special relief; and that the court authorize the district clerk of Henderson county to issue a writ or writs of injunction in connection with this plea; and that the sheriff of Henderson county be permitted to serve such writ of injunction, requiring the defendants to comply to the prayer herein made."

A general demurrer was leveled at said petition, and the same sustained by the court, to which plaintiffs excepted, and gave notice of appeal.

The first assignment of error is:

"The petition in this case shows that the plaintiffs' cattle were bruised, skinned, blistered, caused to decrease in milk, crippled, killed, and suffered other damages; and that they were dipped in vats that were not prepared properly; and that they were dipped in a solution that was poisonous, and that a great many of the cattle were free from the tick fever, ticks, and other diseases. The same being true, the court committed an error in sustaining the defendants' demurrer to the plaintiffs' petition and in dismissing the suit."

The proposition presented by plaintiffs under this assignment is:

"When the pleadings show a case, such as described in the plaintiffs' petition, it is the duty of the court to hear the testimony but in this instance the court, after hearing the petition read, sustained a general demurrer to

the petition, plaintiffs declining to amend, the court dismissed the case."

There was no testimony presented to the court, so none was heard. The general demurrer was sustained, and, plaintiffs declining to amend, the case was dismissed.

The appellees have not furnished this court with a brief upholding the action of the trial court, and appellants have cited but one decision in point, which is *Castleman v. Rainey*, 211 S. W. 630. In that case the plaintiffs' petition was practically the same as the one here presented, and it was there held to be good against a general demurrer. Said case is here cited in support of our views in this case.

The judgment in this case is reversed, and cause remanded for a new trial, and the lower court is instructed to hear the testimony, and render judgment accordingly.

Reversed and remanded.

NATIONAL SURETY CO. v. ATASCOSA ICE, WATER & LIGHT CO. et al. (No. 6272.)

(Court of Civil Appeals of Texas. San Antonio. Nov. 26, 1919. On Motion for Rehearing, April 28, 1920. On Second Motion for Rehearing, May 19, 1920.)

1. Pleading \S 149—Bank sued by depositor for deposits misappropriated by cashier may join cashier's surety in cross-action.

In depositor's action against bank for deposits wrongfully abstracted and misappropriated by bank's cashier, it was proper for the bank by cross-action to join surety on cashier's bond and compel it to discharge the loss or damage; the depositor's right to recover against the bank and bank's right to recover over against surety involving the same facts and issues.

2. Parties \S 50—There is misjoinder of parties where no privity exists.

The courts will not allow a party to be brought in when the issue to be joined is on separate contracts in which there is no privity between the parties, and where to sustain the cause requires separate allegations; but where there is such a privity that no harm will result from keeping the parties together, and where no material or substantial change or other unnecessary burden is imposed, the parties will be held properly joined.

3. Parties \S 25 — Question of misjoinder largely discretionary.

When the plea of misjoinder of parties or question of proper parties is urged, a very large discretion is allowed the courts.

4. Principal and surety \S 161—Evidence held to sustain finding that cashier willfully misapplied and abstracted bank's moneys.

In depositor's action against bank for deposits alleged to have been misappropriated by

bank's cashier, in which bank asked for judgment over against cashier's surety, evidence held to sustain finding that cashier wrongfully abstracted or willfully misapplied bank's money.

5. Principal and surety \S 79—Cashier "willfully misapplied or willfully abstracted" bank's money, though it was applied to use of other person.

Bank's cashier "willfully misapplied or willfully abstracted" bank's funds, within his bond, whether he used all the money for himself personally, or got it and willfully misapplied it in some other way, to the use of some other person.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willfully Misapply.]

6. Appeal and error \S 724(2)—Court will not search record for errors to aid indistinct assignments.

While the Court of Civil Appeals is liberal in passing upon all assignments, it cannot search the pleadings, transcript, and statement of facts for supposed errors that are not distinctly disclosed in the assignment itself or propositions thereunder.

7. Principal and surety \S 167—Sureties may be impleaded or come in themselves for determination as to their liabilities.

Sureties may be impleaded in proper suits, or even come in themselves and have the question of their liability determined and fixed.

8. Principal and surety \S 161—Depositor suing for deposits misappropriated by cashier held not entitled to judgment against cashier's surety impleaded by bank.

In depositor's action against bank for deposits misappropriated by bank's cashier, in which bank impleaded cashier's surety with prayer for judgment over, depositor was not entitled to a judgment against the surety in absence of showing that bank was insolvent or could not meet its obligations by reason of any of the alleged wrongful acts of such cashier.

On Motion for Rehearing.

9. Principal and surety \S 159 — Cashier's surety held not liable for payment of draft on bank by cashier.

Payment of draft on bank by bank's cashier held not willful misapplication of the bank's funds within cashier's bond, in absence of affirmative showing that payment was without consent of his superior officers; the presumption being that payment was rightful.

10. Banks and banking \S 136—Bank not liable to depositor for amount charged against depositor's account, where depositor received the benefit.

In depositor's action against bank for deposits misappropriated by bank's cashier, who, having paid draft on bank, charged amount thereof against depositor's account without depositor's authority, bank could have avoided liability to depositor for such amount by proving that the depositor actually received the benefit of the payment.

Appeal from District Court, Atascosa County; Covey C. Thomas, Judge.

Suit by the Atascosa Ice, Water & Light Company against the Atascosa County State Bank, in which defendant filed answer, making National Surety Company a party and seeking judgment over against it. Judgment for plaintiff against both defendants and for defendant bank over against defendant Surety Company, and the latter appeals. Judgment for plaintiff affirmed as to bank, but reversed as to the Surety Company, and judgment for defendant bank against defendant Surety Company affirmed as reformed.

Black & Smedley, of Austin, for appellant.
Arnold & Cozby, of San Antonio, and James A. Walton, of Jourdan, for appellees.

COBBS, J. This suit was filed in the district court of Atascosa county, Tex., by the Atascosa Ice, Water & Light Company, originally against only the Atascosa County State Bank, plaintiff seeking to recover from said bank judgment for \$7,182 alleged to have been deposited by it with said bank, and payment of which amount had been refused by said bank. The bank filed its answer, making the National Surety Company a party, and seeking judgment over against it for any amount that might be recovered against the bank by the plaintiff. Later the plaintiff amended its petition and made the National Surety Company a party.

Trial before the court, without a jury, resulted in a judgment in favor of the plaintiff, Atascosa Ice, Water & Light Company, against both defendants for the sum of \$7,036.30, with 6 per cent. interest thereon from date of said judgment, and in judgment in favor of the defendant Atascosa County State Bank over against the National Surety Company for so much of the judgment in favor of the plaintiff as said bank should have to pay.

The case went to trial on plaintiff's second amended original petition, in which the ice company sued both of the defendants, namely, the bank and the surety company. Plaintiff alleges that it had deposited a large sum of money in said bank, and that of said money the cashier of said bank, to wit, R. L. Witt, wrongfully abstracted and willfully misapplied \$7,182 thereof, and the pleadings set up the manner in which said Witt accomplished this, namely, by executing checks and charges, wrongfully and without authority, and by taking the money himself. The petition alleges that said Witt was in complete control of the bank, and took advantage of his position to wrongfully abstract and misappropriate said money. The plaintiff's petition alleges that at the time this occurred, the surety company was bound by a bond or contract of indemnity to

the extent of \$10,000, and this contract of indemnity provided that the surety company would indemnify the bank or any person or persons that may be damaged by the said Witt willfully abstracting or wrongfully misapplying any money during the course of his employment with said bank, and the petition alleges that the said bond was for the benefit, not only of said bank, but also of the plaintiff and all other persons.

The defendant bank answered, and by way of cross-action averred that if in fact it was indebted to the plaintiff, Water & Light Company, in the amount claimed in said pleading, such indebtedness was by reason of the fact that the charges made by the defendant against the plaintiff, mentioned in said Exhibit D, attached to plaintiff's first amended original petition, were not authorized by the plaintiff, but were made by R. L. Witt wrongfully abstracting and willfully misapplying the moneys represented by the charges set forth in said Exhibit D, and that said R. L. Witt was the cashier of the defendant bank and in full charge and control of its business, and that if said charges were not authorized by plaintiff, then said R. L. Witt wrongfully abstracted and willfully misapplied the moneys represented in said charges, and wrongfully charged same to the plaintiff's account, and that, if defendant was liable to the plaintiff on the facts alleged in plaintiff's petition, said liability arose by reason of the acts of R. L. Witt in wrongfully abstracting and willfully misapplying the moneys belonging to the defendant and taking and charging same without authority to the account of plaintiff. Defendant further averred that during said year 1916, and at the time said alleged unauthorized charges were made, said R. L. Witt was under bond issued by the appellant surety company, and that by virtue of said bond the surety company had contracted and agreed that it would hold the appellee bank harmless against and pay to it such pecuniary loss as it may sustain of money or other valuables embezzled, wrongfully abstracted, or willfully misapplied by said R. L. Witt in the course of his employment by the defendant during the period of time that said bond was in full force and effect; and that said bond was in full force and effect upon the dates upon which the various charges referred to in Exhibit D appeared to have been made, and was in full force and effect upon the dates the said R. L. Witt wrongfully abstracted and willfully misapplied so much of the money as is referred to in Exhibit D of plaintiff's said first amended original petition, and the defendant appellee bank further alleged that it had notified the surety company of the claim that had been made upon it by the plaintiff, and that, if it was liable to the plaintiff as claimed in plaintiff's first amended original petition, then in such event the surety company was

liable to it in the same amount, because if such liability existed, the same was due to the said R. L. Witt wrongfully abstracting and willfully misapplying the funds of the defendant bank, and wrongfully charging same to the plaintiff without authority. Defendant further averred that R. L. Witt was insolvent, and had departed for parts unknown to defendant, and for that reason was not made a party to the proceeding, and said defendant bank prayed that, in the event any judgment was rendered against it in favor of plaintiff, it might have judgment over against the National Surety Company for the same amount, by reason of the liability existing because of said bond, and for general and special relief.

Thereupon, on October 15, 1918, the surety company filed its plea in abatement and original answer to the cross-action filed in said proceeding against it by the bank. In this answer it set up, in substance, the following: (1) It pleaded in abatement of said cross-action, setting up a misjoinder of causes of action and of parties, as set out in assignments of error relating to the same; (2) a general demurrer; (3) certain special demurrers, raising in main the same issues of misjoinder of parties and of causes of action contained in said plea in abatement; (4) a general denial; (5) it averred a breach of the warranties contained in the application for said bond, the details of which are more fully set forth; (6) that if such bond was issued, it contained a provision with respect to the giving of the notice of loss under the bond, which was breached by the bank. It is not necessary to more fully set forth the substance of the allegations of this pleading.

The exceptions and pleas of all the parties were overruled.

The trial court filed the following:

"Findings of Facts and Conclusions of Law.

"1. The Atascosa County State Bank is indebted to the Atascosa Ice, Water & Light Company in the sum of \$6,782, being the aggregate of all of the items set forth in Exhibit D of plaintiff's second amended original petition, except the item of \$350 under date of March 25, 1916.

"2. The said sum of \$6,782, which is owing to plaintiff by the Atascosa County State Bank, is owing by virtue of the fact that the plaintiff deposited with the Atascosa County State Bank \$6,782 more money than the Atascosa County State Bank is willing to return to the plaintiff.

"3. During the year 1916, R. L. Witt wrongfully abstracted and willfully misapplied money to the extent of \$6,782. The dates and the amounts of such money so willfully abstracted and wrongfully misapplied by R. L. Witt are those dates and amounts set forth in Exhibit D to plaintiff's second amended original petition, aggregating \$6,782, and consisting of all of the items set forth in Exhibit D except the item of \$350, under date of March 25, 1916.

"4. Said money so wrongfully abstracted and

willfully misapplied by the said R. L. Witt was the money of the Atascosa County State Bank, and particularly that part of the money of the Atascosa County State Bank represented by the deposits of plaintiff, and the said money so wrongfully abstracted and willfully misapplied was charged by the said R. L. Witt to the account of the plaintiff, and the said R. L. Witt, in the carrying out of his designs to wrongfully abstract and willfully misapply said money, wrongfully and without authority executed and caused to be executed and paid, and caused to be paid out of the funds of said bank, and charged and caused to be charged against the deposits of the plaintiff, the checks and drafts and charges set forth in Exhibit D of plaintiff's second amended original petition, with the exception of the charge of \$350 under date of March 25, 1916.

"5. The said R. L. Witt, at the time he so wrongfully abstracted and willfully misapplied said money and executed and caused to be executed said checks and drafts, and charged and caused same to be charged to the account of the plaintiff, was an employé and officer of the Atascosa County State Bank, in control and management of the business of said bank.

"6. At the time said money was so wrongfully abstracted and willfully misapplied there was in existence a valid bond constituting a contract of indemnity in the sum of \$10,000, executed by the National Surety Company, and being the instrument introduced in evidence by the plaintiff, binding the National Surety Company to indemnify the bank, or any person or persons who may be damaged by the said R. L. Witt wrongfully abstracting or willfully misapplying any money in the course of his employment in said bank.

"7. By virtue of the wrongful abstracting and willful misapplication of the said money by the said Witt, and the execution of the said checks and drafts by the said Witt, and the wrongful charging of same to the accounts of the plaintiff by the said Witt, as hereinabove set forth, which was done in the course of the employment of said Witt in said bank, it has resulted in damages to the Atascosa County State Bank and to the plaintiff.

"8. The Atascosa County State Bank has not breached any of the terms or provisions of the contract of indemnity, and notified the National Surety Company of the claims made against it by the plaintiff as soon as knowledge of such claim was communicated by plaintiff to the Atascosa County State Bank, and notified the National Surety Company of the said wrongful abstracting and willful misapplication of said funds by the said R. L. Witt as soon as knowledge thereof was obtained by the Atascosa County State Bank.

"Conclusions of Law.

"1. I conclude that the plaintiff is entitled to a judgment against the Atascosa County State Bank, and against the National Surety Company.

"2. I conclude that the loss represented by the judgment in this case is a loss covered by the contract of indemnity of the National Surety Company, and such loss should fall primarily on the National Surety Company, and secondarily on the Atascosa County State Bank;

and that judgment should be rendered in favor of the plaintiff, against both defendants, with the provisions that the plaintiff should exhaust its remedy against the National Surety Company before seeking to collect the judgment against the bank.

"3. The Atascosa County State Bank is entitled to a judgment against the National Surety Company to indemnify and protect the Atascosa County State Bank from any loss by virtue of the wrongful abstraction and willful misapplication of the money by R. L. Witt."

The bank neither appeals nor files any brief.

The first six assignments practically raise the same questions on the several rulings of the court, to the effect "that the cause of action of the plaintiff against the bank and the alleged cause of action of the bank against this defendant are distinct and severable causes of action, the cause of this action alleged by plaintiff being simply a suit by a depositor against a bank to recover the amount of his deposit, while it appears that the suit of the bank against this defendant is based upon a bond, whereby this defendant is alleged to have guaranteed the bank against pecuniary loss of money or property embezzled, wrongfully abstracted, or willfully misappropriated by one of its officers, R. L. Witt, in the course of his employment, and because these are two distinct and separate causes of action, and cannot be properly joined in this suit, existed between different parties, provable by different facts, and because it further appear that there is no privity or community of liability between the defendants and the plaintiff."

[1] It is the contention of the appellee, being a creditor of the bank, that it was interested in the indemnity contract executed by the surety company, which not only bound itself to indemnify the bank, but also all others who sustained loss by the wrongful acts of Witt. Appellee claims the right to join in this action in its own behalf directly against both for the reasons stated. The right of appellee to recover against the bank and the bank's right to recover of appellant involves no additional facts or different issues, and it was proper for the bank to join appellant by cross-action, and to compel it to discharge the loss or damage. *Farmers' Nat. Bank v. Merchants' Bank*, 136 S. W. 1122; *Skipwith v. Hurst*, 94 Tex. 322, 60 S. W. 423; *Harless v. Halle*, 174 S. W. 1023; *Kunz v. Ragsdale*, 200 S. W. 269; *Garrison v. Bowman*, 183 S. W. 72; *Kerbow v. Wooldridge*, 184 S. W. 754; *Phila. Underwriters v. Ft. Worth & D. C. Ry. Co.*, 31 Tex. Civ. App. 104, 71 S. W. 419; *Railway v. Grimes*, 196 S. W. 693; *O'Brien v. Gilliland*, 79 Tex. 602, 15 S. W. 681; *Paul v. Sweeney*, 188 S. W. 527; *Adams v. First Nat. Bank*, 178 S. W. 996. And it has been held that suits on contracts and on torts growing out of precisely the same transaction, or so intimately con-

nected as to require same proof to establish the complained of wrong, may, within the discretion of the court, be joined where no injury can be shown. *Kerbow v. Wooldridge*, 184 S. W. 747; *Paul v. Sweeney*, 188 S. W. 527; *Holloway v. Blum*, 60 Tex. 628.

[2] Of course, as contended by appellant, the courts will not allow a party to be brought in when the issue to be joined is on separate contracts in which there is no privity between the parties, and where to sustain the cause requires separate allegations, proofs, and issues. *U. S. F. & Guaranty Co. v. Fosatti*, 97 Tex. 497, 80 S. W. 74; *Keel & Son v. Gribble-Carter Grain Co. et al.*, 143 S. W. 239; *Young v. State Bank of Marshall*, 54 Tex. Civ. App. 206, 117 S. W. 476; *Zau v. Clark*, 53 Tex. Civ. App. 525, 117 S. W. 893; *Contlett v. U. S. Mortg. Co.*, 60 S. W. 817.

[3] In questions of practice when the plea of misjoinder of parties, or question of proper parties, is urged, a very large discretion is allowed the courts. We do not mean that such discretion is always allowed in any case, for there must be such a relation or privity that no harm will result from keeping the parties in court together for its ultimate determination, who will be affected by the judgment. When it is apparent no material or substantial change in the proof, or other unnecessary burden is imposed by it in the development of the issues necessary in the case, they will be held properly joined. In a sense, however, the question of parties is largely dependent upon its own peculiar facts and issues.

The surety company is bound to the bank to indemnify it against just such acts as those committed by Witt. The same facts that the bank was required to establish in order to recover against the surety company were established against it by appellee. To sustain the exceptions against the prayer of appellee would not, in the least, change the question of the surety company's liability under its indemnity. It would still be the bank's surety, to indemnify against this very loss and judgment.

To dismiss it from this suit would mean that the bank would be required to pay the judgment, and then institute another suit upon the same bond and recover upon precisely the same state of facts. This would be carrying the doctrine of misjoinder quite to the limit. It would be requiring a useless thing to be done, and this the courts will not do. In fact the presence of all the parties here was very proper in order to establish the facts in the case to fix the liability of the bank to appellee, and the presence of appellant to establish its liability to the bank predicated upon the same facts which alone fixed the liability. It is not a new question, and the case of *U. S. F. & Guaranty Co. v. Fosatti*, 97 Tex. 497, 80 S. W. 74, goes into a very full discussion of the subject of

misjoinder. That case appellant seems largely to rely upon. The question presented in the Supreme Court was upon two certified questions: The first, to ascertain whether or not the record presented such a controversy between the parties as made it a removable cause to the federal court; the second was as to misjoinder of parties, and its answer rendered an answer to first unnecessary. That case does not in any way change the rule of law that a defendant may, in a proper case, bring in its surety, but in effect reaffirms that doctrine in the discussion of the case. In the *Fosatti* Case, different issues and different questions arose, which would require different proof. In that case the tax collector was not charged with dishonesty, and the bond indemnifying against loss by "any act of fraud or dishonesty amounting to larceny or embezzlement" is an issue in character different from the state's suit, for the loss might result from the loss of the money in many ways without dishonesty. Here the indemnity is different, and is made directly for the bank's benefit, and the liability of the surety company resulted as a matter of law from the establishment of the bank's demand by the production of the written indemnity.

Bear in mind also, in the *Fosatti* Case, the court is separating in the most technical way to determine whether there are severable controversies that could be tried separately to determine the removability of the case to the federal court.

The seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth assignments raise practically the same questions, and challenge the court's findings that there was evidence to support the recovery to the effect that Witt wrongfully abstracted or willfully misapplied moneys belonging to the bank, because it claims no loss was suffered by the bank, claiming the evidence showed the checks were executed and charged to the water company's account, and no evidence that Witt received the money and willfully misapplied or willfully abstracted same, within the meaning of the bond.

[4] On all these issues the court has found the facts against appellant, and such finding in our judgment is fully sustained by the evidence.

The bond, among other provisions, is as follows:

"* * * For the use and benefit of the bank or any person or persons who may be damaged by breach of the conditions herein set forth."

And the conditions of the above obligation are as follows:

"That, whereas, the said officer is in the service of the bank in the city of Jourdan, county of Atascosa, Texas, holding the position of

cashier: Now, if the above-bounden officer shall well and faithfully perform all the duties of his office or employment and if the company shall hold the bank harmless against, and pay to it such pecuniary loss as it may sustain of money or other valuable securities embezzled, wrongfully abstracted or willfully misapplied by said officer in the course of his employment as such and in the course of his employment in any other position in the bank to which he may be appointed, reappointed, elected or re-elected or temporarily assigned, then this obligation is void; otherwise to be and remain in force and effect. * * *

It is further recited in said bond:

"* * * It being the true intent and meaning of this bond that the company shall be responsible for any loss occasioned by or resulting from any act, as aforesaid, occurring within the period specified in this bond."

R. L. Witt was the chief officer of the bank and in full charge. It has only a bookkeeper, and the cashier, Witt, was bookkeeper and cashier, and managed and controlled all its affairs. The checks and false entries which constitute Witt's embezzlement were made from time to time by him and in his handwriting. They could not have been made by any other. He occupied there a most exalted position, and one of high honor and trust, affording excellent opportunity for his peccancy. Besides being the chief man in the bank, he was the main stockholder in appellee's company, whose moneys were deposited in this bank in his charge, so to speak. He drew checks against the bank at will without authority and for his own use and benefit, and charged many against appellee's account on the bank without authority, and manipulated the accounts so as to represent legitimate charges against appellee to deceive and mislead the officers who examined the bank's accounts from time to time. Appellee had large deposits in the bank, some of which funds Witt abstracted by checks drawn by himself without authority. Witt was speculating and in need of money. He drew something like \$11,000 out of the bank as dividends to pay stockholders of appellee, presumably to get some money for himself, and to conceal the facts from the stockholders credited them on obligations they owed the bank, so they would not receive immediate knowledge of his unlawful acts. When Daughtrey, for the ice company, protested and told him he had no authority, he excused himself by saying he needed the money. A number of instances are shown wherein Witt drew his check against the bank, which was paid by the bank and charged by Witt to appellee. D. B. Daughtrey was secretary and treasurer of appellee company, was the custodian of its funds deposited with the bank. At the time these sums were being drawn out, the ice company was not doing any business, had left its

money on deposit. While it was active in its business, Witt promptly furnished statements from the bank. Mr. Daughtrey testified as follows:

"The bunch of statements already introduced in evidence started about the 1st of March; I think I got them pretty regularly up to that time, but I did not get any after that time. I asked for the statements, but they did not give them to me. I asked Witt for the statements, and he said that he did not have them ready. I got after him about it 30 or 40 times. That was along in March. I tried to get the statements, but did not get them until about the fall of 1917. I went down to the bank, and inquired how much money we had in the bank. The statement as to the amount of money we had in the bank would not tally out with my book, and that is the reason I wanted the statements. It is hard to tell how much money we ordinarily kept on deposit, as it was more at times than at others, and I can't remember."

These acts go to show his concealment, and finally he absconded; was indicted in Frio county on various charges growing out of these transactions. He was bonded "to faithfully perform all the duties of his office or employment, * * * hold the bank harmless against, and pay to it such pecuniary loss as it may sustain of money * * * wrongfully abstracted or willfully misapplied," etc., and, further "shall be responsible for any loss occasioned by or resulting from any act as aforesaid." A case was made out against him, he did not perform his duties, did cause the bank pecuniary loss, wrongfully abstracted money, and misapplied money in the bank of its depositors, which direct loss was "occasioned by" his "acts." This is not a case where the bond simply provides to pay off any judgment that might be recovered, but the terms are such as to require it to discharge the loss as soon as discovered.

The remaining assignments that raise questions as to the errors claimed in the findings of the court, that there was no evidence that the bank lost the money represented by the checks, or that Witt received the money and willfully misapplied or willfully abstracted it, within the meaning of the bond, have really been discussed in the foregoing.

[6] The findings of the court were sustained by the evidence which showed Witt did not perform his duty, but by his own conduct caused the pecuniary loss to this bank, and by wrongful means and methods adopted by him willfully misapplied the funds of the bank which caused its loss. Under the terms of that bond, it makes no difference whether he used all the money for himself personally, or got it and willfully misapplied it in some other way to the use of some other person, it would be "willfully misapplied or willfully abstracted within the meaning of the bond" in obtaining it in the manner he did.

The eighteenth assignment challenges the item of \$1,300 included in the judgment evidenced by draft drawn by Carlos Bee against the bank and charged against the account of appellee by Witt. The evidence showed that the draft was drawn by Carlos Bee, dated at San Antonio, Tex., June 2, 1916, and is payable to the order of the State National Bank, in the sum of \$1,300, drawn on the "Atascosa County State Bank, Jourdanton, Texas." Across the face of the draft appears the following: "Ch. to Waterworks a/c"—and the draft was indorsed on the back by Carlos Bee as well as the State National Bank of San Antonio. The draft did not bear any indorsement or stamp showing that it had ever been paid by the Atascosa County State Bank. It was not drawn on the Atascosa Ice, Water & Light Company, but was drawn on the bank itself. It purports on its face, therefore, to be an obligation of the bank, at least when accepted and paid by the bank. Mr. Daughtrey also testified as follows, with respect to this item:

"It is true that we had made a conditional sale of the property of the Waterworks Company to parties in San Antonio."

Being asked if it was not a further fact that the party in San Antonio had paid \$2,000 on that conditional trade, witness said he heard it was a fact, but did not know it of his own knowledge.

"I do not know that it is a fact that Carlos Bee, who represented that party, accepted \$1,300 of that money as compromise, rather than a suit, although I heard of such a transaction, and our company was connected with it. It seems that Witt made a kind of sale of the waterworks unauthorized by the directors. What I mean by that is he accepted \$2,000 as bonus for the sale of the plant. Made a trade to buy out the plant, by which he paid \$2,000 down. If we accepted the trade, that money was to go to all of us, and we accepted it. I do not know why Carlos Bee was drawing that fee of \$1,300; never heard anything about it, had no communication with Mr. Bee about it. The company had no communication with Mr. Bee about it that I know of. Don't know whether the company did or not. I do not testify as a matter of fact that the company did not agree to pay him \$1,300 compromise, and the return of that bond."

Mr. Daughtrey also testified:

"On the draft of Carlos Bee is a notation in pencil reading: 'Charge to waterworks account.' That is written across the face of the check in Witt's handwriting. I didn't authorize anybody to charge that to the waterworks account."

This is all the evidence, of every character, referring to this \$1,300 draft, which was included in the court's judgment.

Defendant presented to the trial court a

special request for additional findings of fact with respect to this \$1,300 item, and asked the court to find that there was no evidence showing that this draft was actually paid by the Atascosa County State Bank, and that there was no evidence that said bank lost or paid out any sum of money on account of said draft, or was there any evidence showing who, if any one, received the amount of money represented by said draft, but this request was refused by the court, to which defendant excepted.

Whether this was a proper charge against the bank or against the ice company is not material to consider, as Witt who handled the affairs of the bank was so connected and identified with the transactions as to know the bank did not owe it, and knew that it was a transaction in which he was engaged in attempting to sell the ice plant. It was his clear duty, either to have turned down this draft or have called on the ice company to pay it. When he made the indorsement, "Charge to the waterworks account," it was as though he had checked out that sum, as in the other cases, and the presumption arises by the possession of the Bee draft that he caused the bank to pay it, took the bank's money knowingly, willfully, and unlawfully, and paid this draft with it when he knew the bank did not owe it, and caused that loss in such way as to come within the terms of that bond. The bond stood for the use and benefit of any one damaged by the breach for the amount of any balance found due, and promised to pay any pecuniary loss of money, wrongfully abstracted or willfully misapplied by said officer in the course of his employment, it being responsible "for any loss occasioned by or resulting from any act, as aforesaid, occurring within the period specified in this bond." It was conceded, so far as Bee is concerned, his acts were entirely proper, and there is enough to show he had a claim against some of the parties, and some one evidently authorized him to draw, presumably Witt, and there is no issue here for us to determine in that respect. There is no proof or intimation that the bank owed it.

In the twentieth assignment appellants challenge the ruling of the court in including in the judgment the item included in a check for \$3,000, dated March 25, 1916, payable to the order of R. L. Witt upon the ground there was no evidence showing the bank ever paid it. The check is as follows:

"Jourdanton, Texas, 3/25, 1916. No. ———.

"Atascosa County State Bank

"Pay to the order of R. L. Witt a/c \$3,000.00 three thousand dollars.

2,215 L. H. Ernst Atas. I. W. & Light Co.
785 R. L. Witt

3,000.00"

The check was payable to the order of R. L. Witt, and bore no indorsement, and was not stamped "Paid." With respect to this check, Mr. Daughtrey testified:

"Regarding the check for \$3,000 dated March 25, 1916, payable to R. L. Witt, apparently signed by the Atascosa Ice, Water & Light Company, will say that I didn't execute this check, and did not authorize any one to execute it. The check is in the handwriting of Witt."

He also testified that he was familiar with Witt's handwriting, and that he did not know of any one that had authorized the execution of the check, and had never been present at any meeting of the board of directors that authorized its execution. Again, he testified with respect to this check:

"As to whether the check for \$3,000 payable to the order of R. L. Witt has ever been stamped 'Paid' by anybody, will say I don't see any stamp on it. That check came in with my statement. Our checks are usually stamped 'Paid' when they are paid, and this one, so far as it shows on its face, has never been paid at all."

Daughtrey further testified:

"Regarding the check for \$3,000 dated March 25, 1916, payable to R. L. Witt, apparently signed by the Atascosa Ice, Water & Light Company, would say that I did not execute that check, and did not authorize any one to execute it. The check is in the handwriting of Witt. I have seen Witt's handwriting from time to time, and am familiar with his signature, and recognize that as being Witt's handwriting on that check. I do not know of any one who ever authorized the execution of that check, and I was never present at any meeting of the directors that authorized its execution."

It is contended that the check was forged by Witt, as he was not authorized to draw checks in name of appellee. The entire instrument, signature, and marginal memorandum, shows presumably its disposition in paying \$2,215.00 to L. H. Ernst and retaining \$785 for himself.

"This check was forged by Mr. Witt, and was charged to the account of the ice company by Mr. Witt, and the bank's books show that it was paid out by the bank and charged to the ice company, as is shown by the bank's statement to the ice company, and this particular check was attached to the ice company's statement, as is shown in Daughtrey's testimony. * * * The check was payable to Mr. Witt and cashed by him because it was charged against the account of the ice company on the books of the bank, and therefore by this transaction the money belonging to the ice company to the extent of \$3,000 passed into the control of Mr. Witt, and to represent which he charged the ice company with this check, and attached this check to the ice company's statement."

What Mr. Witt did with this money is not shown, except the possible inference that

might be gained by looking at the notation on the corner of the check. It is immaterial what he did with the money. The fact remains that the money was paid by him and charged to the ice company's account by reason of this forged instrument. From these facts, in view of the other facts which we have set forth above, the court was well warranted in concluding that this \$3,000 item "constituted a wrongful abstracting and misapplying of that much money belonging to the bank, and particularly that part of the bank's funds which represented the deposit of the ice company."

All the assignments challenging the rulings of the court in respect to the items paid out of the bank by Witt, going to make up the court's judgment, claiming it was without evidence to support it, involve practically the same facts and issues already discussed, and all may be disposed of together.

Mr. Daughtrey testified Witt was not authorized to charge against the Atascosa Light & Water Company any of the items, and never received any benefits from these expenditures. The item of \$832 was a check, payable to cash, in Witt's handwriting and cashed by the bank; the check of \$100, also in Witt's handwriting, payable to Witt, October 19, 1916, cashed by the bank; check, \$50, also in Witt's handwriting, payable to Witt, dated April 25, 1916, cashed by the bank, and the item of \$150 was to pay one of his personal debts. All these items were charged by Witt against appellee, and rendered to it in a statement afterwards, showing them charged against its account.

The twenty-first assignment is challenging the ruling that R. L. Witt did not have authority, express or implied, to sign these checks. It is overruled because it is satisfactorily shown he had no such authority. He was not an officer in the ice company, had no authority to bind that company, and there is no such act done, knowledge acquired, or benefits received by that company, from which any waiver is shown or inference of authority may be drawn or indulged in to estop it, but per contra.

[6] The twenty-second assignment claims the court erred in holding the bank had not breached the terms and provisions of the contract of indemnity. Neither the assignment nor the propositions thereunder point out in what particular the breach arises, and we cannot speculate as to what they are. At any rate the court found from the evidence there was no breach of the obligations of the bank, and we see no reason to disturb that finding. While this court is liberal in passing upon all assignments, it cannot search the pleadings, transcript, and statement of facts for supposed errors that are not distinctly disclosed in the assignment itself or propositions thereunder. However, from a careful examination of the

assignments and the testimony, we believe the court is sustained in all the findings of facts.

[7] We will now return to a consideration of the seventeenth assignment, which we passed for a discussion of the other assignments germane to each other. Sureties, as seen, may be impleaded in proper suits, or even come in themselves and have the question of their liability determined and fixed. *Illies v. Fitzgerald*, 11 Tex. 417; *U. S. Guaranty Co. v. Fosatti*, 97 Tex. 497, 80 S. W. 74; *Cabell v. Hamilton Shoe Co.*, 81 Tex. 104, 16 S. W. 811; *Stevens v. Wolf*, 77 Tex. 215, 14 S. W. 29; *Railway v. Yale*, 27 Tex. Civ. App. 10, 65 S. W. 57 (affirmed 95 Tex. 683, 66 S. W. xvi).

[8] While we are of the opinion there was no error in permitting the joinder of the cause of action asserted by the bank in its cross-action against the surety company, at least there was no abuse of discretion, as no possible harm could result therefrom, yet we do not believe the appellee the waterworks company alleged or proved a cause of action against the appellant, the surety company, entitling it to hold appellant in this suit for any recovery against it, for it is not alleged, claimed, or shown that the bank is insolvent and rendered unable to respond and pay its said obligation by reason of any of the alleged wrongful acts of Witt resulting in the insolvency of and inability of the bank to pay its said obligation.

The misapplication or abstraction of the money of the bank would not affect appellee's right to recover from the bank unless, as stated, it rendered the bank unable to pay. In such case it might be held that the acts of Witt caused loss to the depositor; but here, as stated, there is no pleading or evidence to that effect. Therefore this assignment is sustained.

The judgment in favor of the waterwork's company, appellee, against the surety company, appellant, is reversed, and judgment rendered, dismissing the suit of the waterworks company against the surety company. In all other respects the judgment is affirmed.

Reversed and rendered in part and affirmed in part.

On Motion for Rehearing.

[9] We are not satisfied with our ruling in respect to the item of \$1,300 discussed by us, presented in the eighteenth assignment. The bank offered no evidence that it did not owe it. Witt was in charge of the affairs of the bank, daily paying out money drawn against it in the regular course of its business, and, so paying out the funds of the bank, the fact of paying this check for \$1,300, drawn against the bank, carries with it no particular significance, more than if he had

paid it to any other customer of the bank on a similar check or draft. It is not the fact that the bank paid this check that is important at all, but rather the character of its payment. Witt was paying them all, daily, as presented in the ordinary course of business. He was in charge of its affairs. No one, therefore, can contend under the circumstances such a payment of a check drawn on the bank constituted of itself a wrongful abstraction or willful misapplication of its funds. It requires more proof than that. It must be shown affirmatively the payment was wrongful under such circumstances as to constitute willful misapplication of the bank's funds.

[10] None of the directors of the bank explained it; none contended that the payment was wrongful. The drawer of the draft, Mr. Bee, did not testify. It does not look as though the case had been fully developed on the point. It may be that the board of directors, with full knowledge of all the facts, consented to the payment. We cannot speculate on the matter, as the record is utterly silent as to whether the payment was rightful or wrongful, but in the absence of sufficient proof on the subject it must be assumed rightful, because the burden of proof was on the bank to show it was wrongfully paid out. The plaintiff company made out a case against the bank for the recovery of said item of \$1,300 by showing that a draft on the bank was charged to its account without its authority. The bank might have avoided the effect of such proof by showing, if it could, that the plaintiff company actually got the benefit of the payment of \$1,300 made by the bank, but we do not find the evidence to be sufficient to establish such to be the fact, nor has the bank appealed and complained of a failure to so find. In order, however, for the bank to recover against the surety company, it must show that the payment of the draft was not authorized by the directors, and the fact that it was charged without authority to plaintiff company raises no inference that the payment of the draft was unauthorized. Witt did not get the money, and, to show that he breached the conditions of his bond as to this item, it is necessary for the bank to affirmatively show that Witt paid the draft without the consent of his superior officers in the bank.

As the plaintiff stated no cause of action against the surety company, it is evident that error committed in trying the cause of action alleged by the bank against the surety company cannot affect the judgment in favor of the plaintiff against the bank. The judgment formerly entered by us will therefore only be changed to the extent that the judgment affirming the recovery of the bank against the surety company will be set aside, and the judgment of the trial court in favor

of the bank against the surety company will be reversed, and the cause, as between said two parties, remanded for another trial.

On Second Motion for Rehearing.

The Atascosa County State Bank, filing its motion for rehearing, says, while it contends the facts are sufficient to justify the conclusion that the item of \$1,300 should be recovered from the surety company, in case this motion is not granted, it does "hereby remit and tender a remittitur of \$1,300 of the judgment rendered in its favor by the trial court against the National Surety Company, and does respectfully pray that such remittitur be allowed and accepted, and by virtue thereof the judgment of the trial court in favor of the bank against the surety company be reformed and rendered, and judgment to stand for the amount allowed the bank against the surety company by the trial court, less said item of \$1,300."

The motion for rehearing is overruled, but, pursuant to the offer to remit in case such motion is overruled, our judgment reversing the judgment obtained by the bank against the surety company is set aside, and judgment entered reforming the trial court's judgment against the surety company by reducing the same from \$7,036.30 to \$5,736.30, and, as thus reformed, such judgment will be affirmed.

BROWN v. MUSGRAVE. (No. 1613.)

(Court of Civil Appeals of Texas. Amarillo. May 28, 1920.)

1. Estoppel §63 — Assertion of one ground for refusing to carry out broker's contract of sale does not preclude reliance on another.

Where a landowner who had listed his property with a broker for sale declined to carry out broker's contract for sale made after discovery of oil on adjoining property, the fact that landowner assigned, as one reason for refusing to carry out the contract, that another broker had previously contracted to sell the premises and that he had procured a release, will not estop him from defending a suit for specific performance on the ground that the purchaser colluded to defraud him, and judgment for the landowner will not be reversed on the ground that, having stated in a deposition that the prior sale was one ground for refusing to carry out the agreement, the landowner cannot rely on others.

2. Trial §357—Answers to special question held responsive.

In an action for specific performance of a contract to convey land, executed by a broker with whom the property was listed for sale, the jury's answer to the question as to whether the owner listed the property that the owner did list land for sale, subject to his approval,

held responsive to the issue; the jury being admonished to answer as the facts might be.

3. Specific performance §121(8)—Evidence held to show that land had increased in value when broker contracted to sell.

In a suit for specific performance of a contract to convey land, made by a broker with whom the land was listed for sale, defended on ground of agent's collusion, evidence held to warrant findings that at the time the broker executed the contract the land had greatly increased in value, because oil had been discovered on adjacent property, and that the broker knew of the increase.

4. Specific performance §121(8) — Finding that owner did not know of producing well on adjacent property warranted.

In a suit for specific performance of a contract to convey land, made by broker with whom land was listed for sale, finding that the owner did not know there was a large producing well on adjacent land warranted.

5. Specific performance §123—Special finding not open to attack as inconsistent with another finding.

In a suit for specific performance of a contract to convey land which had greatly enhanced in value because of the discovery of oil on adjacent property, the jury's finding that the vendor did not know there was a producing well on adjacent land held not open to attack, because it was also found he knew there was a derrick, etc., on the adjacent property.

6. Specific performance §121(8)—Evidence held to warrant finding that purchaser and broker colluded to defraud owner.

In a suit for specific performance of a contract to convey land, entered into by the vendor's broker, evidence held to warrant finding that the broker and purchaser colluded to defraud the vendor, who was ignorant, when the contract was made, that oil had been struck on adjacent property.

7. Brokers §19—Broker must disclose to his principal all facts relating to the value of principal's property.

It is the duty of a real estate broker to disclose to his principal the facts as to the value of the principal's property, and it is a breach of duty for broker to conceal from principal fact that oil had been struck on adjacent premises, which would greatly increase the value of the principal's property.

8. Specific performance §53—Purchaser cannot take advantage of real estate broker's fraud and have specific performance.

Purchaser cannot take advantage of broker's fraud on his principal and secure specific performance of a contract to convey land made by the broker.

9. Specific performance §53—Contract secured by sharp practices will not be enforced.

Specific performance of a contract to convey land secured by sharp practices or trickery will not be granted.

Appeal from District Court, Wichita County; Edgar Scurry, Judge.

Action by W. J. Brown against G. W. Musgrave. From judgment for defendant, plaintiff appeals. Affirmed.

W. B. Chauncey, of Wichita Falls, and Miller & Miller, of Ft. Worth, for appellant.

Martin, Bullington, Boone & Humphrey and Martin & Oneal, all of Wichita Falls, for appellee.

HUFF, C. J. The appellant, Brown, sued Musgrave to specifically perform a contract to convey $13\frac{1}{2}$ acres of land, situated in Wichita county, near Burkburnett, and close to land on which the Fowler well No. 1 was brought in. It is alleged, substantially, that Musgrave listed the land with J. S. Nichols, a member of the firm of Jackson & Nichols, being in a general real estate and brokerage business in the city of Wichita Falls; that Nichols was, and the partnership were, authorized to sell the land at and for the sum and price of \$3,000 for the whole of the land or for \$2,000 for $8\frac{1}{2}$ acres thereof; that it was implied thereby if the whole of the land should be sold \$3,000 should be paid by the defendant upon his execution and tender of a proper warranty deed conveying the land to the purchaser, and thereby Nichols became and was by the defendant legally authorized to enter into a binding contract of sale of the land in the name of appellee; that on the 25th day of July, 1918, Nichols, so authorized, negotiated a sale of it to the appellant at and for the sum and price of \$3,000; that the appellee, through his agent, Nichols, entered into a written contract with appellant for the sale of the land, by the terms of which appellee agreed to sell and convey to appellant, by good and sufficient warranty deed, the land, and to furnish a complete abstract of title to the land within a reasonable time, not later than 20 days from the date of the contract, July 25, 1918. The appellant agreed to report in writing his objections to the defects in the title, if any, within — days thereafter, which means a reasonable time from the furnishing of the abstract, and it was provided appellee should have a reasonable time to cure the defects and objections, and if not urged within the time should be deemed waived. Appellant bound himself to pay \$3,000 cash, which was to be paid and the papers delivered at the office of the First National Bank of Wichita Falls, Tex.; that the contract should be consummated and all things done and performed on the part of each party on or before the 15th day of August, 1918; that to insure the faithful performance of the contract appellant deposited with said bank the sum of \$500, with the understanding that, if the title of said land should prove to be good and appellant complied with his part of the contract, the money should be applied as part

of the cash payment for the land, but if appellant should fail or refuse to comply with his part of the agreement, if the title to the land proved good, the sum paid to the bank should be forfeited to defendant as liquidated damages; that the contract was made upon condition that the title to the land should be good and marketable, and in case there was an incurable defect the contract was to be null and void and the money deposited returned to appellant and the whole agreement canceled. It is alleged the appellant offered to comply and that he was ready, willing, and able to comply with his contract; that the appellee failed and refused to comply therewith. It is alleged the title is good and appellee is able to make a good title. The value of the land is alleged to be \$50,000. The prayer is for specific performance and, in case the land or any portion could not be conveyed, then for damages.

The appellee alleged that the broker had no authority, either verbal or in writing, to execute the contract declared on in the name of the appellee; that the extent of his authority was to exercise the usual and customary services of the broker, which was to find a purchaser and submit the proposition of the purchaser to the appellee. It is also urged, in effect, that between the listing of the land with the agent and the purported contract, an oil well, known as the Fowler well No. 1, was brought in, which proved to be a large producer, and which immediately advanced the market value of appellee's land, which was adjoining the land on which the Fowler well was situated; that Nichols, the agent, knew this fact, but did not report the changed condition to appellee, who was then in Oklahoma, but, on the contrary, Nichols acted as if he were the agent of the appellant; that appellant knew of such well, but, colluding with the agent, secured the contract, and with intent to defraud appellee made the contract declared upon, setting out in detail some of the facts or badges of fraud on the part of appellant and the agent. By supplemental petition it is alleged that the reason given for refusing to keep and perform the contract was that another agent, F. M. Tollett, had sold the land to another purchaser prior to the time Nichols sold the same to appellant; thereby appellee is estopped to set up any other or further defense.

The findings of the jury in effect established that appellee listed the land with Nichols to sell subject to the appellee's approval; that at the time of making the contract Nichols knew the Fowler well was an oil well; that there was a material advance above \$3,000, at which the land was listed, in the market value of the land from the price it was listed to the time the contract sued upon was made, and that Nichols knew of such advance when the contract was made;

that a man of ordinary prudence, with land so listed with him as agent, would have notified his principal before making such contract; that appellee had no knowledge or information about the Fowler well on the morning he left Texas; that this information was such that it would not put him upon inquiry as to the condition of the well at that time; that when appellee paid \$150 commission to Nichols he then knew that Nichols had executed the contract with appellant; that the land was of a greater market value on July 25, 1918, than \$3,000; that on July 22, 1918, the land was not of the value of \$3,000 for any other purpose than its value as prospective oil lands; that it was listed and its value placed by appellee at the time of listing on account of its being prospective oil land; that appellee's reason for not carrying out the contract was because there was an advance in the land and a prospective advance; that appellant and Nichols colluded together and with each other in the making of the contract to bind the appellee on a contract of sale and at a less price than the appellee could have sold it for at the time.

[1] The first assignment asserts that there was error in refusing a peremptory instruction for appellant for the reason that the testimony of appellee and Nichols showed that on January 22, 1918, appellee listed the land with Nichols for sale at \$3,000, which was sufficient authority to the agent to enter into a contract at that price, and without controversy the evidence shows the agent executed the written contract sued upon; that it was breached without cause, which entitled appellants to specific performance. The propositions under this assignment may properly be treated, in so far as necessary to dispose of the case, under other assignments, except the third proposition, which is to the effect when a party gives a reason for his conduct as to anything involved in controversy he cannot, after litigation begun, change and put his conduct upon another ground. The appellee assails this proposition as not being relevant to the assignment or included therein, and asserts that the trial court was not put upon notice by motion for new trial that the appellant was relying upon the estoppel for an instructed verdict. It is very doubtful whether the assignment will admit the consideration of the proposition. However, we think the testimony is not conclusive that appellee asserted at the time he refused to carry out the contract, as his only ground therefor, that the land was sold by another agent. The appellant quotes appellee as testifying:

"My excuse for not desiring to close up this deal, Mr. Tollett sold it first; that is, he found a purchaser for it and I paid Tollett \$80 and he released it back to me. Both of them, Tollett, Mr. Lipscomb, and I, believed that I had a right to buy my own land back."

This excerpt is taken from the ex parte deposition of the appellee, given November 23, 1918. Suit was then pending and was filed August 9, 1918. The breach was alleged to have occurred July 29, 1918. In this deposition the appellee was asked if it was not a fact that his only reason for refusing to make a deed was that oil was struck on land near his tract and he answered: "I guess so. Tollett sold it first and he released me." He also answered if no oil had been struck he would have sold the land for \$3,000, but that if oil had not been struck he could not have sold it to appellant; that he had offered it to appellant some time in May and he would not buy it at any price. Nichols testified that on July 29, the first time appellant visited him after the contract, he stated if an oil well had not come in that he would have accepted Nichols' proposition. The facts generally show that appellee declined to make the deed because the fact of an oil well having been brought in was concealed from him by appellant and the agent until after the contract. The assertions of the bringing in of the oil well and that another agent had purported to convey the land were not so inconsistent as to preclude both as grounds for refusing to convey the land, or to estop the appellee to rely upon the fraud and deceit in making the sale. The appellant could not have been injured by the assertion that the two reasons existed and were asserted as reasons for not completing the sale. It is not shown that appellant would have acted differently or could have remedied the complaint made as to deceit, and the breach of trust reposed in the agent. *Barnett v. Kemp*, 258 Mo. 139, 167 S. W. 551, 52 L. R. A. (N. S.) 1185; *Hutchings v. Binford*, 206 S. W. 557; *Ault v. Dustin*, 100 Tenn. 366, 45 S. W. 984.

[2] The second and third assignments are to the effect that the answer to the first special issue is not responsive and fails to answer directly the special issue as the issue was submitted. The proposition under these two assignments is that a verdict not responsive to an issue will not support a judgment. The issue submitted is:

"Did, or not, the defendant, G. W. Musgrave, list the land in controversy with J. S. Nichols for sale, or did he list it with Nichols for the purpose of having Nichols find a purchaser? Answer as you find the facts to be."

The jury answered:

"He, Musgrave, listed it for sale, subject to his approval."

The assignment is, not that the pleadings and evidence do not support the finding, but that the finding of the jury is not responsive to the issue. The appellant, by his statement, seems to contend the pleadings and evidence are not sufficient. The pleadings presented the issue submitted, and there is some

evidence by the appellee that he did not authorize the execution of the contract as made, and that the appellee had sold land in that country by agents and they always asked him about the land before the contract was put up; and he also testified that he told Nichols as quick as he got a buyer to let him know. It also seems that the agent wired to appellee he had made the sale, and that the appellee wired in reply to hold the trade open, inferably until he could get there. We have not tried to determine definitely whether the evidence was sufficient to support the answer of the jury to the issue. The question upon which we are called to determine is, was the answer responsive to the issue? The first part of the issue is, Did, or not, the appellee list the land with the agent for sale? And the jury were admonished by the court to answer as they found the facts to be. We are inclined to think the answer is responsive to this issue under the admonition; that is, appellee listed it for sale, subject to his approval. If they found the fact to be that the authority to sell was subject to approval, they could not comply with the request of the court to answer as they found the facts to be by leaving off the latter part of their answer. They evidently understood they should give the right to make the sale as the facts showed that authority to be, and that they were justified in attaching the limitation to the power to sell. However, this would not prevent the rendition of a judgment if the other issues established fraud and collusion.

[3] The fourth, fifth, ninth, and tenth assignments assert that the findings of the jury in answer to issues Nos. 3 and 10, both of which were answered in the affirmative, are without evidence to support them. No. 3 is:

"Was there, or not, a material advance above \$3,000 at which the land was listed in the market value of the land in controversy from the time same was listed with J. S. Nichols and the time the contract sued upon was made?"

No. 10 is:

"Was, or not, the land in controversy of greater market value than \$3,000 on July 25, at the time of the execution of the contract in controversy?"

These assignments also assail the finding that Nichols knew at the time of the execution of the contract that the market value of the land was greater than \$3,000. It is asserted that there is no evidence to support such findings. We are inclined to think there is. The evidence shows that the land was listed about July 22, 1918, and between that date and July 25, 1918, the Fowler well came in as a large producer. One witness testified before July 24 leases out there had practically no value; that on July 24 leases between the Musgrave land and the Fowler land were selling at \$1,000 an acre. An-

other witness, who appears to have been a dealer in oil lands, testified:

"If July is the proper date the royalty value would be to the lease value as two is to three. That is the basis upon which oil men figure these values. The surface of the land, if there is production on it, would not be worth anything at all."

He further testified:

"Leases out there went up in value, commencing on the morning of the 24th, and they quadrupled in value before noon and keep going—everybody was crazy as they are now."

At the time of leasing the land and at the time of the contract the appellee had leased the land for one-eighth royalty, and, as we understand, the lease was then in effect. The facts, we think, warranted the jury in finding that Nichols knew, or should have known, of the advance in the price of the land when he contracted to sell to appellant. His office was in the very center of oil dealers and brokers in the city of Wichita, and the appellant admits that Nichols said something about the oil well and the excitement around the well before the contract was signed. The Wichita daily papers July 24 announced a big oil well on the Fowler farm. Nichols testified he did not think that he was under obligations to notify appellee of any increase of value by reason of the discovery of oil. There are several circumstances pointing to Nichols' knowledge of the condition of the well and of the increased value of the land. These assignments will be overruled.

[4, 5] The seventh and eighth assignments assail the findings of the jury to the effect that appellee did not know the Fowler well was producing before he left Texas for Oklahoma on the 23d of July. The facts are sufficient to support the verdict. Certain acts and the appellee's knowledge that there was a derrick on the Fowler land and that he had passed near it are relied upon by appellee as rebutting the finding of the jury. We think these matters only went to the weight of the appellee's testimony, all of which were for the jury. The jury's findings are criticized for having found that appellee had no "knowledge or information about the Fowler well." It is asserted that appellee admitted he knew the well was being drilled on the land. The jury evidently understood the issue as an inquiry if appellee knew the well was then an oil well. The next issue answered by the jury shows that to have been their understanding; that is, if his knowledge and information were such as to put him upon inquiry as to the "condition of the well." It would be technical in the extreme to hold the jury intended to find that appellee did not know of the derrick, or that there was being put down a well on the Fowler

land. It is manifest they understood the issue to mean an oil well—a producer.

[6-9] The eleventh assignment assails the finding of the jury that appellant and Nichols colluded together and with each other in the making of a contract to bind the appellee on a contract to sell the land at a less price than the appellee could have sold it for at the time. The facts in this case make it certain that appellant knew the well was a large producer when he made the contract. Before that time appellee had tried to sell the land to appellant, who would not consider the proposition. On July 24 appellant sent a telegram to the appellee that he had sold his place and wanted to buy the land for a home. The evidence is sufficient to show it was not valuable as a home with parties drilling for oil. The jury, we think, had ample evidence to find that this telegram was sent after he had talked to Nichols. He finally admitted that it looked like he did not want appellee to know that he was buying the land because of the oil excitement. We think the evidence amply warranted the jury in finding that Nichols knew appellant was purchasing because of the oil discovery and that he was assisting him in getting the land; that there were several parties, in addition to appellant, wanting the land at that time; and that as many as four or five wired appellee on the 25th of July. Nichols never notified the appellee that there was a discovery of oil in the well, and we think his testimony indicates that he knew that appellant had wired to the appellee as above stated; at least that he instructed him to wire for a price. On the 25th day of July the contract was drawn, signed, and placed in the bank as an escrow. The appellee wired to Nichols to hold the trade open, evidently in answer to Nichols' wire that he had sold. There is some evidence or circumstances, taken together with the uncertain manner of Nichols and appellant in testifying, which would justify the jury in believing that this wire from appellee was received by Nichols before Nichols went to the bank and took out the contract and placed it of record. This land had been leased by appellee for oil and gas, but Nichols said he knew nothing of this. In order to protect appellant Nichols indorsed on the margin of the contract: "It is agreed that this land is not leased for oil and gas." Nichols and appellant somewhat crossed each other as to when this indorse-

ment was made. Nichols thinks, or seems to say, it was before the contract was placed in the bank; appellant says it was afterwards, when the contract was taken out to record. Nichols and appellant were friends of several years' standing, and Nichols says in effect he did not think it to be his duty to report the condition of the well with reference to oil to his principal. We believe it is evident from all the circumstances in this case that Nichols and appellant knew if appellee learned of the condition of the Fowler well he would not sell for \$3,000. It seems to have been their purpose to put the contract of record and thereby hold the land, and in this they were acting together. Nichols was giving the appellant ample time and opportunity to secure this land and to fully inform himself, while he permitted his principal to remain in the dark and sought to bind him by an irrevocable contract. He certainly manifested but little solicitude for appellee's interest when land values were quadrupling in that neighborhood in a half day's time. It was Nichols' duty to disclose all the facts affecting the rights of appellee. He did not fulfill the measure of the legal requirements by merely selling at the specific price listed under the circumstances of this case. R. C. L. vol. 4, § 22, p. 272; Pomeroy, Equity Jurisprudence, vol. 3, § 1077. The appellant could not avail himself of the breach of trust on the part of Nichols and knowingly take advantage of the appellee's ignorance and act with the agent in securing the land at a grossly inadequate price, under the circumstances of this case. The facts found by the jury and the legitimate deduction to be made from the record in this case rendered the contract such that a court of equity will not specifically perform. Pomeroy's Equity Jurisprudence, vol. 2, § 905, also section 901; Black on Rescissions and Cancellation, vol. 1, §§ 62 and 63.

"If the plaintiff had obtained it by sharp and unscrupulous practices, by overreaching, by trickery, by taking undue advantage of his position, by nondisclosure of material facts, or by any other unconscientious means, then a specific performance will be refused. It necessarily follows that a less strong case is sufficient to defeat a suit for specific performance than is required to obtain the remedy." Pomeroy's Equity Jurisprudence (4th Ed.) §§ 2207, 2206.

We believe the case should be affirmed.

MARTINEZ v. LOGAN. (No. 1654.)

(Court of Civil Appeals of Texas. Amarillo.
April 28, 1920. Rehearing Denied
June 9, 1920.)

1. Adverse possession \S 76 — Title acquired not "title by regular chain of transfer from or under the sovereignty of the soil."

A grantee of a purchaser at a sale under a trust deed did not have a title acquired "by a regular chain of transfer from or under the sovereignty of the soil," supporting limitation under the three-year statute, where the holder of the legal title to the land before the mortgage lien was foreclosed was not a party to the suit to foreclose.

2. Mortgages \S 497(2)—Legal owner not affected by foreclosure unless party.

Unless a party to a suit for foreclosure of a mortgage, the holder of the legal title to the land is unaffected by the foreclosure.

3. Adverse possession \S 89—Annual payment of taxes necessary under five-year statute.

Under the five-year statute of limitations adverse possession must be for a consecutive period of five years, coupled with concurrent payment of annual taxes for such consecutive period.

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Suit by P. P. Martinez against Wm. O. Logan. Judgment for defendant, and plaintiff appeals. Affirmed.

W. A. Kemp and Muse & Muse, all of Dallas, for appellant.

Hatcher & Zumwalt, of Dallas, for appellee.

HALL, J. This is a suit in trespass to try title filed by appellant, Martinez, against appellee, Logan, July 28, 1916, to recover certain land described in the petition. By answer appellee pleaded a general demurrer, general denial, and plea of not guilty, and by amended answer disclaimed as to 25 acres of land and set up title by limitation under the statutes of 3, 5, and 10 years. The cause was submitted to the jury upon the issues of limitation. The answers to the special issues were in favor of appellee upon all three issues. By written stipulation, signed by the attorneys and filed, it was agreed that Harry Boswell is the common source of title; that plaintiff's title is under a valid judgment rendered in the justice court of precinct No. 1, Dallas county, Tex., on the 3d day of February, 1891, in the case of Harry Boswell v. James Alexander, No. 162 on the docket of said court, in which cause judgment was rendered for defendant and against plaintiff that execution issue against Harry Boswell, said common source, on which executions were issued in due order; that under the

last alias execution a levy was made on April 29, 1901; that on the first Tuesday in June, 1901, the property in controversy was sold to plaintiff and conveyed to him by deed dated June 4, 1901, which was filed for record the same day; that an execution under such judgment was issued July 20, 1891, returned nulla bona by W. F. Marton, constable. The last alias execution was issued on the 24th day of April, 1901, under which the above sale was made. This statement is the basis of appellant's title.

The appellee deraigns title as follows: A deed of trust dated January 8, 1897, and duly acknowledged, from Harry and Scott Boswell, R. H. Woody, trustee, to secure a note for \$100 in favor of Cullen & Woody and assigned to H. H. Jacoby, filed for record January 12, 1897. A suit by Harry Boswell v. M. C. Cullen and H. H. Jacoby, numbered 2550, in the district court of Dallas county, filed August 6, 1901, to enjoin said Cullen and Jacoby from foreclosing the above-described deed of trust lien on the property involved in this suit. Judgment in said cause of date October 8, 1901, denying the injunction and decreeing recovery for Jacoby against Boswell and foreclosing the lien on said property. Order of sale under the above judgment was executed on the 16th day of December, 1901, by levying on the premises therein described, and the return of the sheriff shows that the property was sold on the 7th day of January, 1902, to H. H. Jacoby, for the sum of \$50. The sheriff's deed conveying the property to Jacoby is dated January 22, 1902, and filed for record June 2, 1902. The appellee herein deraigns title through H. H. Jacoby by mesne conveyances. A detailed statement thereof is not necessary.

[1,2] It is first contended by appellant that the court erred in instructing the jury as to the three-year statute of limitation and that the affirmative finding of the jury upon this issue is not supported by the evidence. This assignment is sustained. According to the rule announced by the Supreme Court in *Burnham et al. v. Hardy Oil Co.*, 108 Tex. 555, 195 S. W. 1139, appellee did not have "title by a regular chain of transfer from or under the sovereignty of the soil," as required by the statute, and which would enable him to claim under this article of the statute. The sale of the premises by appellant under the justice court judgment and its purchase at said sale, as shown by the stipulation quoted above, divested Harry Boswell of his title. In the foreclosure proceeding, effected in the injunction suit, brought by Boswell against Cullen and Jacoby, appellant was not made a party, and appellant's title was not affected thereby. *Browne v. King*, 196 S. W. 884; *V. S. C. S. arts. 5672-5675*. As said in the *Browne Case*, appellant held the legal title to the land before the mort-

gage lien was foreclosed and not having been a party to the suit his title was afterwards unaffected by the foreclosure.

[3] It is further contended that the court erred in submitting to the jury the issue made by defendant's plea of limitation of five years. This assignment must also be sustained. It is shown without contradiction that the adverse possession of appellee for a consecutive period of five years was not coupled with concurrent payment of annual taxes for any such consecutive period. This has been frequently held to be a necessary element to enable one to hold under the five-year statute.

The contention under the fourth assignment of error is that the evidence does not show clearly and positively that defendant had been in continuous, peaceable, adverse possession of the premises sued for for such time as to enable him to defend under the ten-year statute. The evidence upon this issue is conflicting. That of the several witnesses who testified for plaintiff with reference to the condition of the fences and possession of the land and its cultivation by tenants is unsatisfactory. The testimony for the appellees as to such use and occupancy and as to fences is sufficient to sustain the verdict.

Upon this issue alone, the judgment of the trial court is affirmed.

Error from District Court, Orange County; W. T. Davis, Judge.

Suit by the Southwestern Settlement & Development Company and others against A. L. Ponder and others, in which Mrs. S. N. Conn intervened, and in which named defendant interposed cross-action against intervenor. Judgment for named defendant against intervenor, and she brings error. Affirmed.

Warren & Conn, of Houston, for plaintiff in error.

Kennerly, Williams, Lee & Hill, of Houston, John Hancock, of Thurber, and Smith & Crawford, of Beaumont, for defendants in error.

WALKER, J. This suit was instituted by the Southwestern Settlement & Development Company and others, as plaintiffs, against Amos L. Ponder and others, as defendants, in an action of trespass to try title to recover the title and possession of the Samuel J. Withey survey in Orange county, Tex. As sole devisee and independent executrix of the estate of R. C. Conn, deceased, Mrs. S. N. Conn made herself a party to this suit. Amos L. Ponder answered by a cross-action against Mrs. Conn, claiming to own the southwest one-fourth of this survey. She answered this cross-action, as cross-defendant. The case was tried on the following agreement:

"Come now the parties here by and through their attorneys of record, and agree that the plaintiffs herein own all of the S. J. Withey survey in Orange county, Texas (described in the pleadings of the parties herein) unless the defendants or some one or more of them have acquired title to said survey or a part thereof under the statutes of limitation of this state."

All the matters in controversy were settled by agreement, except the contest between Ponder and Mrs. Conn over the southwest one-fourth. This was tried by the court without a jury, and judgment was rendered for Amos L. Ponder against Mrs. Conn for the title and possession of the said southwest one-fourth. From this judgment she has duly perfected her appeal by writ of error.

In our discussion of this case we will refer to Mrs. Conn as appellant, and to Amos L. Ponder as appellee.

On motion of appellant, the trial court filed the following conclusions of fact:

"1. That the land in controversy, being the southwest one-fourth ($\frac{1}{4}$) of the Samuel J. Withey survey, in Orange county, Texas, was known throughout all of the period of the transactions before the court in this cause by all of the parties dealing therewith and by the public generally as the Jack Ballard survey of 160 acres.

"2. That the land in controversy was pat-

CONN v. SOUTHWESTERN SETTLEMENT & DEVELOPMENT CO. et al. (No. 526.)

(Court of Civil Appeals of Texas. Beaumont. May 4, 1920.)

1. Names \S 16(3) — Sam J. Whitney and Samuel J. Withey held not idem sonans.

Deed describing land as the "Sam J. Whitney survey" held insufficient to vest grantee with title to land in the "Samuel J. Withey survey," as against subsequent innocent purchaser for value from grantor; such names not being idem sonans.

2. Vendor and purchaser \S 236—To be protected as bona fide purchaser, purchaser must pay value.

To be protected as a bona fide purchaser, purchaser must have paid value for the land.

3. Adverse possession \S 115(1) — Evidence held to raise issue as to who matured title by limitations.

In an action of trespass to try title to recover the title and possession of land, evidence held to raise an issue as to whether defendant's remote grantor or intervenor's testator's grantor matured limitation title.

4. Appeal and error \S 101(1)—Finding on conflicting evidence not disturbed.

Where the evidence was sufficient to clearly raise an issue of fact, court's finding thereon will not be disturbed on appeal.

ented by the state of Texas to Samuel J. Withey on April 3, A. D. 1841.

"3. That in the year 1894 Ben Hollis purchased the southwest one-fourth of the Samuel J. Withey survey known as the Jack Ballard 160-acre survey, and immediately moved his family onto the same; there being a good house and 15 or 20 acres of land in a state of cultivation on said survey.

"4. That Ben Hollis resided upon said land, claiming, cultivating, using, and enjoying the same from the date he purchased the same until about November, A. D. 1895, when he sold the same to Jesse Gentry, Sr., which sale was subsequently evidenced by a conveyance executed Ben Hollis and wife to Jesse Gentry, Sr., dated July 28, A. D. 1906.

"5. That Jesse Gentry, Sr., resided upon, cultivated, used, and enjoyed said land, claiming the same from November, 1895, to and including the year 1908, when he conveyed the same to his son, Jesse Gentry, Jr.

"6. That after 1908 up to 1916 the said Jesse Gentry, Sr., continued to reside upon said land, cultivating, using, and enjoying the same, believing the same to be his property, but in the name of his son, Jesse.

"7. That during the period from 1895 to 1916 the said Jesse Gentry, Sr., paid all taxes due on the land in controversy.

"8. That on September 26, 1908, Jesse Gentry, Sr., conveyed the Withey survey to Jesse Gentry, Jr., which deed was filed on the same day.

"9. That on December 15, 1908, Jesse Gentry, Jr., conveyed the Sam J. Whitney section No. 11 to W. H. Gentry, which deed was filed for record October 15, 1914.

"10. That on September 21, 1911, Jesse Gentry, Jr., by his duly authorized attorney, Leslie B. Ponder, conveyed to Amos L. Ponder the southwest one-fourth of Samuel J. Withey survey. This deed was first filed for record September 22, 1911, and recorded in Book 9, page 304, Deed Records of Orange County, Texas, at which time the same was not acknowledged. Subsequently this deed was properly acknowledged, and again filed for record on May 10, 1918, and recorded in Book 28, page 21, Deed Records of Orange County, Texas.

"11. That the said Amos L. Ponder paid the sum of \$2,000 for said land, and made inquiry at the time of the clerk of the county court of Orange county, Texas, who informed him that the records of his office showed the title to said land to be in Jesse Gentry, Jr.

"12. That the said Amos L. Ponder was an innocent purchaser for value and without notice of the said deed from Jesse Gentry, Jr., to W. H. Gentry, dated December 15, 1908, and knew nothing of the claim of said W. H. Gentry or any other person, to said land.

"13. That during the year 1911, the said W. H. Gentry resided at Vidor, Texas, and not upon the land in controversy. During said year Jesse Gentry, Sr., and a Mr. Chapman, who was a tenant of Jesse Gentry, Sr., were the only ones residing upon said land.

"14. That during 1912, and subsequent thereto, W. H. Gentry resided upon the northeast one-fourth of the S. J. Withey survey, and has not been in possession of any portion of the southwest one-fourth of the Withey survey.

"15. That during a portion of the time prior

to 1906, the said W. H. Gentry lived with his father, Jesse Gentry, Sr., on this land. During this time he was a member of his father's family, and made no claim as against his father to any portion of this land.

"16. That from the year 1906 to 1909, inclusive, W. H. Gentry was away from said land and had no tenant on the same.

"17. That on January 28, 1913, by deed filed March 4, 1913, W. H. Gentry conveyed to R. C. Conn the land in controversy. The only consideration paid for this conveyance was a load of wire fencing which was to be used in building a fence on said land, which was for the use and benefit of R. C. Conn.

"18. That on August 15, 1913, by deed filed August 27, 1913, W. H. Gentry conveyed to R. C. Conn the entire S. J. Withey survey of 640 acres, less the land of the northeast one-fourth. The only consideration paid for this conveyance was \$100.

"19. That the deed offered in evidence from Jesse Gentry, Sr., to W. H. Gentry, purporting to convey the Withey survey dated August 12, 1913, and filed for record August 27, 1913, was not executed by Jesse Gentry, Sr., nor under or by virtue of his authority or consent.

"20. That the S. J. Withey survey would cut 4,000 feet of pine timber per acre, and the southwest one-fourth of said survey would cut 300,000 feet of pine timber valued at \$2.50 per thousand in 1913, and the land was valued at \$2 per acre."

[1, 2] From these conclusions of fact, it results that judgment was properly rendered for Amos L. Ponder for two reasons: First. Because the deed from Jesse Gentry, Jr., to W. H. Gentry, dated December 15, 1908, conveyed the Sam J. Whitney survey, and not the Samuel J. Withey survey. These names are not idem sonans, and there was no testimony in the record that the Withey was commonly or generally known as the Whitney survey, nor is there any testimony that any of the parties to this suit so recognized it. Had this deed been of record, it would not have been notice to Amos L. Ponder when he purchased from Jesse Gentry, Jr., in 1911. Second. Because the deed from W. H. Gentry to R. C. Conn, of date January 28, 1913, was without consideration. Under the rule announced in *White v. McGregor*, 92 Tex. 556, 50 S. W. 564, 71 Am. St. Rep. 875, as between W. H. Gentry and Amos L. Ponder, Ponder acquired the superior title. Then, in order to defeat the Ponder title, a subsequent purchaser under W. H. Gentry must pay value. On this issue the judgment of the trial court was against Mrs. Conn and in favor of Ponder.

However, by her third assignment of error, she challenges the court's conclusions of fact that Jesse Gentry, Sr., acquired title to this land by limitation, asserting that this limitation title matured in W. H. Gentry, and that Jesse Gentry, Sr., never had any interest in it. In favor of the title of Jesse Gentry, Sr., his daughter, Mrs. Alice McGee, testified as follows:

"My name is Mrs. Alice McGee. Jesse Gentry, Sr., is my father. I have been married, Mack McGee was my husband. He is not my husband now. I am now a single woman. I was single for a year before I was served with citation here in this suit. I was a single woman at that time. I know where the Samuel J. Withey survey in this county is. I used to live there. I said I know where that survey of land is. I lived on it at one time; that was our old home once. When I say 'our' I mean when I lived with my father. We called that land at that time the Jack Ballard place. The part we bought for the Jack Ballard was 160 acres. As to whether or not that was the southwest quarter of the Withey survey, will say it was right near the Jasper county line, on the Orange county north line.

"I said my father, and his family moved on this land in August, 1895; that is, on the Jack Ballard 160 acres. Ben Hollis was living there when we moved there. We moved into the house with him. We bought it from him. My father bought the place from Mr. Hollis. He traded him some oxen for it. That was in August, 1895. Mr. Hollis was living there on the place at that time. We lived there in the house with him a week or more before he ever moved out. My father claimed 160 acres of land there then. The house on that land was a log house with a plank room on the back and a front gallery and back gallery. There were two fields on the land, one by the house and one northeast of the house. I don't know how many acres were in cultivation in all. There must have been about 30 acres in the two fields. In about a week after we moved there, Mr. Hollis moved away. I don't remember just how long it was, but it was a week, I am sure, before he moved away. We lived there a long time. My father continued to live there all the time. He never did move away from there until they sorter moved him away, which was year before last now. He cultivated those fields there around the house; they farmed there every year; he helped; he didn't do it all. My father never moved away from that place at all from the time he moved there until year before last. He would go off and come back. He left his things there; he never did give the place up. They cultivated these fields right straight along every year; they never did lay out as I know of."

"I know who those oxen belonged to that were traded for this place. My father had a big old yoke of steers, and they ran off of a bridge, and he traded them for another yoke, and traded them for the place. The oxen belonged to my father that were traded for this place. My father had control of that property after we moved down there in 1895. I did the most of the superintending, and my father did the providing. Hamp did not stay there all the time. He worked off some. He never worked much in the crop. My husband and my father built the house that he said he built."

Jesse Gentry, Sr., testified by deposition as follows:

"My name is Jesse Gentry. I will be 80 years of age on the 10th of May, 1917. I first moved on my present Texas home about 22 years ago. To the best of my recollection it was in October or November, 1895, that I first

moved on the land now occupied by me as my home in Texas.

"Int. 5. Please state whether or not you purchased any land in the Samuel Withey survey in Orange county where you now reside in Texas, and, if so, from whom you purchased the same. A. Yes; I purchased 160 acres of land from one Ben Hollis in the Samuel Withey survey in Orange county, Tex."

In answer to the sixth, tenth, eleventh direct interrogatories and the thirteenth and nineteenth cross-interrogatories, he testified as follows:

"There was a good double log house on the land when I bought it, and I built a barn, cleared about 30 acres of land and fenced and cultivated it, and cut three ditches a year ago this spring. I also reset all the fencing, putting in new rails where necessary, about a year ago. I built the barn about the third or fourth year after I purchased the place, and did most of the clearing the first winter I was on the place. I was engaged in clearing the most of the first three winters that I was on the place. Yes, while I have resided upon, used, and cultivated and enjoyed the Samuel Withey survey in Orange county, Tex., I have claimed to own the same as my own property."

[3, 4] W. H. Gentry testified that he bought the land from Ben Hollis and gave Hollis a yoke of oxen in payment for it, and had always claimed the land and had lived on it. Ben Hollis testified that he sold the land to W. H. Gentry in 1895, Gentry being a minor at that time, that he sold it to him at the request of Jesse Gentry, Sr., and that W. H. Gentry gave him a yoke of oxen for the land. This testimony clearly raised an issue as to who matured the limitation title. The court having resolved this in favor of Jesse Gentry, Sr., we will not disturb it.

By her fourth assignment of error, appellant complains of the finding that R. C. Conn did not pay value for the deed made to him by W. H. Gentry, dated January 28, 1913.

On the question of value, W. H. Gentry testified as follows:

"I don't recollect exactly what the consideration was for the deed from myself and wife to R. C. Conn for the southwest quarter, dated the 28th of January, 1913, reciting the consideration of \$10 and other valuable considerations. I can't remember now how much money Mr. Conn paid me for that deed. I remember the circumstance of Mr. Conn buying some wire for me and shipping it up there. That was part of the consideration for that deed. The consideration was something like \$300, I am pretty sure. One hundred dollars was the consideration for the deed from myself and wife to R. C. Conn for the entire section, excepting the northeast quarter. Mr. Conn paid me \$100 for that deed.

"I don't really know how much Mr. Conn gave me for it. I sold it to him in order to get able to stay there to help me out in living. I made Mr. Conn the deeds; I borrowed money from him sometimes. I made him several deeds. I got the deed from my father on August

12th, and on the 15th of August I made Mr. Conn the last deed. I did not make that deed for the purpose of getting his title straightened out. Mr. Conn paid me \$100 when I made him the last deed. It was before that that Mr. Conn sent me some wire up there. I know it was before that that he sent me the wire because I had a crop growing on my land at the time this last deed was made. I put some of that wire on the southwest quarter. It is scattered around there over this whole section; that is, where there is a field. I put some of this wire that Mr. Conn sent me down there on this identical land I sold to Mr. Conn, and it is there yet; I put some of it on the old place, on the southwest quarter. Mr. Conn gave me \$100 for this last deed after I got a deed from my father. He paid that to me in money, and I gave my father \$50 of that. Mr. Conn gave me that \$100 for this deed that I made him in August, 1913, and I gave my father \$50 of it; he was talking about going to Alabama then, and he didn't go. During the time I was making these transactions, I thought my title to this land was questionable, but I had bought it, and I thought it would be mine some time if I ever got it cleared up.

"Mr. Conn shipped to me the net wire, and we had been talking about it in the spring of 1913. Prior to that time I had executed to him deeds to the northwest one-fourth, the northeast one-fourth, and the southeast one-fourth. I reserved to myself the land on the northeast one-fourth.

"Q. These various deeds that Mr. Conn had obtained from you for the quarter sections—state whether or not he had paid you for those deeds. A. Yes, sir; he paid me for the deeds. He paid me for each deed that he obtained from me. At the time I executed to him the deed for the entire section after I had obtained the deed from the old man, Mr. Conn owned by deeds from me the entire section of land except the land in the northeast quarter, and that is the time he paid me the \$100. When the old man told me to sign his name to that deed in the presence of these witnesses Burrell and Wright, Burrell and Wright and myself went to the Jasper county line and met Preston Bond there, and had Preston Bond to take the acknowledgment of the witness Wright. We went about 400 yards from the house up to the county line. Preston Bond was a notary in Jasper county."

He also testified that he could not tell exactly what consideration was paid him for the land. He estimated it at about \$300. In view of the fact that the trial court found him guilty of forgery, in that he forged the deed from his father, dated August 12, 1913, his testimony was not conclusive. As he was thoroughly discredited by the findings of the trial court, we cannot disturb the conclusion that no value was paid to him for the deed of date January 23, 1913.

Our discussion of this case has disposed of all the legal propositions raised under the other assignments. As we find no error in this record, the judgment of the trial court is in all things affirmed.

**GALVESTON-HOUSTON ELECTRIC RY.
CO. v. PATELLA et al. (No. 468.)**

(Court of Civil Appeals of Texas. Beaumont.
May 30, 1920. Rehearing Denied
June 9, 1920.)

1. Railroads §350(22) — Automobile driver's contributory negligence held question for jury.

In an action for the death of an automobile driver at an interurban railroad crossing, evidence which showed that the driver neither looked nor listened for an approaching car, but that his view was somewhat obstructed in the direction from which the car came, *held* not to establish contributory negligence as a matter of law.

2. Railroads §301 — Public and interurban company have equal rights at crossing.

An interurban railroad company has no right to the exclusive use of that part of the street upon which its track is laid, but all persons have an equal right to the use thereof for traveling over and across the street.

3. Trial §252(9)—Correct abstract charge as to rights at crossing held misleading.

In an action for the death of an automobile driver at an interurban railroad crossing, where there was no contention that the driver did not have a right to be where he was and the evidence barely supported an inference of freedom from contributory negligence, it was misleading to give a correct charge that the driver had a right equal to the interurban company to use the street, from which the jury might have inferred it was not negligence for him to go upon the crossing as he did.

4. Railroads §338 — Failure of autoist to show motorman he heard whistle does not indicate peril.

The failure of occupants of an automobile to indicate to the motorman of an approaching interurban car that they heard his warning whistle does not show that he knew they were in peril, so that he should have stopped or checked his car, where the speed of the automobile was such that he inferred it would stop before going on the crossing.

5. Railroads §350(7)—Submission of issue as to sufficiency of whistle of interurban car held not warranted by evidence.

Where the evidence was undisputed that an interurban car had a whistle that could be heard for more than a mile, and which was heard by others when the car was 800 yards from the crossing where the accident occurred, there was no evidence to warrant submitting the issue of negligence in failing to equip the car with a sufficient whistle, though there was testimony that the whistle was less efficient than a locomotive whistle.

6. Railroads §350(12)—Submission of special issue as to control of interurban car on approaching crossing held proper.

In an action for the death of an automobile driver at an interurban railroad crossing, the submission of a special issue raised by the

pleadings and evidence whether it was negligence not to have the car under control after the motorman discovered the automobile approaching the crossing was not error, though there was no evidence to sustain an issue of discovered peril.

7. Railroads *§*348(1) — Evidence held to show no special danger, requiring watchman or warning at crossing.

In an action for the death of an automobile driver, evidence held not to show that the interurban crossing at which the accident occurred was one of special danger, though it was in a small incorporated town, and there was some obstruction to the view, so that it was error to admit evidence that there was no watchman or automatic crossing warning maintained there.

8. Railroads *§*351(22)—Charge on discovered peril held incorrect.

A requested charge that, before the jury could determine the issue of discovered peril in favor of plaintiffs, they must find the motorman actually discovered and realized the peril, and knew that plaintiffs' decedent would go on the crossing ahead of the approaching car and be injured, before any duty would arise to stop the interurban car or check its speed, was incorrect.

Appeal from District Court, Harris County; J. D. Harvey, Judge.

Action by Mrs. Annie Patella and others against the Galveston-Houston Electric Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

C. R. Wharton and R. C. Patterson, both of Houston, for appellant.

W. J. Howard, Clarence Kendall, and Louis, Campbell & Nicholson, all of Houston, for appellees.

HIGHTOWER, C. J. This suit was filed by Mrs. Annie Patella in her own behalf and for the benefit of her minor daughter, Antoinette Patella, widow and daughter, respectively, of Phillip Patella, deceased, and by Bernardo Patella and wife, parents of said deceased. The object of the suit was to recover damages because of the death of Phillip Patella, alleged to have been negligently caused by the defendant. The plaintiffs alleged that on or about the 18th day of November, 1916, the defendant, Galveston-Houston Electric Railway Company, was the owner of and was engaged in operating an interurban railway line between the cities of Houston and Galveston in Harris county, which line passed through various towns, villages, and stations, one of which was Park Place, and that on said date the said Phillip Patella was driving an automobile along one of the main boulevards of the town of Park Place, and that when he undertook to cross the tracks of the defendant, where they intersected said boulevard or street upon which Patella was driving, his automobile was

struck by one of the cars of defendant, and that in such collision Phillip Patella received injuries which resulted in his death. The grounds of negligence alleged were as follows:

(1) The defendant was negligent in failing to have at the said crossing an electric bell, gate, or other device to warn persons, traveling along said boulevard and across the defendant's tracks, of the approach of its cars.

(2) The defendant was negligent in operating its car, which struck the automobile and killed Phillip Patella, over said crossing at an excessive rate of speed, to wit: 45 or 50 miles an hour.

(3) The defendant was negligent in not having its car, which struck the automobile, equipped with a proper whistle or other warning device, that is, a whistle or device that would give reasonable notice or warning to the said Phillip Patella, or other persons having occasion to pass over said crossing, of the approach of said car.

(4) The defendant was negligent in failing to keep a watchman at the crossing, which was a much-used and dangerous crossing, in order to warn persons, who had occasion to pass over the track of defendant at that point, of the approach of its cars.

(5) The defendant was negligent in that it discovered Phillip Patella, at a considerable distance from the point at which the collision occurred, approaching the track of said defendant at a speed of 10 to 15 miles an hour, after he apparently did not hear the warnings given him by the defendant, and continued on his course, and at the same rate of speed approached said railroad track and the point of a collision under such conditions that made it appear that it was likely, possible, and probable that he would go upon said track, in front of the rapidly moving interurban car, and the defendant and its operatives in charge of the car saw Phillip Patella in such position and under such circumstances in time to have stopped the interurban car or lessened its speed and brought it under control so as to have avoided the collision and the killing of said Phillip Patella, but made no effort to stop the car or slow the speed thereof, when by exercising ordinary care the interurban could have been stopped and the collision avoided.

(6) That defendant was negligent, in that it discovered Phillip Patella in a position of peril or danger on, or near to, and approaching the track, in time to have stopped the car or lessened its speed and have avoided the collision; and it failed to stop the car in time to avoid such injury and death, although it could have done so with the means at hand, in the exercise of ordinary care.

(7) That if the defendant, its servants and agents, did not discover Phillip Patella in a position of danger at or near the track in time to have stopped the car before striking

him, it was negligent in not discovering him, in that it failed to exercise ordinary care to have so discovered him, and the defendant and its servants in charge of the car failed to keep a lookout for persons who might have occasion to cross the track of the defendant company at that point, the company well knowing that the crossing was a dangerous one, where the view of persons having occasion to pass over the track was cut off and obstructed by many objects; the crossing being a frequently and much-used crossing.

Damages were claimed by the plaintiffs in the sum of \$40,000.

Defendant answered by a general demurrer and a special exception unnecessary to here mention, and by general denial and plea of contributory negligence upon the part of said Phillip Patella.

The trial resulted in a judgment in favor of the plaintiffs, and was apportioned as follows: \$18,000 to Mrs. Annie Patella, \$3,000 to the minor, Antoinette Patella, \$1.00 to the father, Bernardo Patella, and \$1.00 to the mother, Mrs. Bernardo Patella. From this judgment the defendant appealed, after its motion for new trial had been overruled.

The special issues which were submitted to the jury, and their answers thereto were as follows:

Issue No. 1: "Was or was not the defendant negligent in operating its car under the circumstances at the rate of speed it was operating same at the time it neared the crossing at which the collision with the automobile occurred? You will answer, 'It was,' or, 'It was not,' according as you find the fact to be." The jury answered: "It was."

Issue No. 2: "If you have answered special issue No. 1 in the affirmative, then you will answer, Was or was not such negligence a proximate cause of the injury? You will answer, 'It was,' or, 'It was not,' as you may find the fact to be." The jury answered: "It was."

Issue No. 3: "Was or was not the defendant negligent in not sounding the gong of said car as it approached the said crossing? You will answer, 'It was,' or 'It was not,' according as you find the fact to be." The jury answered: "It was."

Issue No. 4: "If you have answered the foregoing special issue No. 3 in the affirmative, then you will answer special issue No. 4. Was or was not such negligence a proximate cause of the collision? You will answer, 'It was,' or, 'It was not,' according as you find the fact to be." The jury answered: "It was."

Issue No. 5: "Was or was not the interurban car in question, under the circumstances, equipped with a whistle or other device that would have emitted or carried sufficient sound to properly warn people using such crossing? You will answer, 'It was,' or, 'It was not,' according as you find the fact to be." The jury answered: "It was not."

Issue No. 6: "If you have answered the foregoing special issue No. 5, then you will answer special issue No. 6. Was or was not such omission, if any, on the part of the defendant negligence, as that term has been hereinbe-

fore defined? You will answer, 'It was,' or, 'It was not,' according as you find the fact to be." The jury answered: "It was."

Issue No. 7: "If you have answered the foregoing special issue No. 6 in the affirmative, then you will answer special issue No. 7. Was or was not such negligence, if any, the proximate cause of the collision in question? You will answer, 'It was,' or 'It was not,' according as you find the fact to be." The jury answered: "It was."

Issue No. 8: "Was or was not Phillip Patella guilty of contributory negligence, as that term has been hereinbefore defined, in approaching the crossing on the occasion in question in the manner he did? You will answer, 'He was,' or, 'He was not,' according as you find the fact to be." The jury answered: "He was not."

Issue No. 9: "If you have answered the foregoing special issue No. 8 in the affirmative, and only in such event, then you will answer special issue No. 9. Was or was not such contributory negligence, if any, the proximate cause of the collision in question? You will answer, 'It was,' or, 'It was not,' according as you find the fact to be." There was no answer to this question.

Issue No. 10: "Did or did not the motorman in charge of the defendant's interurban car actually discover Phillip Patella approaching the crossing under conditions that made it appear probable or likely that he would go onto the track ahead of the interurban car at a time when said interurban car was at a sufficient distance from said crossing to have enabled the motorman to have stopped same or lessened its speed, so as to avoid a collision by using the means at hand, consistent with the safety of its passengers? Answer, 'He did,' or, 'He did not,' according as you find the fact to be." The jury answered: "He did."

Issue No. 11: "Was or was not the defendant negligent under the circumstances in not having the interurban car under control after the motorman discovered the said Phillip Patella approaching the crossing? You will answer, 'It was,' or, 'It was not,' according as you find the fact to be." The jury answered: "It was."

Issue No. 12: "If you have answered the foregoing special issue No. 11 in the affirmative, then you will answer special issue No. 12. Was or was not such negligence a proximate cause of the injury and death of the said Phillip Patella? The jury answered: "It was."

Issue No. 13 related to the measure of damages, which was determined as above shown.

From the foregoing findings, it is obvious that the jury found that appellant was guilty of negligence in every particular as alleged by the appellees, but acquitted Phillip Patella, deceased, of contributory negligence, as pleaded by appellant.

By its first assignment of error, appellant complains of the refusal of the trial court to peremptorily instruct the jury in its favor. This assignment is followed by several propositions showing the reasons of appellant for this contention. We shall not mention these

propositions in detail, but it will suffice to say that appellant's main contentions in this connection are that the evidence, as a whole, showed that Phillip Patella, deceased, was guilty of contributory negligence as a matter of law, which barred any recovery in favor of the appellees, and also that the issue of discovered peril, determined against it by the jury, was not in the case upon the evidence.

[1] We shall first dispose of the contention that contributory negligence on the part of the deceased was shown as a matter of law.

At the time of his death, Phillip Patella resided in the city of Houston, and was an employé of the Gulf Refining Company in that city. In the afternoon of the 18th day of November, 1916, about 2 o'clock, Phillip Patella and three of his companions and co-employés, O. C. Herzog, S. G. Herring, and C. H. Wetzel, all young men, left the city of Houston in an automobile owned by Phillip Patella's father, and went to Park Place, a little town south of the city of Houston, through which appellant's interurban railway track runs between that city and the city of Galveston. Deceased and his companions reached the town of Park Place about 3 o'clock, or a very few minutes thereafter, and upon reaching there, drove at once to the house of S. P. Mott, who was also an employé of the Gulf Refining Company in the city of Houston, but who lived with his family at Park Place. The purpose of these young men in going down to Park Place on said afternoon was to look at the town and drive around for pleasure generally. Being unacquainted with the town of Park Place they requested Mott, upon reaching his house, to get in the automobile with them and show them around the town, which Mott agreed to do, and got in the automobile with Patella and his companions, and they started out to see the town. After driving away from Mott's house, they in a few minutes reached what is known as Broadway boulevard, one of the principal streets of the town of Park Place, and which, as we gather from the record, runs practically north and south through the town. After driving into Broadway boulevard, the automobile, which was driven by Patella, turned north and proceeded in the direction of the crossing, where the accident, which resulted in Patella's death, occurred. Herring was on the front seat with Patella, sitting to his left, and Herzog, Wetzel, and Mott were sitting in the rear seat of the automobile.

Appellant's interurban railway track, as best we can gather from the record, runs practically north and south through the town of Park Place, and at the time these young men left Mott's house for the purpose of driving over the town, appellant's interurban car, coming from Galveston, was, according to its schedule, due at the station at Park Place

between five and eight minutes thereafter. These young men drove several blocks, perhaps some four or five blocks, after leaving Mott's house, before they drove into Broadway boulevard, but at the time they drove into Broadway, appellant's interurban car was not in sight of them, nor did they hear any signals of the approach of the car at that time, and they proceeded along Broadway north, in the direction of the crossing, where the accident occurred, the automobile traveling at a speed between 8 and 10 miles an hour. When the automobile reached a point on Broadway approximately 250 feet from the crossing where the accident occurred, appellant's interurban car had approached from Galveston, and was somewhere between, as best we can gather, 800 and 900 feet south of the crossing where the accident occurred, when the motorman on the interurban car discovered the automobile on Broadway, traveling in the direction of the crossing, and the motorman blew the whistle on the interurban for the crossing, and gave the usual crossing signals, but, according to the testimony of Mott, Herzog, Herring, and Wetzel, they did not hear the signal whistle, and did not hear any other signal or sound of the approaching interurban car, and did not see it, and were unaware of its approach to the crossing. About 250 feet from the crossing in question, that is, where appellant's track crosses Broadway boulevard, there was a small park, situated practically in the middle of Broadway boulevard, and for that reason the boulevard forks right at the south end of this little park, and one fork of the street turns to the left around the park, and the other fork to the right. On this occasion, when the park was reached, and upon seeing the forks in the street, Patella asked Mott which way they should go, and Mott directed him to take the left fork, leaving the little park on the right as they drove in the direction of the crossing. This direction was complied with, and Patella drove the automobile around the little park to the left, and continued in the direction of the crossing without change in the speed of the automobile, and during the time Patella was thus driving around the park the automobile was observed by appellant's motorman, and he, as we find the fact to be, was sounding the whistle on the interurban car to warn persons of the approach of the same to the crossing; but, according to the testimony of all the occupants of the car, other than Patella, they did not hear any of the signals, and did not know of the approach of the interurban car, and were not thinking about the interurban car, and did not look in the direction from which the interurban was coming. All of the occupants of the car who testified on the point stated that they were driving along at the rate of speed of between 8 and 10 miles an hour from the time the car came into Broadway boulevard until about the time the

crossing was reached, and that they did not change the speed of the automobile, and that they never thought of the approach of an interurban car, though some of them stated that they were aware that the car passed through the town of Park Place every hour.

One of the young men in the automobile testified that when the automobile was something like 50 feet from the crossing where the accident occurred, he did look in the direction of Houston, and saw no interurban approaching, and he thought that about at the same time Patella also looked in the same direction, but that none of them looked in the direction of Galveston, from which the interurban was approaching, until the automobile was within a few feet of the track at the crossing, and that when this witness, who was Herzog, did look in that direction he observed the interurban, which was then not over 30 feet distant from where Herzog was sitting in the rear seat of the automobile, and that he, upon seeing the interurban, said, "There is the interurban," and that he was the first man who discovered the interurban, and that within two seconds thereafter the collision occurred. This testimony on the part of Herzog is practically corroborated by Mott, Wetzel, and Herring. These same companions of Patella testified, however, that the view of the approach of the interurban car to the crossing, while the automobile was traveling up Broadway and around the little park, was to some extent obstructed by palms, which were growing in the park for ornamental purposes, and also they testified that as they approached near to the crossing, within 25 or 30 feet perhaps, the view of the approaching car was also obstructed by the trolley poles placed along the right of way, which were some 150 feet apart. There are photographs in the record before us which were used on the trial below, showing the location of the little park we have mentioned, and showing the palms growing therein, and also showing the trolley poles along the right of way, but the photographs do not show all palms that were growing in the park at the time the accident in question occurred, the undisputed evidence being that some of the palms that were growing at the time of the accident had been removed. The evidence further shows that the palms in the park averaged about 5 feet in height, though some of them were as high as 7½ feet, and the grade of appellant's track at that immediate vicinity was more than 4 feet higher than the street upon which the automobile was traveling. We are unable to tell from the photographs sent up with the record just what the extent of the obstructions to the view of an approaching car on the occasion in question was; that is, such obstructions as were caused by the palms and trolley poles, and from the whole evidence on that point we are not able to say that there was no obstruction to the view

of an approaching car on the occasion in question, but must assume from the evidence that the view of the approaching car was to some extent obstructed, as claimed by the appellees. And while we conclude from the evidence in the record before us that deceased and his companions did not look or listen for appellant's interurban car, as it approached the crossing in question, and as the occupants of the automobile were approaching the crossing and before going on same, still, because of the fact that the view of an approaching car to the crossing was to some extent obstructed, and being unable to tell to what extent obstructed, we have concluded that we would not be authorized to hold that Phillip Patella was guilty of contributory negligence as a matter of law.

We shall not go into a lengthy discussion of the law as we understand it on this question, but feel bound by the expression of the Supreme Court of this state in the recent case of *Trochta v. M., K. & T. Ry. Co.*, 218 S. W. 1038. The facts in that case will be found in the opinion of the Court of Civil Appeals at Austin, reported in 181 S. W. 761. The plaintiffs in that case, claiming damages in consequence of the death of Trochta, recovered judgment in the trial court against the railroad company because of Trochta's death, which was occasioned by a collision between the railroad company's train and Trochta's wagon at a public road crossing. The railroad company pleaded contributory negligence on the part of Trochta in approaching and going over the crossing as he did without looking or listening for the approach of a train to the crossing, and the jury, in response to a special issue submitted by the trial court, expressly found that Trochta neither looked nor listened for the approach of a train to the crossing, and also that he made no effort whatever to ascertain whether a train might be approaching the crossing before going upon the same, where he met his death; but the jury also found that his failure to look or listen, or to use any effort whatever to ascertain whether a train might be approaching the crossing, was not negligence on his part, and the trial court permitted such verdict to stand, but the Court of Civil Appeals said, substantially, that the jury was not authorized to infer that Trochta was not guilty of negligence which contributed to his death after expressly finding that he neither looked nor listened, nor made any other effort to ascertain whether a train might be approaching before he went upon the railroad crossing. A writ of error was granted in that case, and the Commission of Appeals, in an opinion by Justice Strong, declined to discuss or pass upon the action of the Court of Civil Appeals in holding as it did on the issue of contributory negligence, but disposed of the case upon the issue of discovered peril. Chief Justice Phil-

lips, in approving the disposition made by the commission, took occasion to say:

"Under the facts of this case there is in our opinion no warrant for not applying to it the general rule prevailing in this state, that the failure of one about to go over a public railway crossing to look and listen for an approaching train, does not, of itself, constitute negligence as a matter of law. Here, the question as to whether, under all the circumstances, Trochta was guilty of negligence in not looking or listening for the train, was for the jury. The jury determined it against the defendant.

"For this reason, as well as that announced in the opinion of the Commission of Appeals, the judgment of the Court of Civil Appeals is reversed and the judgment of the district court is affirmed."

It will be seen from the opinion of the Court of Civil Appeals in that case that there was some evidence to the effect that the view of an approaching train to the crossing where Trochta was killed was to some extent obscured by trees, some of which, as many as two small trees, were on the railroad company's right of way, and others on contiguous land.

We assume that Chief Justice Phillips had in mind, when he used the language just quoted, the fact that the evidence in the Trochta Case showed that the view of the railroad company's approaching train was to some extent obstructed, and that, therefore, the fact that Trochta neither looked nor listened nor made any other effort to ascertain whether he might go over the crossing with safety would not make him guilty of contributory negligence as a matter of law, and so, in this case, there being evidence regarding obstructions to the crossing, which we consider equally as strong as that shown in the Trochta Case, we could not consistently, in view of the expression of Judge Phillips, hold that Patella was guilty of contributory negligence as a matter of law, although we conclude as a fact, from all the evidence of his companions who testified on the trial, that neither he nor any of them looked or listened for an interurban car that might be approaching the crossing at the time Patella and his companions were approaching and attempting to make the same, nor did they use any other efforts to ascertain whether they might approach and make said crossing with safety to themselves. We think such conclusion cannot be escaped by any fair and reasonable mind. The writer, before the decision in the Trochta Case, had been of the opinion that all persons were required to use ordinary care for their own safety in going over railroad crossings, which every one knows are places of inherent danger, and that in the nature of things such care could only be used by the exercise of the senses of seeing and hearing, and that where it was admitted or proved beyond contradiction that a person neither looked nor listened for the approach of a train to a railroad crossing be-

fore attempting to make the same, and met his death in consequence of such failure, then no liability would attach because of such death.

In the case of *Railway Co. v. Moy*, 174 S. W. 697, it was held by the Galveston Court of Civil Appeals, upon facts similar to the facts of this case, as regards obstructions, etc., that the deceased, Moy, was guilty of contributory negligence as a matter of law, but the Supreme Court also reversed the Court of Civil Appeals in that case.

Also, in the case of *Southern Traction Co. v. Kirksey*, 181 S. W. 545, the Court of Civil Appeals for the Third District held that Kirksey was guilty of contributory negligence as a matter of law, and reversed and rendered a judgment of the trial court, which was in favor of the plaintiff. The Supreme Court granted a writ of error in that case, and reversed and rendered the judgment of the Court of Civil Appeals, and affirmed that of the district court, basing its action largely upon the fact that there were some obstructions to the view of an approaching car to the crossing where Kirksey was injured, but also laid some stress upon the fact that Kirksey's attention was diverted about the time he started over the crossing.

In view of the holding of the Supreme Court in the three cases mentioned, we have concluded, without discussing the matter further, that we would not be authorized to hold that Phillip Patella was guilty of contributory negligence as a matter of law, and therefore the assignment upon that point is overruled.

Passing for the present the second, third, and fourth assignments of error, we shall proceed to dispose of the fifth assignment. This assignment complains of paragraph 5 of the trial court's charge to the jury, which was as follows:

"You are further instructed that a street car company or interurban company has no right to the exclusive use of that part of the street upon which its track is laid, but all persons have an equal right to the use of same for traveling over and across the street."

By appropriate propositions under this assignment, appellant contends:

(1) That this charge was misleading, and calculated to cause the jury to give undue emphasis and prominence to the right of deceased to use the street and crossing in question, and that any charge upon the subject, in a case of this character, should instruct the jury that the railway company had, in a sense, the paramount right, to the extent, at least, that public necessity and convenience required that it take precedence at such crossings over the right of way of the ordinary traveler by vehicle or on foot; and

(2) That in a case of this character, where the deceased was not charged with being a trespasser, it was improper to give such

charge to the jury; that it could serve no good purpose, but was calculated to confuse and mislead the jury in determining the duties of the respective parties; and

(3) That even if the charge could be said to announce a correct proposition of law in the abstract, it was, nevertheless, error in this case, because it was calculated to confuse and mislead the jury in considering the vital questions involved under the issue of discovered peril; and

(4) That even if it could be held that the charge announced a correct proposition of law in the abstract, it was, nevertheless, error to give it to the jury in this case, because it was calculated to make the jury believe that the deceased had the right to be on the crossing at the time and under the circumstances in question, and that the charge was clearly calculated to nullify the defense of contributory negligence, because it was calculated to give the jury the understanding that the deceased had the right to be on the crossing at the time, and was therefore rightfully there at the very time and under the very circumstances in question, and that, being rightfully there, he was not guilty of negligence in being there.

Counsel for the appellees, by one of their counter propositions in this connection, reply to the contention of appellant by saying that the charge complained of announced a correct abstract principle of law, and that, as far as the charge went, it did not involve any affirmative error, and that if appellant desired to have the charge amplified or explained in any way touching its application to the facts in this case, appellant should have presented a special charge embracing such explanation. Appellees' counsel also seek to answer appellant's contention in this connection by other counter propositions, which we think are not tenable.

[2] As to whether the charge complained of announced a correct abstract principle of law, it is unnecessary for us to determine, but if we were called upon to do so, we would feel compelled to hold that it did so, following *San Antonio Street Railway Co. v. Melcher*, 87 Tex. 632, 30 S. W. 899, *San Antonio Traction Co. v. Haines*, 100 S. W. 791, and *San Antonio Traction Co. v. Kumpf*, 99 S. W. 864.

[3] There was no issue between the parties below as to their rights to the use of the crossing where the accident occurred, but the issues were whether appellant was guilty of negligence in any of the particulars charged by appellees, and whether Phillip Patella was guilty of contributory negligence, as charged by appellant, and, if so, then whether appellant discovered the perilous position in which Patella's negligence had placed him in time for appellant's motorman to have avoided injuring him by the use of such means as were then at the motorman's com-

mand, consistent with the safety of appellant's car and the persons thereon. Such being the only issues between the parties, we have searched this record in vain to find anything that might have suggested to the trial court the propriety of giving the charge complained of. If Phillip Patella was not guilty of negligence as a matter of law, and we have concluded he was not, yet it must be admitted, upon the practically undisputed evidence in this record bearing upon that issue, that the jury had a very narrow margin upon which to determine that Patella was not guilty of contributory negligence as a matter of fact, and such was the main defense relied upon by appellant in the trial before the jury. If the charge was correct as an abstract proposition of law, still it does not follow that the trial court may always properly give in charge to a jury some correct abstract principle of law, but, on the contrary, the reports of adjudicated cases in this state are replete with instances where such charges have been condemned on the ground that, being mere abstract propositions of law, they were confusing and misleading, and in some of the cases they were held to be reversible error.

In our judgment, it would be difficult to suppose any case where a charge along the lines of that complained of here would be calculated to be more prejudicial to the defendant than was this charge, upon the facts adduced upon the trial below.

Let us look at the probable effect of this charge upon the jury, composed of laymen, though supposed to be men of average intelligence and understanding, and see how they would probably construe the charge complained of. The defendant in this case was contending before the jury, in effect, that, even if it was guilty of negligence, as claimed by the plaintiffs, still the deceased, Phillip Patella, was also guilty of negligence at the very time and place when and where he met his death in approaching and going upon the crossing in question, without first using proper care to ascertain whether defendant's interurban car might be approaching such crossing, and that Phillip Patella did not use such care, and did not look or listen for the approach of appellant's car to such crossing, but, on the contrary, attempted to drive his automobile over said crossing when defendant's car was in plain view of Patella, and when he knew, or by the exercise of proper care ought to have known, that fact, and that under such circumstances Phillip Patella was not justified in so driving upon the crossing, and that his act in so doing barred any recovery by his family for his death. Presumably, this theory and position of the defendant below was strenuously argued by its counsel before the jury, which theory and position was, of course, denied by counsel in their argument for the plaintiffs. Now, when the

jury retired to consider of their verdict, bearing in mind the evidence admitted upon the defendant's plea of contributory negligence and the argument of counsel on that issue, when they reached that issue for determination, they were confronted by this charge and admonition coming from the trial judge:

"You are further instructed that a street car company, or interurban company, has no right to the exclusive use of that part of the street upon which its track is laid, but all persons have an equal right to the use of the same for traveling over and across the street."

With this charge before them, telling them in unmistakable language that Phillip Patella's right upon the crossing was equal to that of appellant's interurban car, was it not most natural for the jury to conclude that, Phillip Patella having the same legal right as the defendant to use the crossing as the defendant had, he could not be guilty of negligence which would have prevented a recovery by his wife and baby for his death, even if he did not look or listen for the approach of appellant's car to the crossing, and did not use any effort to ascertain whether an interurban car might be approaching the crossing at that time? Presumably, the jury tried to be guided, and were guided, by the court's charge as to the law applicable to the case before them; and when they were told by the charge complained of, in effect, that Phillip Patella had just as much right upon the crossing where he met his death as did the defendant, the jury very probably got the idea, and acted upon it, that Phillip Patella had the right to be upon that crossing at the very time he was struck and killed, regardless of the circumstances surrounding him at the time he went upon the crossing.

When it was said in some of the cases above mentioned that the rights of railroad companies and street car companies and the rights of the public to the use of crossings on public roads and streets are equal, it was certainly not meant that such companies and the public had the right to use and occupy such crossings at the same moment, because such a use would be unreasonable and impossible, and therefore the opinions in those cases did not intend to announce any such rule, but, on the contrary, meant to say only that the public had just as much right to pass over the railroad track at such public road and street crossings as did the railway or street car company to run its cars along that track over such roads or streets. But, to say to a jury in a case where contributory negligence on the part of one injured or killed at the crossing was interposed as a defense, that the injured or deceased person was as much within his rights in using the crossing as was the railway company was certainly calculated to mislead and confuse the jury, and cause them to treat very lightly, at least,

the defendant's plea of contributory negligence.

In the case of *Baker v. Collins*, 199 S. W. 519, the plaintiffs had recovered judgment below because of the alleged negligent killing of John F. Collins at a public road crossing over a railroad track, the said Collins at the time riding in an automobile which was struck by a train of the railroad company at the crossing. In that case the defendant, among other things, was relying upon the defense of contributory negligence on the part of Collins, and the trial court, at the plaintiff's request, gave to the jury this charge:

"Gentlemen of the jury, you are instructed that as a matter of law the deceased had an equal right to travel on the dirt road at the intersection with the railroad, as the railroad had to run its train on its track at that point."

The Austin Court of Civil Appeals, speaking through Chief Justice Key, in sustaining an assignment of error challenging the correctness of the trial court's action in giving the quoted charge, among other things said:

"We sustain appellant's contention that this charge was confusing and misleading, and therefore the court erred in giving it. The case involved a question of negligence from two standpoints: one, negligence on the part of the defendant in approaching the crossing without giving statutory signals, and the other on the part of Mr. Collins in driving his automobile upon the crossing while the train was near by and approaching. The court in its main charge gave all the law that was necessary upon both of those questions.

"In so far as the record shows, no one had charged that the deceased was a trespasser and had no right to travel the public road where it intersected and crossed the railroad track, and therefore it was unnecessary for the court to inform the jury of deceased's right in that respect. But the charge in question was not properly framed to give the jury correct and accurate knowledge upon that subject.

"As bearing upon the question of negligence charged against railroad companies in the operation of their trains, our Supreme Court has frequently said that railroads have no exclusive right to the use of their tracks where they cross public highways; that the public have the right to travel such highways, and in so doing to cross railroad tracks; and that the law imposes upon those operating railroad trains the duty of exercising due care to prevent injury to persons who may be so traveling. And in considering the question of negligence on the part of the railroad company, it is not improper to give such charge, if it is so framed as to limit it to that question.

"The charge now under consideration was not restricted to a consideration of the question of the defendant's negligence, and the jury had the right to consider it in determining the question of contributory negligence. And when so considered, and in view of the fact that it specifically declared that Mr. Collins had an equal right to travel on the dirt road at the inter-

section of the railroad as the railroad had to run its trains on its tracks at that point, the jury may have concluded that the charge meant that as Collins had such right, proof of the fact that he knowingly and willfully ran his automobile upon the track at a time when he must have known that it was very dangerous to do so would not defeat the plaintiffs' right to recover. * * * Of course, it is not true in either law or reason, that when a person is traveling a public highway which crosses a railroad track, such person and the railroad each have the right to pass the intersection at the same time. Under such circumstances, and in the very nature of things, one or the other must have the right of precedence, because they cannot both occupy the point of intersection at the same time.

"Such right of precedence is not fixed by statute in this state, but, generally speaking, common sense and public welfare dictate that it should be accorded to railroad trains; and it is a matter of common knowledge that, as a general rule, the traveling public recognize and accord such right of precedence to approaching trains. We do not state this as a rule of law to be given in charge to juries, though the writer, speaking for himself only, believes that it should be. * * *

Counsel for appellees in this case contend, among other things, that the charge condemned in *Baker v. Collins* was materially different from the charge here complained of by appellant, but we cannot agree with counsel for appellees that there is any material difference between the two charges as to their effect upon a jury in determining the issue of contributory negligence. After considering most carefully the evidence in this case bearing upon the issue of contributory negligence relied upon by appellant, we are unable to escape the conclusion that the charge complained of was highly calculated to cause the jury in this case to acquit Phillip Patella of contributory negligence, and that it very probably did cause the jury to so acquit him, and we, therefore, hold, after very much consideration of the question, that the giving of the charge complained of was error on the part of the trial court for which the judgment in this case should be reversed. See *Stafford v. Chippewa, etc., Ry. Co.*, 110 Wis. 331, 85 N. W. 1036; *Austin, etc., Ry. Co. v. Faust*, 63 Tex. Civ. App. 91, 133 S. W. 451.

The charge complained of was not only calculated to cause the jury to render a verdict acquitting Phillip Patella of contributory negligence, but it was also highly calculated, we think, to cause the jury to find that appellant's motorman discovered Phillip Patella's perilous position in time to have prevented injuring him, and that after such discovery the motorman failed to do so, and for that reason also the charge should not have been given, even if the issue of discovered peril were in this case, as developed on the trial below. We have concluded, however,

that the issue of discovered peril was not made by the evidence adduced upon the trial below, and shall now discuss that point.

Without stating the evidence of any of the witnesses separately, we shall state, substantially, what the material undisputed evidence was, as a whole, bearing upon the issue of discovered peril. Appellant's motorman, according to the undisputed testimony, saw Patella's automobile traveling north on Broadway boulevard at a distance, at least, as far as 250 feet from the crossing of that street by appellant's track where the accident occurred, and appellant's motorman could see, and did see, the automobile as it proceeded along the entire distance of 250 feet up Broadway in the direction of the crossing, and some of the testimony, especially that of Mrs. Ainsworth, was to the effect that while the automobile was traveling in the direction of the crossing, and after it had gotten within 250 feet thereof, the whistle on appellant's interurban car was sounded repeatedly and almost continuously up to the time the collision took place. Mrs. Ainsworth also testified that she saw no change in the speed of the automobile after she discovered it at the point of about 250 feet from the crossing until it practically reached the crossing, and that she did not see any of the occupants of the automobile look in the direction of the approaching interurban car. Practically the same character of testimony was given by Mrs. Langham. The automobile in which Patella and his companions were riding was a Hudson make, and the evidence shows that Hudson automobiles, in proper working order, as this car was at the time, when going at a speed of 8 or 10 miles an hour, could be stopped in 8 or 9 feet, and when going at a speed from 6 to 8 miles an hour could be stopped in 6 or 8 feet. The evidence also showed that the automobile was an open car, and there was nothing about the car itself to prevent the occupants from seeing the approach of appellant's interurban to the crossing had they looked in that direction. The evidence further shows that the occupants of the car were doing nothing out of the ordinary while driving along in the direction of the crossing, but were conversing and acting as persons usually do in driving along.

Appellant's motorman, Pennington, testified, substantially, that he first discovered the automobile traveling north on Broadway when it was about 250 feet from the crossing in question, and that in his opinion the automobile was traveling about 6 or 8 miles an hour, and that he kept his eyes on the automobile as the interurban approached the crossing, and that from the speed at which the automobile was traveling, he, the motorman, thought that the automobile was going to stop before going on the crossing, and that he never discovered anything from the actions of the occupants of the automobile that

indicated anything to the contrary, or that they were unaware of the approach of the interurban car, until the automobile was within 25 or 30 feet of the crossing, at which time one of the occupants of the automobile raised up and waved his hand at the interurban car, and that at that instant the interurban car was then within 150 feet or about that distance from the crossing, and that it was impossible to then stop the interurban car or so check its speed as to prevent the collision at the crossing. The undisputed testimony further showed that the interurban car was running at a speed between 40 and 50 miles an hour as it approached the crossing in question, and the motorman testified that in going at that rate of speed it would require a distance of between 400 and 600 feet to stop the car. There was one witness who testified for appellees, to the effect that an interurban car ought to be stopped, going at a rate of speed of 35 or 40 miles an hour, within 250 or 300 feet, but he also stated that he had never operated an interurban car, but was only basing his opinion upon his experience as a locomotive engineer, and that he thought that an interurban car such as appellant's in this case could be stopped about as soon as a light train, and that from his experience as an engineer of many years, a light train could be stopped, by proper application of the air brakes, when going at a rate of 35 or 40 miles an hour, within 250 or 300 feet. This, we say, is about the substance of the testimony of appellees' witness Middleton on this point.

The collision occurred in broad open daylight, at about 3:15 in the afternoon, and the interurban car, at the time of the collision, was running on its schedule time. The motorman further testified that he had often observed persons approaching the crossing in automobiles, and that as a usual thing such persons would bring their cars to a stop when the interurban was approaching the crossing, and permit the interurban to pass, and that on a number of occasions persons driving automobiles would drive up sometimes within 5 feet of the track and then stop the automobile and permit the interurban to pass, and that on that occasion he saw nothing in the conduct of the occupants of the car that indicated to him that they would try to go over the crossing in question ahead of the interurban, or that they were unaware of the approach of the interurban to the crossing at the time, until, as stated above, some one in the automobile, when the same was within 25 or 30 feet of the crossing, raised up and waved his hand in the direction of the approaching interurban.

The testimony in the record shows, we think, without reasonable dispute, that the whistle on the interurban was capable of being heard on an ordinary day for more than a mile, and, according to the testimony of

Mrs. Ainsworth and Mrs. Langham, the whistle on the interurban on the day in question was distinctly heard by them when it blew at a distance of between 400 and 600 yards south of the crossing, back near the woods in the direction of Galveston, and before the interurban was in sight.

There can be no question, from the positive evidence in this case, that the motorman on the interurban could reasonably expect that the occupants of the car heard the alarm given by the whistle as the interurban was approaching the crossing, because the positive evidence in the case makes it too plain for argument that this whistle could be heard more than a mile away.

The evidence also shows that there was the usual crossing sign at the crossing where the accident occurred, containing the words, "Railroad Crossing," and that this sign was facing the occupants of the automobile as they approached the crossing.

Now, Patella's companions in the automobile each testified, as we have stated in the beginning, that they neither heard nor saw appellant's interurban car as it approached the crossing in question until it was discovered by Herzog, who was sitting on the rear seat of the automobile, at a time when the interurban was only 25 or 30 feet from him.

Now, from this evidence, substantially stated, it is the contention of counsel for appellees that the issue of discovered peril was in the case, and that the trial court properly submitted it for the consideration of the jury, and that the evidence is sufficient to warrant the finding of the jury that appellant's motorman actually discovered Phillip Patella's peril or danger as he approached the crossing in question in time to have prevented injuring him by the means then at the command of the motorman, and that he failed to use such means, and that, therefore, the judgment should be affirmed, regardless of Patella's contributory negligence, if there was such, and regardless of any error, if any, touching the issue of contributory negligence.

Of course, if the evidence were sufficient to show that appellant's motorman actually discovered that Phillip Patella was in imminent peril as he approached the crossing in question, and that such discovery was made by appellant's motorman at such time when he could, by the use of all means then at hand, consistent with the safety of appellant's car and the persons thereon, have prevented the collision which resulted in Patella's death, and failed to do so, then appellant was liable for the death of Phillip Patella, regardless of contributory negligence on his part.

[4] Counsel for appellees base their contention of discovered peril mainly upon the fact, as shown by the undisputed evidence, that none of the occupants of the automobile indicated to the motorman on the interurban that they heard the alarm whistle which was

being given as the car and the automobile were approaching the crossing. Certainly, the occupants of the automobile were in no imminent or actual peril while traveling along Broadway boulevard in the direction of the crossing, unless they were, in fact, unaware of the near approach of appellant's interurban car to that crossing, because certainly it must be presumed that they would not attempt to go upon the crossing and risk a collision with the approaching interurban if they were aware of its approach. Therefore the only thing that could have constituted peril or danger to the occupants of the automobile in approaching the crossing as they did was their ignorance of the approach of the interurban, and unless appellant's motorman was aware of or realized that the occupants of the automobile did not hear the whistle on the interurban and were not aware of its approach to the crossing, and that they would not probably stop or look or listen before going over the crossing, he did not actually know that the occupants of the automobile were in any danger or peril. Now, counsel for appellees contend that the fact that the occupants of the automobile failed to indicate to the motorman, by any action on their part, that they heard the alarm whistle was of itself sufficient to apprise the motorman and cause him to realize and know, and compel him to act upon such knowledge, that the occupants of the automobile had not heard the alarm whistle, and were ignorant and unaware of the approach of the interurban to the crossing. In this contention we cannot agree with the able counsel for appellees.

In support of their contention that the issue of discovered peril was in the case, counsel in their brief have cited several cases by the appellate courts of this state, among them *H. & T. O. Ry. Co. v. Finn*, 101 Tex. 511, 109 S. W. 918; *Railway Co. v. Munn*, 46 Tex. Civ. App. 276, 102 S. W. 442, and *Galveston Electric Co. v. Antonini*, 152 S. W. 845. It is the contention of counsel for appellees that these three cases specifically mentioned are practically parallel with the case at bar on the issue of discovered peril. In order to get at the facts in the *Finn* Case, reference must be had to the opinion of the Court of Civil Appeals in that case, reported in 107 S. W. 94, because the opinion of the Supreme Court in that case does not recite the facts, but merely refers to the opinion of the Court of Civil Appeals for the facts. All three of these cases, as well as all others cited by counsel for appellees, recognize the rule in this state to the effect that a recovery cannot be had against a railway or street car company upon the doctrine or principle of discovered peril in the absence of proof that such company's employes or servants actually discovered the perilous position of the person injured at such time that the opera-

tives or servants of such company could have prevented the injury by the proper use of all means then at their command. *T. & P. Ry. Co. v. Breadow*, 90 Tex. 26, 36 S. W. 410; *Morgan & Bros. v. M., K. & T. Ry. Co.*, 108 Tex. 331, 193 S. W. 134; *Galveston Electric Co. v. Swank*, 188 S. W. 705; *San Antonio Traction Co. v. Kelleher*, 48 Tex. Civ. App. 421, 107 S. W. 64; *Schaff v. Gooch*, 218 S. W. 783, and many other cases might be cited upon the point. But counsel for appellees do not deny the rule as we have stated it, but contend that the evidence in this case was sufficient to raise the issue of discovered peril, and to warrant the finding of the jury in appellees' favor on the issue, because they say that, when the occupants of the automobile failed to indicate, by some sign or otherwise, that they had heard the alarm whistles, which were so frequently repeated by appellant's motorman, the motorman then realized and actually knew that the occupants of the automobile were unaware of the interurban's approach, and that they would probably and likely go onto the crossing and collide with the interurban car.

If we should sustain counsel's contention in this connection, we would be virtually holding that any person, driving an automobile approaching a railroad or street car crossing, and near thereto, who fails to indicate to those in charge of an approaching railroad engine or street car, which is giving signals of its approach to the crossing, that such driver of the automobile heard such signals while approaching the crossing, was in actual peril or danger of collision at such crossing, and that if a collision at the crossing should follow, and it should be shown that the operatives of the railroad engine or street car failed to use all means then at command to prevent the collision, the injured party would be entitled to recover damages, regardless of any and all negligence on his part. We cannot subscribe to such a doctrine, because we think it would be most unreasonable, and would seriously hamper and interfere with the discharge of the duties owed by railroad and street car companies to the public. Such companies must operate their trains and cars in accordance with fixed and regular schedules, and in the very nature of things they cannot be required or expected to so run and operate their trains and cars as will permit private individuals to cross over their tracks in such manner and at such rate of speed as they may be pleased to go, and the engineer in charge of a railroad engine, or the motorman of an interurban street car, ought not to be held to have actual knowledge that the driver of an automobile approaching a public crossing was ignorant of an approaching train or car to the crossing merely because the driver of the automobile fails to respond in some way to warning signals given by the engineer

or motorman. And especially should the motorman in this case not be held to have had actual knowledge of such ignorance on the part of Phillip Patella or those in the automobile with him, which ignorance alone must constitute any peril or danger that the occupants of the automobile were in, in approaching the crossing in question, because the automobile was going at a very slow rate of speed, which, according to Patella's companions who testified in the case, did not exceed 10 miles an hour, and the proof showed that the automobile going at that rate of speed could have been stopped within 8 to 10 feet, and during all the time that the automobile was approaching the crossing the proof is undisputed that the motorman on the Interurban was blowing a whistle that the people in that vicinity could hear a mile or more, and there was nothing in the conduct of the occupants of the automobile, other than their failure to respond to the motorman's signals, that they were unaware of the approach of the interurban car. Pennington, appellant's motorman, in this connection, testified as follows:

"I saw the automobile as it came around the palm grove. The car (meaning the automobile) was driving slow. * * * The automobile was running 6 or 8 miles an hour as it was coming up the drive. It looked like it was going to stop at the speed it was going. * * * When I got close to the crossing one man stood up and waved his hand at me. They were 25 or 30 feet from the crossing when he did this. I was somewhere about 150 feet from them at that time, I reckon."

In the case of *Austin Street Railway Co. v. Faust*, 63 Tex. Civ. App. 91, 133 S. W. 449, the Court of Civil Appeals used this language:

"From the fact that people usually recognize and act upon this preferential right of the car [meaning street car], the motorman may well assume that it will be recognized and acted upon in a given instance, until there is something to reasonably indicate the contrary."

What was there in the conduct of the young men in the automobile with Phillip Patella to indicate that they intended to drive over the crossing ahead of the interurban car? In this connection see, also, *Ft. Worth & Denver City Ry. Co. v. Shetter*, 94 Tex. 199, 59 S. W. 533; *Ft. Worth & Denver City Ry. Co. v. Harrison*, 163 S. W. 332; *New York Central & H. Ry. Co. v. Maidment*, 168 Fed. 21, 98 C. C. A. 413, 21 L. R. A. (N. S.) 794.

Before concluding on this point, we will say that we have read carefully every authority cited by counsel for appellees in support of their contention that the issue of discovered peril was in this case, but, after doing so, we have concluded that neither of them is parallel in its facts to this case on the issue of discovered peril but on the con-

trary each of them is easily distinguishable in its facts from the present case; and we would be pleased to let this opinion show such distinction were it not for the fact that it would carry this opinion to too great length. This court is unanimously of the opinion that the issue of discovered peril was not in this case, and therefore appellant's assignment of error challenging the action of the court in submitting that issue, and the finding of the jury upon that issue, as being unsupported by the evidence, are sustained.

[5] Over objection of appellant the trial court submitted as an issue for the jury's determination this issue:

"Was or was not the interurban car in question, under the circumstances, equipped with a whistle or other device that would have emitted or carried sufficient sound to properly warn people using such crossing?"

The jury answered that appellant's car was not so equipped. The action of the court in submitting this issue is made the basis of the sixth assignment of error. The contention of appellant is that there was no evidence raising such issue and that therefore the court was unauthorized to submit it for the jury's determination. We sustain the assignment.

It is true that Patella's companions in the automobile at the time of the accident testified that none of them heard the whistle on appellant's car, but none of them testified positively that the whistle was not blown, nor did any of them undertake to state any fact from which the jury might have reasonably inferred that the whistle used on the car was insufficient to properly warn people using the crossing. On the other hand it was shown by the positive testimony of Mrs. Ainsworth and Mrs. Cunningham which was introduced by appellees that this whistle on appellant's car was capable of being heard, under ordinary conditions of weather for a mile or more and, as said by one of them, the whistle on this car was considered a clock, the car making its trips every hour, and thereby afforded to the witness a fairly accurate timepiece. Both of these witnesses, Mrs. Cunningham and Mrs. Ainsworth, lived several blocks from appellant's track in the town of Park Place, and on the very occasion in question, as the car was approaching the crossing from Galveston and while still some 500 or 600 yards south of where the accident occurred this whistle was distinctly heard. It may be true, as one of the appellees' witnesses said, that the whistle was not as strong as that of a steam whistle on a locomotive engine, and yet it would not follow from that fact that this whistle was insufficient in volume or sound to apprise persons using crossings over the interurban track of the approach of appellant's car. To require interurban cars to be equipped with

such powerful whistles and bells as are usually used upon locomotive engines on railroads would perhaps constitute a source of great annoyance on many occasions. For instance, an interurban car running through the popular streets of the city of Houston and city of Galveston with a whistle shrieking like that on an ordinary locomotive engine would hardly be expected, and perhaps not tolerated, by the people of the city, and we think that because this whistle on appellant's interurban did not have the volume or carry as far as that on a locomotive engine ought to be considered no evidence that appellant's whistle on this car was insufficient for the purpose of giving warning to persons at a crossing. Of course, we would not reverse the case because of the submission of that issue, since the whole case was submitted upon special issues, but upon another trial, if the evidence as to the sufficiency of the whistle should be the same, or practically so, the court should not submit that issue to the jury.

The seventh assignment points out no prejudicial error, and it is overruled.

The eighth assignment complains of the action of the court in submitting to the jury the issue of discovered peril, and from what we have said above it follows that the assignment must be sustained, because no such issue was in the case.

The ninth assignment complains of the form of the issue of discovered peril, as submitted to the jury. It is unnecessary to discuss that matter, because the issue of discovered peril could not have properly gone to the jury in any form.

[6] There was no error in the submission of issue No. 11, which is made the basis of appellant's tenth assignment. Appellant's counsel are mistaken in what seems to be the view that issue No. 11 involved the issue of discovered peril. Without discussing that matter, owing to the length of this opinion, we simply overrule the assignment, because the issue there submitted was properly pleaded, and there was evidence in support thereof.

The eleventh assignment of error, which relates to the same matter, is overruled for the same reason.

[7] The twelfth assignment of error complains of the action of the trial court in admitting evidence, over the objection of appellant, that there was not maintained at the crossing in question a watchman or some character of an automatic crossing warning or device at the crossing where the accident happened. It is contended by appellant in this connection that there was no evidence showing that the crossing where the accident occurred was extrahazardous or extradangerous, and that therefore no negligence could be predicated upon the failure of appellant to keep a watchman or other auto-

matic device for warning persons at that crossing. It seems to be settled by the authorities that railroad companies and street car companies can only be held negligent for failure to keep a watchman or maintain other warning devices at crossings where the circumstances surrounding the same are such as to make such crossing extrahazardous or extradangerous. We see nothing in the evidence in this record from which it could be reasonably concluded that the crossing where the accident in question occurred was extrahazardous or extradangerous. It is true, as claimed by appellees, that the little town of Park Place was incorporated, but the proof also shows that there were only about 100 families in the town, and as we see the evidence in this record, there is practically nothing at or near the crossing in question that could be said to constitute any considerable obstruction to the view of approaching cars. *M., K. & T. Ry. Co. v. Magee*, 92 Tex. 620, 50 S. W. 1013. Upon another trial, the matters here complained of should be obviated.

The thirteenth assignment challenges the verdict as being excessive. It is unnecessary and perhaps would be improper to pass upon this assignment, since the case must be reversed for other reasons.

The fourteenth assignment complains of the conduct of the jury in the manner in which they arrived at their verdict. It is unnecessary to determine the matter, because it will not probably occur upon another trial.

By the fifteenth assignment it is contended that the judgment should be set aside because three of the jurors in the case were alien enemies, and were not citizens of the United States, etc., and that these facts were unknown to and could not have been known, etc., by appellant at the time they were taken upon the jury. This matter will probably not occur upon another trial, and it is unnecessary to pass upon it.

[8] We now return to the second, third, and fourth assignments of error, which relate to the refusal of the trial court to give to the jury three special charges requested by appellant, designed to guide the jury in determining the issue of discovered peril, which the court had submitted over appellant's objection. The substance of the three charges was practically the same. They told the jury, in effect, that before they could determine the issue of discovered peril in favor of the plaintiffs the jury must find from the evidence that appellant's motorman actually discovered Patella in a situation of peril and realized his peril, and that the motorman actually knew and realized that Patella would go on the crossing ahead of the approaching car and be injured, before any duty would arise on the part of the motorman to stop the interurban or check its speed. Such charge did not announce a cor-

rect principle of law relative to the doctrine of discovered peril. Had the evidence been sufficient to raise such issue, it would have been proper to have instructed the jury that if the motorman actually knew that Patella was in danger, that is to say, that the motorman actually knew that Patella was unaware of the approach of the motorcar to the crossing, and that the motorman realized, under all the circumstances then attending, that Patella would probably go upon the crossing and a collision take place, and that the motorman, after having such knowledge and so realizing, could have prevented the collision, by use of means then at hand, consistent with the safety of the interurban car and its passengers, and failed to do so, then the jury would find for the plaintiffs on the issue of discovered peril, but, unless they so found the facts to be, to find for defendant on that issue. *Railway Co. v. O'Donnell*, 99 Tex. 636, 92 S. W. 409; *Railway Co. v. Munn*, 46 Tex. Civ. App. 276, 102 S. W. 442; *Railway Co. v. Finn*, 101 Tex. 511, 109 S. W. 918; *Galveston Electric Co. v. Antonini*, 152 S. W. 845.

We have said this much relative to the refused charges because it may be that the evidence on another trial will be such as to authorize the submission of the issue. Nor would we be understood to mean that the issue of discovered peril may not be raised and sustained by circumstances when sufficiently strong.

Because we are thoroughly convinced that the fifth assignment already discussed points out error which was highly prejudicial to appellant the judgment will be reversed and the cause remanded; and it is so ordered.

**GALVESTON, H. & S. A. RY. CO. et al. v.
PRICE. (No. 6178.)**

(Court of Civil Appeals of Texas. Austin.
March 17, 1920. On Motion for Re-
hearing, May 12, 1920.)

1. Railroads §350(13)—Contributory negligence ordinarily question for jury.

Ordinarily, where a person is injured on a road crossing by a railroad train, the question of contributory negligence is one for the jury.

2. Railroads §350(16)—Contributory negligence in failing to look and listen question for jury.

The mere failure to look and listen before entering on a railroad track at a public crossing is not negligence as a matter of law; but whether, under the circumstances, a reasonably prudent man would have so acted is for the jury.

3. Appeal and error §999(3)—Jury finding against contributory negligence not disturbed, if reasonable minds can differ.

Unless the appellate court can say, from all the undisputed facts and circumstances of the case, that no reasonable mind can draw any conclusion except that plaintiff was negligent in crossing a railroad track without listening or looking, the jury's finding that such act was not negligent will not be disturbed.

4. Railroads §348(10)—Jury may find freedom from negligence in reliance on signal before starting engine.

While as a general rule reliance on due care by the railroad company's servant does not excuse negligence by a person crossing the track, the jury may find absence of negligence, where the pedestrian saw a train standing near the crossing, and relied on notice of starting the train by ringing a bell or blowing the whistle.

5. Negligence §135—Jury can affirm facts negating contributory negligence, whose existence is not excluded by evidence.

Where there were any facts or circumstances excluding contributory negligence, the existence of which was not excluded by the testimony, the jury may be justified in indulging the supposition that such facts did exist.

6. Railroads §352—Special findings held not to show contributory negligence.

Special findings that a train was moving when deceased stepped on the track at a crossing without stating whether the track referred to was the one on which the train was, or another, and that deceased entered the track from a safe place, do not entitle the railroad company to judgment, notwithstanding a finding that deceased was not contributorily negligent.

7. Death §99(4)—\$4,000 for death of husband held not excessive.

A verdict awarding \$4,000 for the death of plaintiff's husband is not so excessive that a remittitur will be ordered to prevent reversal, since every husband has for his wife a pecuniary value beyond the amount of his earnings, which value can be assessed by the jury by the exercise of their best judgment.

8. Trial §350(3)—Special issue as to earnings properly refused as evidentiary.

In an action for death of plaintiff's husband, a special issue as to the earning capacity of deceased was properly refused, since it was only as to an evidentiary fact.

On Motion for Rehearing.

9. Railroads §350(16)—Contributory negligence of pedestrian held question for jury.

In an action for the death of a pedestrian at a railroad crossing, contributory negligence held a question for the jury, notwithstanding evidence that he stepped on the track directly in front of the moving train without looking.

Appeal from District Court, Caldwell County; M. C. Jeffrey, Judge.

Action by M. S. Price against the Galveston, Harrisburg & San Antonio Railway Company and others. Judgment for plaintiff, and defendants appeal. Affirmed, and motion for rehearing overruled.

Page & Jones, of Bastrop, M. O. Flowers, of Lockhart, and Baker, Botts, Parker & Garwood, of Houston, for appellants.

Nye H. Clark and E. B. Coopwood, both of Lockhart, for appellee.

Findings of Fact.

JENKINS, J. Appellee brought this suit to recover damages on account of the death of her husband, who was run over and killed by the cars of appellant, and which was alleged to have occurred by reason of the negligence of appellant. The case was submitted upon the following special issues:

"1. Was the said W. T. Price struck by defendant's cars on a public street crossing?" To which the jury answered, "Yes."

"2. Was the bell ringing as the engine and cars approached the said street crossing?" To which the jury answered, "No."

"3. Were the parties in charge of said train of cars guilty of negligence in running said cars over and killing the said W. T. Price?" To which the jury answered, "Yes."

"4. Did the parties in charge of said train keep a lookout ahead of said train, in passing over the public street crossing where it is alleged said W. T. Price was killed, to see that no one was on said crossing and in danger of being injured by said train?" To which the jury answered, "No."

"5. If the parties in charge of said train had kept a lookout in front of said train in crossing said street crossing, could they have discovered the danger of said W. T. Price, by the exercise of ordinary care as that term has been defined, in time to have prevented killing him?" To which the jury answered, "Yes."

"6. Was there any obstruction to prevent deceased from seeing the engine and coal car ahead of it, when he approached the track from the north?" To which the jury answered, "No."

"7. Did deceased, W. T. Price, stop, look, and listen for a train of cars before entering upon defendant's track?" To which the jury answered, "No."

"8. Was the deceased, W. T. Price, guilty of contributory negligence, as that term has been defined?" To which the jury answered, "No."

"9. Did the defendants and their employees use and exercise ordinary care, as that term is herein defined, to prevent injury to persons who might be passing over said street crossing, as they were approaching said crossing?" To which the jury answered, "No."

"10. Was there a brakeman or brakemen on the west end, on the south side of the car that struck said W. T. Price, and at the time the said Price was so struck?" To which the jury answered, "No."

"11. What sum of money, if paid now, would fairly compensate the plaintiff for the pecuniary loss, if any, sustained by her by reason of the death of her husband?" To which the jury answered, "\$4,000."

At the request of appellant, the court gave the following special charge:

"Gentlemen of the Jury: You are charged that if you believe from the evidence that said W. T. Price, when he was struck by said car, was west of the street crossing, then he was a trespasser on the property of defendant, and the trainmen operating said train owed said W. T. Price no duty to exercise ordinary care to prevent his injury, and if you so find you will return a verdict for the defendants."

Also, at the request of appellant, the court submitted the following special issues:

"1. Was said coal car and engine moving at the time said W. T. Price entered upon the track of defendant, and, if so, did said Price step immediately in front of said car and engine?" To which the jury answered, "Yes."

"2. Was the bell ringing just prior to the time of the accident, and just before the deceased entered upon said track?" To which the jury answered, "No."

"3. Was said train and engine stationary on said street crossing, and, if so, did they move forward just prior to said accident?" To which the jury answered, "No."

"4. Was the deceased, W. T. Price, struck by the car in front of the engine, at a point on the west of the gravel walk along the public street?" To which the jury answered, "No."

"5. Did deceased, W. T. Price, enter upon defendant's track from a safe place?" To which the jury answered, "Yes."

The evidence sustains all of the above findings by the jury. The deceased was run over and killed while crossing the principal street in the town of Caldwell, in the afternoon on a Saturday, and at a time when there was a large number of people in said town. The street runs north and south. At the place where it crosses the railroad, there are three tracks; the main track being in the center, the team track about 15 feet to the north, and the house track about the same distance to the south. The deceased was on his way to his home from the business portion of the town. He was seen by the witness Mrs. Palmer, who was crossing the street from the south side. Whether this witness saw the deceased as he stepped upon the main track, or as he stepped upon the team track, is somewhat uncertain. She states that at the time she saw him he appeared to be reading a paper; that he stepped across the north rail of the main track at a time when the coal car, which was being pushed across said street from the south, was within 2 feet of it; that she hallooed to him; and that he looked up, and as he did so was struck by the car. This is the only witness who saw the accident, except the witness Davis, who saw him as he was struck by the train.

Opinion.

The undisputed evidence in this case shows that the appellant was guilty of negligence, and that such negligence was the proximate

cause of the death of W. T. Price, husband of appellee. The controverted issue of fact determinative of this case is: Was the deceased guilty of negligence in entering upon the track of appellant?

[1] It has been held in some cases that a party who was injured upon a railroad track was guilty of negligence, as a matter of law, in going upon such track. In such cases it is the duty of the trial court to instruct a verdict for the defendant, and, failing to do so, if the plaintiff recovers judgment, it is the duty of the appellate court to reverse the cause, and render judgment for the appellant. *Railway Co. v. Shivers*, 48 Tex. Civ. App. 112, 106 S. W. 894; *Railway Co. v. Kutac*, 72 Tex. 651, 11 S. W. 127; *Sanches v. Railway Co.*, 88 Tex. 117, 30 S. W. 431; *Schaff v. Combs*, 194 S. W. 1160; *Railway Co. v. Abendroth*, 55 S. W. 1122.

Ordinarily, however, the question of contributory negligence, where one is injured on a road crossing by reason of being run over by a railroad train, is a question for the determination of the jury. *Trochta v. Railway Co.*, 218 S. W. 1038, opinion by the Supreme Court not yet [officially] published; *Railway Co. v. Tinon*, 117 S. W. 936; *Railway v. Hilgartner*, 149 S. W. 1091; *Railway v. Cardena*, 22 Tex. Civ. App. 300, 54 S. W. 313; *Railway v. Bowles*, 32 Tex. Civ. App. 118, 72 S. W. 451; *Railway v. Pennington*, 166 S. W. 464; *Railway v. Walker*, 161 S. W. 961; *Railway v. Linney*, 163 S. W. 1035; *Railway v. Winton*, 27 Tex. Civ. App. 503, 66 S. W. 483; *Railway v. Tirres*, 33 Tex. Civ. App. 362, 76 S. W. 806; *Railway v. Anderson*, 70 Tex. 244, 13 S. W. 196; *Elliott on Railways*, § 1163.

[2, 3] These authorities establish the doctrine that the mere failure to look and listen, before entering upon a railroad track at a public crossing, does not establish negligence as a matter of law, and that such act is not negligence, if under the facts and circumstances of the particular case a reasonably prudent man would have so acted; and this is a fact to be determined by the jury. Unless the court can say, from all of the undisputed facts and circumstances of the case, that no reasonable mind can draw any conclusion other than that the plaintiff was guilty of negligence in entering upon a railroad track without listening or looking, the finding of the jury that such act was not negligence will not be disturbed.

Appellant contends that the finding of the jury herein, sustained by uncontroverted evidence, showed that the deceased, Price, was guilty of negligence as a matter of law, and that for this reason the court erred in overruling its motion to enter judgment in its favor upon the findings of the jury in answer to questions Nos. 6 and 7, and to special issues Nos. 1 and 5.

By reference to questions Nos. 6 and 7, it will be seen that the jury found that the de-

ceased did not look and listen before entering upon defendant's track, and that, had he done so, there was nothing to have prevented him from seeing the engine and coal car which ran over and killed him. A finding of the jury that the deceased did not look and listen for the train must be taken to mean that he did not do so after he was seen by the witness Mrs. Palmer, as they could not have known from the testimony whether he did so or not prior to that time. If Mrs. Palmer saw him as he entered upon the team track, she saw him in a position in which, if he had looked, he could have seen the coal car and engine on the east side of the street. It is not clear from the evidence, nor the findings of the jury, that the coal was moving at this time; but, even if it had been, there is nothing to show that the deceased did not look before reaching the team track, and, if he did so, he might have seen the car and engine standing still, with nothing to indicate that they would cross the street in front of him.

[4] While it is true that, if a party injured is guilty of negligence as a proximate cause of the injury, he will not be excused on account of the negligence of the railway company, and that he cannot, as a general rule, rely upon the fact that the railway company's servants and employees will not be negligent, still we think that if a party approach a railroad track on a public street, and a car is standing at or near the edge of the street, he may take it for granted that the car will not be pushed across the street, or, if so, that notice of same will be given by ringing a bell or blowing a whistle, and that if a party, in reliance upon such fact, should continue his journey without looking further, and the train should run over him, he would not be guilty of negligence—at least, that a jury might find absence of negligence under such circumstances.

[5, 6] We do not know upon what the jury based their answer that the defendant was not guilty of contributory negligence; but, if there were any facts or circumstances which might have existed, the existence of which was not excluded by the testimony, the jury might have been justified in indulging the supposition that such facts did exist. We cannot tell whether, by answer to special issue No. 1, the jury meant to say that the coal car and engine were moving at the time the deceased entered upon the track of defendant upon which he was killed, or at the time he entered upon the team track. If the deceased was not guilty of negligence in going upon the track of appellant, under the circumstances of this case, the mere fact that he stepped immediately in front of appellant's car would not render him guilty of such negligence. The finding of the jury that deceased entered defendant's track from a

safe place is of no value in this case. Of course, so long as he was not upon appellant's track, he was in a safe place.

Perhaps the judgment in favor of appellee could be sustained upon the ground that the testimony in this case does not show that the act of the deceased in stepping upon the track of appellant was the proximate cause of his death. The evidence of the witness Jim Davis shows that when the car struck the deceased it merely bumped him over. The train at this time was moving only 3 or 4 miles an hour. The car and the engine passed over the deceased without injuring him. His clothes were caught by the cow-catcher, and he was dragged along the track some 70 feet without being injured; but at this place he was dragged over the switch frogs and was killed. Had appellant's employes been keeping a lookout, they would have seen the deceased when he was knocked over, and could have stopped the train before he was injured; so it may well be said that the failure to keep a lookout and discover the perilous situation of deceased was the real cause of his death; but for such failure he would probably not have been seriously injured. However, we rest our decision of affirmance in this case upon the ground that there were no such facts and circumstances in evidence as would prevent the jury from being the judges as to whether or not the deceased was guilty of contributory negligence under all the facts and circumstances in evidence.

[7] Appellant complains that the verdict of \$4,000, in favor of appellee, is excessive. Perhaps it is a larger verdict than we would have given, had we been the jury trying the case; but it does not follow from this that it is our duty to require a remittitur in order to prevent a reversal. In *Railway v. Lehmberg*, 75 Tex. 61, 12 S. W. 838, in which it was insisted that the verdict was excessive, the court said:

"Every parent and husband has for his wife and children a pecuniary value beyond the amount of his earnings by his labor or vocation. That value may to some, but not to every, extent be susceptible of allegation and proof; and to the extent that it can be alleged and proved it ought to be done. * * * When no amount is fixed by law, and no rule is prescribed for making the calculation, upon facts capable of exact ascertainment, it necessarily follows, we think, that the lawmaker intended that, having reference as far as practicable to conditions existing at the time of the death, juries, from their own knowledge, experience, and sense of justice, should fix and assess the proper sum. They are expected to act uninfluenced by passion, prejudice, or partiality, and to pay due regard to the ascertained facts and conditions surrounding the subject. When it appears to the court that they have disregarded these requirements, their verdict should

be set aside. On the other hand, when the court is unable to determine that these things have not been observed by the jury, and when it does not appear that the verdict is not the result of the honest endeavor of the jury to follow their own convictions, in the exercise of a power not precisely defined, we think the law intends that the jury's estimate, rather than the equally undefined one of the judges, shall prevail."

In *Railway v. Hulbert*, 177 S. W. 554, it was held that this doctrine applies where the surviving widow sues for the damages sustained by her, and the interest and rights of minor children are not involved.

[8] Appellant assigns error upon the refusal of the court to submit the following special issue:

"What was the average net earning capacity of deceased, W. T. Price, for the past three years?"

The refusal to submit this issue was proper, for the reason that the question was asked only as to an evidentiary fact, and an answer to the same would not have assisted the court in rendering judgment. The jury found appellee's damages to be \$4,000, and the court was compelled to enter judgment in accordance with the verdict. If the jury had found that the average earning capacity of deceased for the past three years was a very small amount, this would not have justified the court in not entering judgment for the \$4,000. It might have been very persuasive argument on motion for a new trial, on grounds that the verdict was excessive, but all the evidence as to this matter was before the court, and could have been considered by it, and doubtless was, on the motion for new trial on this issue.

Finding no error of record, the judgment of the trial court is affirmed.

Affirmed.

On Motion for Rehearing.

We modify our findings of fact to the extent of finding that the witness, Mrs. Palmer, saw the deceased as he entered upon the switch track, and also that she saw him step upon the main track, about 2 feet in front of the moving car, and that he did not stop and look from the time that she saw him until he was struck by the car.

[9] The evidence in this case makes a strong showing of negligence on the part of the deceased, but, in view of the recent decisions of our Supreme Court in *Trochta v. Railway Co.*, 218 S. W. 1088, and in *Kirksey v. Southern Traction Co.*, 217 S. W. 139, neither of which has been [officially] reported, we hold that the question of contributory negligence was one for the jury.

Motion overruled.

STUBBS v. MOURSUND. (No. 8165.)

(Court of Civil Appeals of Texas. Austin.
Feb. 4, 1920. Rehearing Denied
June 2, 1920.)

1. Elections \S 293(1)—Ballot with erased lead pencil marks held ambiguous, authorizing explanation by voter.

A ballot at a general election cast for district and county clerk, whereon perpendicular lead pencil lines had been drawn through all the party tickets, one of them indicating an attempted erasure, and other horizontal pencil marks had been made through the names of certain candidates, the face of the ballot was ambiguous, and permitted the voter who cast it to explain why he voted it in that condition.

2. Elections \S 190—Mutilated ballot should be counted if voter's intent can be ascertained therefrom.

There is no statutory law prohibiting a mutilated ballot from being counted, and if the intent of the voter can be ascertained by the ballot cast, in the light of surrounding circumstances, effect should be given to the ballot in accordance with such intent.

3. Elections \S 190—Ballot containing partly erased lead pencil marks held not "mutilated."

A ballot cast for district and county clerk, containing horizontal marks through names of certain candidates, and also perpendicular lead pencil marks through all the party tickets, one of which marks, indicating an attempted erasure, held not a "mutilated" ballot; "mutilated" meaning "destitute or deprived of some essential or valuable part; greatly shortened."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mutilate.]

4. Elections \S 180(7)—Pencil mark through names of candidates held to indicate intention not to vote for them.

Where a ballot cast at an election for district and county clerk bore horizontal lead pencil marks through the initials of the names of candidates for that office, such ballot held sufficiently to indicate that the voter did not intend to vote for such candidates, but did intend to vote for those whose names were not marked in any respect.

5. Officers \S 78—Statute for contesting elections does not destroy previously existing right of litigating title to office.

The statute providing for contesting elections does not destroy the right which existed before it was enacted to litigate the title to an office.

6. Elections \S 238—Where candidate legally elected special election to determine tie will not oust him.

Where a candidate for the office of county and district clerk was legally elected at a general election, a special election ordered thereafter, on the ground that the vote was a tie, held not to deprive such candidate of his right to hold the office.

Appeal from District Court, Blanco County; Geo. Calhoun, Special Judge, by exchange with Judge Stubbs, disqualified.

Proceedings for mandamus by Albert Moursund against B. J. Stubbs. Judgment for plaintiff, and defendant appeals. Affirmed.

White, Cartledge & Wilcox and Fiset & Shelley, all of Austin, for appellant.

R. E. McKie, of San Marcos, and V. B. Goar, of Johnson City, for appellee.

KEY, C. J. At the general election held in 1918, B. J. Stubbs was elected district and county clerk of Blanco county, and qualified and served as such. At the general election held November 5, 1918, he was a candidate for re-election, and Albert Moursund was a candidate for the same office. In due time after the election the commissioners' court of Blanco county canvassed the election returns, and ascertained and declared, as the result of such election, that Stubbs and Moursund had each received 841 votes, and ordered a special election for that office, to be held on December 21, 1918. That election was held, Stubbs and Moursund being the only candidates, and the result being a majority of 78 votes for Moursund. After canvassing the returns, the commissioners' court declared Moursund duly elected, and issued to him a certificate to that effect. Thereafter, and within due time, Moursund gave the bond required by statute, which was properly approved, and he also took the oath of office required by the Constitution; also, and within due time he received a commission from the Governor of Texas, reciting that he had been duly elected, etc.

After the result of the special election had been declared, Stubbs notified the commissioners' court that he considered such election illegal, and held without authority of law, and contended that he had received a majority of the votes cast in the general election on November 5, 1918, and therefore claimed the right to such office. He also took the oath of office required by the Constitution, and tendered to the commissioners' court an official bond in due form, which the court declined to receive and approve.

After receiving his certificate of election and qualifying as stated, Moursund demanded of Stubbs possession of the office rooms, furniture, record books, papers, and paraphernalia belonging to the office, which Stubbs refused to surrender; and on February 25, 1919, Moursund brought this suit against Stubbs, praying for a writ of mandamus, compelling the defendant to deliver to the plaintiff the rooms provided by the county for the use of the county and district clerk, together with all books, papers, records, archives, and paraphernalia belonging or pertaining to the office of county and district clerk of Blanco county, etc.

The defendant Stubbs filed an answer, including a general and special exception, a general and special denial, and special answer, averring that he was duly elected county and district clerk of Blanco county at the election held on the 5th of November, 1918; and therefore the commissioners' court had no authority to order the election held on the 21st day of December following, and that the same and the proceedings connected therewith were and are wholly void. The special plea referred to alleged that while the returns sent in to the commissioners' court showed that the plaintiff and defendant each received 341 votes, a mistake was made by the election officers in tabulating and preparing the returns from one of the election precincts, by which the plaintiff Moursund was allowed one vote more than he received. The plea also alleged that several persons not entitled to vote were permitted to vote for the plaintiff, Moursund, and that, after excluding such illegal votes, he (the defendant) received a majority of the legal votes cast at the election held November 5, 1918.

The plaintiff filed his supplemental petition, demurring and excepting to the defendant's cross-action upon various grounds. It also contained a general denial and other averments, tending to show that the defendant had not complied with the statute regulating contested elections; and specially denied that the defendant received a majority of the legal votes cast at the election held November 5, 1918; and averred that, if that election did not in fact result in plaintiff and defendant each receiving an equal number of the qualified votes, then that he (plaintiff) received a majority of such votes, and that ballots were counted for the defendant in that election which should not have been so counted, because they were illegal, and ballots were not counted for the plaintiff which were legal and should have been counted; and the plea sets out with particularity the alleged legal and illegal ballots referred to.

The defendant filed a supplemental answer which contained a general and several special exceptions to the plaintiff's supplemental petition and a general denial of the allegations therein.

The plaintiff filed a second supplemental petition, in which he withdrew certain allegations in his first supplemental petition, charging that Will Crossley was not a legal voter, and alleging that the averment withdrawn was made by inadvertence, and that Crossley was a qualified voter. The plaintiff also filed a trial amendment, setting up some additional facts relating to the legality of certain votes that were cast for the defendant.

The defendant filed a second supplemental answer, which contained exceptions to the plaintiff's trial amendment, and a general denial of the allegations contained therein, and a special denial, and several averments

relating to the right of certain persons to vote.

The plaintiff filed a second trial amendment, charging that certain other persons, who were not entitled to vote, were permitted to vote for the defendant; and alleging certain additional facts relating to the validity of certain votes, already put in issue by the pleadings.

There was a non-jury trial, in which the court overruled the various demurrers and exceptions presented by each party, and, after hearing and considering the case upon its merits, rendered judgment for the plaintiff for the relief prayed for, and the defendant has appealed.

The trial court filed findings of fact, which, in so far as they are challenged by appellant, this court holds are sustained by testimony.

Neither time nor reasonable regulation concerning the length of opinions will permit review and discussion of all the testimony bearing on the issues referred to. However, two of the original ballots have been sent up for the inspection of this court, and some observations concerning them are deemed appropriate.

Ballot No. 29 was voted by Edwin Bindsell, a qualified voter. It consists of five perpendicular columns, the first headed "Democratic Party"; the second, "Republican Party"; the third, "Socialist Party"; the fourth, "Independent Party"; and the fifth having no heading. The Democratic column had the names on it of Democratic nominees, no names appearing thereon for county and precinct offices, presumably because that party made no nominations for such offices. The Republican column was substantially the same, while the Socialist column had names of candidates for most, but not all, state offices, but none for county offices. The Independent column had no names on it for any office above representative in the Legislature, but had the name of one candidate for county judge; no candidate for county attorney; Albert Moursund and B. J. Stubbs, for county and district clerk; J. R. Johnson and A. J. Wagner, candidates for sheriff and tax collector; G. A. Cammack, candidate for tax assessor; J. E. Page, W. E. Stevenson, and J. C. Goar, candidates for county treasurer; and Max H. Lungwitz, candidate for county surveyor. The other column, which had no heading, had printed on it, as had all the other columns, the title of the different offices, but no names were printed in that column. The ballot shows on its face that perpendicular pencil lines were run through all the columns, and that such line on the Independent column extended through and beyond the names of both Albert Moursund and B. J. Stubbs, on through the names of both candidates for sheriff, of the candidate for tax assessor, the three candidates for county treasurer, and the candidate for county

surveyor. However, an inspection of it indicates that an unsuccessful effort had been made to erase that perpendicular line, which was made with a pencil, and the same indication appears with reference to the perpendicular line which was made across the column which had no heading and no names upon it. The face of the ballot also shows quite plainly that horizontal pencil marks had been made through the name of B. J. Stubbs, candidate for county and district clerk; A. J. Wagner, candidate for sheriff and tax collector; and J. E. Page and J. C. Goar, candidates for county treasurer; while the names of Albert Moursund, candidate for county and district clerk, J. R. Johnson, candidate for sheriff and tax collector, and W. E. Stevenson, candidate for county treasurer, were not marked otherwise than by the perpendicular line, which passed through the names of all of the candidates in that column.

[1] Such being its condition, the trial court held, and we think correctly, that the face of the ballot was ambiguous, and permitted the voter who cast the same to explain why he voted it in that condition. He testified that the perpendicular pencil mark through the column headed "Independent Party" was inadvertently made, and that he undertook to erase it, but, the eraser being defective, he was unable to accomplish that result; whereupon he ran pencil lines horizontally through the names of the candidates he did not desire to vote for, and left the names of the candidates for whom he intended to vote without any such marks upon them.

The trial court held that appellee, Moursund, was entitled to have the ballot referred to counted for him, and we sustain that ruling.

In *Davis v. State*, 75 Tex. 430, 12 S. W. 957, the Supreme Court held that a ballot should be construed as any other written instrument, and, in the event the intention of the voter is clear, extrinsic evidence should not be admitted; but, if from the face of the ballot, the intention be doubtful, then evidence of the circumstances under which it was made out, if calculated to throw light upon the intention, should be admitted.

Counsel for appellant present the contention that the ballot referred to shows upon its face that it had been mutilated; and, therefore, inasmuch as the statute provides that when a ballot has been mutilated the voter may return the same to the election officer and receive another ballot, the ballot under consideration should not be counted for either party.

[2] There is no statutory law which prohibits a mutilated ballot from being counted, and the general trend of decisions in this respect is to hold that, if the intent of the voter can be ascertained by the ballot cast, in the light of the surrounding circumstances,

effect should be given to the ballot in accordance with such intent.

In *Hanscom v. State*, 10 Tex. Civ. App. 638, 31 S. W. 547, Judge Williams, speaking for the Galveston Court of Appeals, said:

"It is a mistake to assume that it works any such radical change in the election laws of this state as has been wrought in other states by the adoption of a new and complete system of election laws modeled after that of Australia. Decisions of the courts of those states enforcing the minute and rigid regulations of their statutes have often very little application here, and are apt to be misleading rather than otherwise."

However, we are not prepared to hold that the ballot in question was a mutilated ballot within the purview of the statute. The Standard Dictionary defines the word "mutilated" to mean, "destitute or deprived of some essential or valuable part; greatly shortened." It defines the word "mutilate," "to cut off or deprive of a limb or essential part." The Century Dictionary gives substantially the same definitions.

[3] The ballot under consideration is complete in all respects, and is not mutilated, unless it be that the perpendicular line running through the names of all candidates, and the horizontal marks placed through the names of appellant, Stubbs, and several other candidates, constitute mutilation, and we hold that they do not.

In the case last cited the court said:

"Mere marks are not among the things which are declared to avoid the ballot, unless they are 'stamp marks.'"

There is no law in this state declaring void and prohibiting the counting of a ballot which has been inadvertently or improperly marked, and if such ballot, either upon its face or when construed in connection with surrounding circumstances, indicates, with reasonable certainty, how the elector intended to vote, it should be so construed as to give effect to such intention. Hence we hold that the trial court ruled correctly in counting the ballot in question in favor of appellee.

[4] Original ballot No. 130 is in this condition. It is printed in the same form as the one just considered, and has plain pencil marks running horizontally through the initials of B. J. Stubbs, candidate for county and district clerk; A. J. Wagner, candidate for sheriff and tax collector; W. E. Stevenson and J. C. Goar, candidates for county treasurer, leaving unmarked the names of Albert Moursund, candidate for county and district clerk; J. R. Johnson, candidate for sheriff and tax collector; and J. E. Page, candidate for county treasurer. The names of the Republican and Socialist candidates for governor, lieutenant governor, and comptroller were so marked as to indicate that the voter did not intend to vote for either of those can-

didates; but there are no other marks anywhere on the ballot, except those referred to as "horizontal marks" through the initials of appellant, Stubbs, and some other candidates for county offices. As both the Democratic and Republican columns had candidates' names printed on them down to and including candidates for Congress, except there were no Republican candidates for the Court of Civil Appeals and for district attorney, and as the voter did not attempt to erase any of the names in the Republican column below that of comptroller, and as the Democratic nominees were the only candidates for the Court of Civil Appeals and district attorney, it is quite evident that with the exception of United States senator, governor, lieutenant governor, and comptroller, the voter did not intend to vote except for county offices, unless it be that he intended to vote for the Democratic candidates for the Court of Civil Appeals and district attorney, whose names were printed in the Democratic column, and who had no opposition; and the question is, did the horizontal marks, which he made through the initials of certain candidates, sufficiently indicate that he did not intend to vote for such candidates, but did intend to vote for those whose names were not marked in any respect? The trial court held that it did, and we are not prepared to say that that holding was erroneous.

The law requires the voter to run a mark through the names of the candidates for whom he does not desire to vote, thereby leaving but one name unmarked to indicate the candidate for whom he intends to vote. It would be construing the law too strictly to hold that the mark referred to must extend all the way through the entire name, in order to indicate that the voter did not intend to vote for that person. To illustrate: Suppose in this case the horizontal mark, which extended through the initials "B. J.," had extended on through half, or even through the first letter, of the word "Stubbs," would any one deny that such mark failed to indicate that the voter did not intend to cast his ballot for Mr. Stubbs? Or suppose the initials had been left unmarked, and the pencil mark run through the name "Stubbs" could it reasonably be contended that such mark did not show, with sufficient certainty, that the elector intended to vote for Albert Moursund, and not for B. J. Stubbs? And the fact that the voter marked the names of three other candidates in the same manner tends strongly to show that he intended to vote for candidates for three offices, which were county and district clerk, sheriff, and treasurer; and when he marked names of candidates for all those offices, and left unmarked one name for each office, we think it appears, with sufficient certainty, that he intended to vote for those whose names were in no wise marked.

As pertinent to this ballot and the question

under consideration, we quote as follows from the opinion of the Supreme Court, in *Davis v. State*, 75 Tex. 430, 12 S. W. 960:

"It is shown by the bill of exceptions that the court, over the objections of respondent, counted the vote of one George Rector for relator. The ground of the objection was that both names appeared upon the ballot, and that neither appeared to have been erased. The original ballot is in the record, and upon it, just above the name of Davis, which is above that of Wren, there is found a broad pencil line, obliterating a part of the first initial of the former's name, and barely touching the second. In discussing the two original ballots sent up with the record, we have spoken of erasures. We mean constructive erasures—that is to say, such lines drawn across the names as clearly show an intention to erase them. In both ballots the lines are made with a pencil, and are so faint that the printing beneath is perfectly legible. None of the names are actually erased. The line, however, is usually drawn through the name from the beginning to the end. In this case there is a broad line drawn just above the name of Davis, and very close to it, which it is to be presumed was drawn for some purpose. It does touch two letters of the name, and erases in part the first—that is to say, the distinctive legal initial. 'It is not necessary to obliterate the name entirely.' *McCrary on Elec.* § 411.

"We think, in the absence of proof explaining the ambiguity of the ballot, the court did not err in treating it as if Davis' name was erased, and in counting it for relator."

Appellant's challenges of most of the other votes complained of are based upon the ground that persons who cast such votes were not at that time residents of Blanco county, and therefore were not entitled to vote. We have carefully considered the testimony, which, in some respects, is conflicting, and have reached the conclusion that the findings of the trial court, in the respects complained of by appellant, are sustained by evidence.

[5, 6] Appellee has presented numerous cross-assignments, some relating to the action of the trial court in overruling demurrers and exceptions, and others complaining of the findings of fact relating to alleged illegality of votes cast for appellant, which questions it is not necessary for this court to decide, as the conclusions already announced must lead to an affirmance of the judgment in appellee's favor. However, as it is earnestly insisted in behalf of appellee that the trial court erred in not sustaining appellee's exceptions to appellant's cross-action, and as numerous authorities in other jurisdictions are cited in support of that contention, we deem it proper to say that we are inclined to agree with appellant's contention, which, in substance, is that notwithstanding the fact that we have a statute which provides for contesting elections, that statute does not destroy the right which existed before it was enacted to litigate the

title to an office; and if appellant was legally elected at the general election held November 5, 1918, it seems to us that the special election ordered thereafter, together with the result of such election, should not be held to deprive him of his right to hold the office. The statute regulating contested elections did not afford him an adequate remedy. As the commissioners' court declared no one was elected at the November election, he had no right and could not institute a contest, and he does not claim to have had any right to contest the subsequent election, if it was lawfully held. Such being the case, under our liberal system of procedure we feel inclined to hold that he had the right in this case to resist the plaintiff's claim, upon the ground that he was legally elected at the general election held in November, 1918.

Appellee's other cross-assignments, relating to the legality of certain votes counted for appellant have not been passed upon, because the judgment in appellee's favor can be affirmed without doing so.

All of the questions presented in appellant's brief have been considered, and are decided against him.

In conclusion, we desire to commend counsel for both appellant and appellee for the assistance rendered this court by the helpful briefs and arguments filed by them.

Our conclusion is that the judgment should be affirmed; and it is so ordered.

MAGEE v. MISSOURI, K. & T. RY. OF TEXAS. (No. 6498.)

(Court of Civil Appeals of Texas. San Antonio. May 19, 1920.)

Carriers \S 328(2)—Railroad not liable for injury to one attempting to board train on side on which passengers were not being received.

Railroad company held not liable for loss of leg, through sudden movement of its train, of one who claimed he came to its depot to meet a brother coming in on a train, where the injured man was hurt by an outgoing train while seeking to enter it, not from the side where passengers were boarding it, where there was a platform, but from the other side, where there was no platform, no lights, and the doors to the train were closed.

Appeal from District Court, Bexar County; J. T. Sluder, Judge.

Action by Wirt Magee against the Missouri, Kansas & Texas Railway of Texas. From a judgment for defendant, plaintiff appeals. Affirmed.

J. D. Childs, of San Antonio, for appellant.

F. C. Davis, of San Antonio, C. C. Huff, of Dallas, and Marshall Butz, of San Antonio, for appellee.

FLY, C. J. Appellant instituted this suit against appellee for damages arising from the loss of a leg through the negligence of appellee in suddenly moving a train, without notice or signal, into which he was endeavoring to enter. After hearing the evidence the court instructed a verdict for appellee, which was accordingly returned by the jury, and judgment rendered thereon.

There is but one assignment which necessitates a review of all the testimony, at least that could be considered favorable to the claim of appellant. The only important witness for appellant was appellant himself, the propriety or impropriety of the peremptory instruction resting on whether his testimony could possibly form the basis for a verdict in his favor. He was corroborated in the assertion that he was a drafted soldier; that he was away from camp on a pass; and that in some way he was so injured, in the yard of appellee, on the night of December 9, 1917, that he lost one of his legs.

He stated that he went to the passenger depot of appellee between 8 and 9 o'clock on the night of December 9, 1917, to meet a sick brother, who had written him a letter. The letter was not shown, nor did the sick brother testify, although it transpired that the brother was not on the train and did not come to San Antonio for two months after the accident. He stated that he went to the depot to assist the sick brother off the train with his baggage, and went to the window and asked the agent if there was a train in, and he said, "Yes." He then went out the door of the station and saw three or four trains standing there and—

"a fellow standing there, looked to be a railroad man, and I asked him if the train was in; I asked him if he was in charge of the railroad; I told him I had a sick brother on there and I wanted to help him off with his baggage and he just says, 'Go ahead.' I asked him if it was a Katy train and I went on out. This fellow I saw standing there was telling the railroad people to do this and that around there."

He further testified:

"Yes; I asked him which was the Katy train. And I went on down the side of the train looking in the windows there, and I saw a fellow that I knew, Evans Wilkinson, a friend of mine and my brother's, and I thought by seeing him on there that maybe my brother was on there too, with him. So I started to get on the train, and just as I started to get on, got my foot up there, the train kind of moved up quick and I got unbalanced some way up there, which throwed me, and I rolled and my foot somehow got under the wheel there—I don't know just exactly how it was—and just cut it off right there. The train was standing still when I went to step on it. Just as I started to get up on the step—I had my foot up there—the train moved up and throwed me. I rolled

and got my foot under the train. The train was a passenger train. My purpose in going on that train was to help my brother off and see Evans Wilkinson. I wanted to see Evans Wilkinson about some business. I wanted to see him; also I wanted to see both of them. * * * When I stepped up on the steps there was nothing occurred to indicate or warn me that the train was going to move. Nothing like a bell or whistle or the conductor or anything like that."

Appellant swore that there was no one at or near the train when he undertook to board it, and that there were no platforms. He said "a fellow" pointed out the train to him. He swore that there were no platforms "no steps, no box, or anything to get in on," and he did not know whether he was on the east or west side of the train. He also testified that he saw no one on the side of the train on which he tried to climb. When examined by the court, appellant testified:

"Yes, sir; I have been down there since the accident and I saw these platforms there where passengers get on. There are platforms there between the tracks where people get on and off. There wasn't any platform on the side of the train I attempted to get on. It wasn't up against the platform. I don't know whether the other side of the train was up against the platform or not."

He also said there were no platforms, but cement sidewalks.

The uncontradicted testimony of appellee showed that appellant was hurt by an outgoing train that left about 9 o'clock p. m. Passengers boarded the train on the west side, where there was a platform, but there was no platform on the east side. San Antonio is a terminal for appellee, and the trains go no further than the place in the yard near the depot where appellant was hurt. All trains come in from and go out in a southerly direction. The train which hurt appellant was the first section of No. 26, the "Katy Flier." An employé of appellee swore, and he was not contradicted, that when the first section moved out he was standing on the platform west of the train, and he heard a groan and scream on the east side and as soon as the train passed he crossed over the track and he and two soldiers picked appellant up, carried him across the track, and laid him on the platform. There were a large number of people on the platform at that time. There was no platform nor lights on the east side of the train and the doors were closed. Others testified to seeing blood on the east side of the track, where passengers were never received. It was made of gravel and rocks between the tracks, and was not for ingress or egress.

Appellant did not know on which side of the train he sought to enter, but he knew there were no platforms and steps there. Although a passenger train was preparing to leave, he swore that there was not a human

being on the side of the train where he was hurt. He said: "I didn't see anybody there at this place where I attempted to get on—passengers or anybody else." He was looking for a train discharging passengers, yet no one was there, and to convince him that he was not at a train delivering passengers he says he saw a friend in one of the cars, who it seems was not there and consequently could not have disembarked. The man he saw must have left on the train. If he received a letter from his sick brother, it was not produced, and the brother not only did not come at that time but did not testify at the trial and no effort was made to obtain his deposition, although his residence in Texas was well known to appellant. No human being corroborated a single statement made by him except that he was hurt and had a pass on his person. No letter was found in his pocket. Wilkinson was not in San Antonio that night, nor was his brother there. No one else has intimated that the brother was sick when the accident occurred. There was no evidence as to when any train came in on the night in question. If appellant did ask any one about the train that had come in, he did not indicate who it was. He did not swear that "the fellow" wore any uniform or badge, nor how he knew the men he was ordering around were railroad men. His testimony alone shows that he could not have been on the side of the train where people entered or left the cars, and in fact he stated he saw no one entering or leaving. The only reasonable way to account for the absence of every one on the side of the train where he was hurt was that he had for some purpose of his own gone on the dark side, where there was no platform and where he was a trespasser.

If he was a licensee on the premises to help his brother off a train that had just come, that did not license him to endeavor to enter an outgoing train; and appellee would not be liable unless some agent of the company had induced him to attempt to board it, or knew of his position of danger and with such knowledge gave no notice of the intention to move. All the facts go to show that no one showed him the outgoing train and told him that it was the one which had just come in, and all the facts tend to show that he was not trying to board the train where any one would expect him to make such endeavor.

Appellant does not pretend that any one, whether connected with the train or not, knew he was trying to get on the train that was about to leave for the north. He made it impossible for any one to have seen him, for he reiterated that there was no one on that side of the train. It is utterly incredible that any one told him that train had just come in, and any one of the most ordinary intelligence should have known that if the train had just come in persons would be getting off. No one was getting off. No one was getting on, and

consequently it is certain appellant was not on the side of the train where people got on. He was undoubtedly found on the east side of the train, where he had no right to be. Four trains were standing on the different tracks in the yard.

The movement of the train was not shown to be negligent. Every quick movement of a train is not negligent, and it was not shown that appellee knew that appellant was in a place where movement of the train would injure him. Appellant gave no description of the train by the time it was due or in any way identified it, but asked if the "Katy train" was in and was told it was. There may have been several that had come in.

The cases cited by appellant as to due notice to those who, he says, go to trains "to welcome the coming or speed the parting guest," refer to parties going at train time to depots to place relatives or friends on trains or to assist them off, and not to a person going on the side of a train where no one can see him, and where no one gets off or on. He was not licensed to go to any such place. If he had gone to the proper train, on the platform side, at the time when it arrived, to assist his brother to alight, he was a licensee, and appellee would have owed him ordinary care in his protection. But when he entered the yards and wandered off to a train going out, on the side where no one got off or on, without the knowledge of appellee, it owed him no duty. Appellee was under no obligation to provide a guide or bodyguard to prevent appellant from wandering into places where reason and common sense should have taught him he should not go.

The judgment is affirmed.

POSS v. KUHLMANN. (No. 6353.)

(Court of Civil Appeals of Texas. San Antonio. March 10, 1920. On Motion for Rehearing, June 16, 1920.)

Wills §130—Application for probate held to show a valid holographic will.

An instrument, signed and dated, and in terms: "To Mrs. Eugenia Poss auto and \$5,000," is shown by application for probate to be a valid holographic will; application alleging the instrument was wholly in the handwriting of deceased, made just before his death, and accompanied by his statement that he intended it as a gift to P., and that the auto and money described therein should be given to P. after his death, it being capable of being relieved of ambiguity by parol evidence.

Appeal from District Court, Kendall County; R. H. Burney, Judge.

Application by Mrs. Eugenia Poss to probate a will, opposed by P. Kuhlmann, admin-

istrator. Application dismissed, and appellant appeals. Reversed and remanded.

W. A. Wurzbach, of San Antonio, for appellant.

Davis & Long and H. B. Cline, all of San Antonio, and F. W. Schweppe, of Boerne, for appellee.

COBBS, J. This is an application to probate a will as the last will and testament of Wm. Kuhlmann, deceased. Appellant alleged in her application:

"That William Kuhlmann departed this life on the 18th day of December, A. D. 1918, leaving real and personal property of the estimated value of \$30,000. That said William Kuhlmann, deceased, resided at the time of his death in Kendall county, state of Texas. That on the 17th day of December, A. D. 1918, the said William Kuhlmann made the following writing, which is wholly in the handwriting of said William Kuhlmann as follows, to wit: 'Dec 17 To Mrs. Eugenia Poss auto and \$5,000 Dollars Wm. Kuhlmann 1918.' That said writing was intended by the said William Kuhlmann as his last will and testament, that he made the same about 12 hours before his death, and that a short time thereafter, and before his death, which occurred about 11:30 a. m. on December 18, 1918, he declared that he intended the same as a gift to the said Mrs. Eugenia Poss, and that the said auto and \$5,000 described in said writing should be given to the said Mrs. Eugenia Poss after his death, and that your petitioner believes, and therefore alleges, the writing to be the last will and testament of said deceased, and which is herewith filed."

Phillip Kuhlmann, as the administrator of said estate, appeared, filed exceptions to the application to probate the same as the last will and testament of said decedent, and filed an answer, contesting the same. The court, after hearing argument, sustained a general exception thereto, and, appellant refusing to amend, the same was dismissed at his cost, from which action of the court in dismissing the application appellant appealed to this court.

The ruling of the court is alleged to be erroneous, and is challenged by proper assignments presented here. This was claimed to be a will written wholly in the handwriting of the testator, as provided by our statute. The demurrer, of course, admitted the allegations of the pleader, but challenged the statement as sufficient to show a valid will. Appellee cites the case of *Adams v. Maris*, 213 S. W. 623, in support of his contention. He cites no other case, and wholly relies on it. This opinion is delivered by the Commission of Appeals, on reversing and rendering in part, and in affirming in part, the judgment of the Court of Civil Appeals of the Seventh District, reported in 166 S. W. 475.

The language of the instrument itself is

very obscure to evidence a gift or devise or when to take effect. The instrument bears date the 17th day of December, 1918, and the application to probate alleges the death as of 18th day of December, 1918. It further alleges he made the same about 12 hours before his death, and that a short time thereafter and before his death, which occurred about 11:30 a. m. on December 18, 1918, he declared that he intended the same as a gift to the said Mrs. Eugenia Poss, and that the said auto and \$5,000, described in said writing, should be given to the said Mrs. Eugenia Poss after his death. The statute prescribes the allegations necessary to be made in an application to probate a will. Article 3251; Bradshaw v. Roberts, 52 S. W. 574. And article 3271 prescribes facts which must be proven before admitting to probate. It is the duty of the court to require all facts to be drawn out upon the execution of a paper offered for probate. Hopf v. State, 72 Tex. 281, 10 S. W. 589.

It is important, in passing on the ruling of the court on the demurrers to the application as a whole, to ascertain the meaning, as far as possible, of the testator, to develop all the facts bearing on the question. Hopf v. State, supra. This is necessary to discover his intention. In Winfree v. Winfree, 139 S. W. p. 41, the court says:

"In the case of Hawes v. Foote, 64 Tex. 22, our Supreme Court says: 'Liberal allowance is made in construing wills to mere casualties or ignorance or awkwardness in the use of words in their exact sense and in the structure of sentences, for the purpose of attaining the paramount object—the real intention of the testator. The law will not allow the testator's intention to be defeated because he has not clothed his ideas in technical language.' * * * When the meaning of the words used in a will is ambiguous, the court, in order to arrive at the intention of the testator, must be put as near as may be in his environment, 'stand in his shoes, and look with his perspective through his eyes,' and to enable the court to do this parol evidence of the conditions and circumstances surrounding the parties and the execution of the instrument is always admissible. Peet v. Railway Co., 70 Tex. 527, 8 S. W. 206; Weller v. Weller, 22 Tex. Civ. App. 247, 54 S. W. 652; Clark v. Catron, 23 Tex. Civ. App. 51, 56 S. W. 100."

See Hunting v. Jones, 183 S. W. 860; Held-enheimer v. Bauman, 84 Tex. 182, 19 S. W. 382, 31 Am. St. Rep. 29.

Taking into consideration that this instrument was wholly in the handwriting of the testator, immediately preceding his death, and the further fact that on his deathbed he declared he intended it as a gift, is a strong circumstance to be taken into consideration in support of its validity. Lawson et al. v. Estate of J. P. Dawson, 21 Tex. Civ. App. 361, 53 S. W. 64.

The main question that can be raised against the instrument as a will is its am-

biguity. It is admitted by the demurrer to be in the handwriting of the testator and bears his true signature, made shortly before his death, accompanied by a statement as to what he desired done with it. That statement relieves it of part of its ambiguity and shows his intent. This will does not from the pleading evidence an intention to make a gift inter vivos, for it was not consummated by delivery, but the facts evidence an intention to make a gift to take effect after his death. In such a case parol evidence is admissible. In Adams v. Maris, 213 S. W. 626, 627, the court has this to say:

"The words are not ambiguous to the extent that they are unmeaning, or inconsistent with themselves to the extent that parol evidence is not admissible to aid in making clear what they mean. Ferguson v. Ferguson, supra; Cyc. vol. 17, pp. 680-682; Jones on Evidence, § 473; Meyers v. Maverick, 28 S. W. 716; Page on Wills, 998; Schouler on Wills, § 581; Gardner on Wills, 388. The courts are reluctant to declare wills, as well as contracts, void for uncertainty. They have in cases in which no question of fraud arises resorted to 'every shift,' rather than declare the gift void for such reason. Doe ex dem. Winter v. Parratt, 6 Man. & G. 362. While doubtless not a wise policy to go to such extreme to effectuate an uncertain intention, it is safe to follow the rule announced in Jones on Evidence, that 'it is only when the instrument is unintelligible or uncertain after the extrinsic evidence as to the situation of the parties and the surrounding circumstances have been received, that a true patent ambiguity is established.' Jones on Evidence, vol. 1, § 474."

We believe the court erred in sustaining a general exception to appellant's application, and reverse the judgment of the court, and remand the cause for a new trial.

On Motion for Rehearing.

The application for probate of the instrument sufficiently alleges that the very instrument copied in the petition was intended by Kuhlmann as his last will and testament. The general demurrer and so-called special exceptions, which were also general demurrers, were sustained on the theory that the instrument declared on must on its face contain words evidencing a gift of some kind. In support of the contention the case of Smith v. Smith, 112 Va. 206, 70 S. E. 491, 33 L. R. A. (N. S.) 1018, is specially relied on, and some cases are cited which are not available. We do not regard said case of Smith v. Smith as sustaining the contention made. The expressions particularly relied on were made in view of the facts of that particular case, and when the opinion is considered as a whole, it appears that the court was of the opinion that the language, "Everything is Lou's," could be shown to be a will if the facts and circumstances surrounding the execution thereof showed that such instrument was intended as a will, but that evidence of

expressions of an intention to make that kind of a will having no reference to the particular instrument would not be sufficient to entitle the instrument to be admitted to probate. We call attention to the court's quotation from Jarmon on Wills, and to the discussion of the attending circumstances, all of which we believe show that the opinion sustains our holding in this case.

We conclude that the motion for rehearing should be overruled.

HOLMES v. UVALDE NAT. BANK et al. (No. 6393.)

(Court of Civil Appeals of Texas. San Antonio. May 12, 1920. Rehearing Denied June 2, 1920.)

1. Trial \S 232(2) — General charge controlling half amount sued for in case submitted on special issues properly refused.

Where suit against a bank, its directors, and liquidating agent, to recover deposits made by plaintiff, was submitted on special issues, general charge to control the disposition of at least half the amount sued for was properly refused to plaintiff.

2. Trial \S 191(1)—Charge assuming as facts matters whereon jury could have found to contrary properly refused.

Charge for plaintiff assuming as facts matters whereon the jury could have found to the contrary, which were important and decisive in the case, was properly refused.

3. Appeal and error \S 730(2)—Assignments as to giving or refusal of charges without stating substance not considered.

Assignments of error complaining of giving of certain charges or refusal of others, without stating even substance of charges, should not be considered; a reference to bills of exceptions without giving substance of them not complying with rules of Courts of Civil Appeals, and it not being incumbent on an appellate court to search record for matters that should be supplied by appellant.

4. Trial \S 352(4) — Issue whether cashier converted plaintiff's funds held properly refused.

In suit against a bank, its directors, and liquidating agent for deposits made by plaintiff, refusal of trial court to place before jury issue whether bank's cashier had converted any money of plaintiff to his own use held proper in view of the evidence.

5. Banks and banking \S 112—Bank's knowledge cashier had authority to draw from plaintiff's loan account held not to make it liable for conversion.

If a bank had known that its cashier had authority to draw out money deposited in a loan account of plaintiff, the fact would not have charged the bank with notice the cashier was loaning or pretending to loan such money

for plaintiff, nor make the bank liable for the cashier's conversion of it.

6. Banks and banking \S 108—Cashier's loans in name of bank for depositor did not bind bank.

It was not within the scope of the agency of the cashier of a bank to make loans in the name of the bank for depositors, and the bank was not bound by his acts in making such loans.

7. Principal and agent \S 180—Rule of imputation of knowledge destroyed by action adverse to principal.

Presumption that an agent has performed duty to communicate to principal knowledge possessed by him relative to subject-matter of agency, basis of rule imputing notice to principal of acts of the agent, is destroyed where the agent, nominally acting as such, in reality acts in his own or in another's interest adversely to his principal.

8. Banks and banking \S 116(6)—Bank not chargeable with knowledge of cashier acting adversely.

Though a bank knew plaintiff had deposited his money, and that its cashier had authority to draw it whenever he desired, the bank was not charged with knowledge its cashier had authority from plaintiff to lend the money for him, nor that the cashier had appropriated plaintiff's money to his own use, and had forged notes to hide his crime; any action by cashier being adverse to bank, preventing imputation of his knowledge to it.

9. Banks and banking \S 258—National bank not authorized to contract to lend money of depositor.

Under Rev. St. U. S. § 5136 (U. S. Comp. St. § 9661), a national bank had no authority to enter into a contract for loaning money of a depositor kept in a deposit account through its cashier authorized by the depositor to draw thereon to make loans.

10. Banks and banking \S 112—Bank not liable for moneys used by cashier in manner ultra vires as to bank.

Where money is deposited in bank, and the cashier is authorized and paid as an individual by the depositor to act for the depositor in making loans, which acts, if performed by the bank, would be ultra vires, the depositor cannot recover from the bank for the peculations and conversions of the cashier.

11. Banks and banking \S 112—Bank not liable for misappropriation of funds by cashier to make loans for depositor.

Where there has been collusion between cashier of bank and a depositor to secure services of cashier adversely to the bank, it is not liable for misappropriation by the cashier of funds drawn out under authority of the depositor to be used to detriment of bank by cashier in making individual loans for depositor.

Appeal from District Court, Uvalde County; Joseph Jones, Judge.

Suit by Daniel Holmes against the Uvalde National Bank and others. From judgment for defendants, plaintiff appeals. Affirmed.

W. D. Love, of Uvalde, and Denman, Franklin & McGown, of San Antonio, for appellant.

Martin & Martin, of Uvalde, and W. B. Teagarden and Clamp, Searcy & Clamp, all of San Antonio (Boyle, Ezell & Grover, of San Antonio, of counsel), for appellees.

FLY, C. J. Appellant instituted suit against the Uvalde National Bank, T. O. Frost, J. M. Kincaid, M. B. Walcott, F. J. Rheiner, J. C. Turman, and F. T. Kincaid, as directors of the bank, and Jake Schwartz, as liquidating agent, for certain deposits made by him, amounting to \$48,788.81. The cause was submitted to a jury on the following issue, given by the court:

"Was F. J. Rheiner the agent of plaintiff, Daniel Holmes, in making the loans of the money that he turned over to said Rheiner?"

The issue was answered in the affirmative, and the second issue became unimportant and, under instruction of the court, was not answered. At the request of appellees, the jury was informed that the suit against the directors had been dismissed by appellant. Judgment was rendered that appellant take nothing by his suit as to the bank and Schwartz and Turman, Walcott, and Kincaid as the liquidating committee.

The evidence showed that appellant, without the knowledge or consent of the directors of the bank, entered into a personal agreement with F. J. Rheiner, by which the latter was to make loans for appellant out of money from time to time delivered to Rheiner personally by appellant, and Rheiner placed the money in the bank, with the full authority to draw it out whenever he so desired. He dealt with Rheiner as an individual and not as cashier of the bank. The arrangement entered into as to loaning the money was concealed by appellant and Rheiner from the directors of the bank. The money was loaned at different times by Rheiner, and the securities were placed in the hands of appellant by Rheiner. About five years elapsed between the time when the last loan was made, to wit, May 24, 1914, and the date of the filing of this suit, and the notes now claimed by appellant to be worthless were taken for or indorsed and delivered to appellant by Rheiner more than five years before this suit was filed. Appellant at no time dealt with Rheiner as cashier, and in the numerous letters written to him by appellant he was addressed as "Dear Ferdie." Appellant testified:

"Yes, sir; I told Rheiner in the beginning that I wanted him to loan my money for me. Yes, sir; I trusted him to do that. Yes, sir; I gave him authority to draw my money out to make loans and investments for me. Yes, I gave him authority to make loans, and he had

as much authority as I did to make loans, and I put money at his disposal for that purpose—to make loans."

In April, 1916, there was a full settlement between appellant and Rheiner. Appellant swore that he placed about \$7,000 in the bank when Rheiner was absent, and when he returned appellant gave him a check for the money, to be placed in the "loan account," to be loaned by him.

The first assignment states error in the refusal to give the following charge, requested by appellant:

"In any event, you will find your verdict herein for plaintiff for the sum of \$26,779.65, being the aggregate or the principal of the four notes in evidence, purporting to be the notes of T. J. Martin, and the one note in evidence, purporting to be the note of W. B. Patterson, less the sum of \$2,517.04 drawn from the loan account of plaintiff and carried into the \$4,600 certificate of deposit in evidence; that is to say, said \$24,262.61 is the balance of the total of said above-named notes after said sum of \$2,517.04 is deducted therefrom. The remainder of the case you will consider from the evidence in the case and the charge of the court, and base your verdict thereon."

[1,2] The charge was properly refused. The cause was submitted on special issues, and yet appellant sought a general charge to control the disposition of at least one-half of the amount sued for. The charge assumed that Rheiner was acting as the cashier of the bank in making the loans, that it was responsible for his lack of care and judgment or his criminal acts, when that was the crucial point in the case. It assumed that the notes were forgeries, when the jury might have found that they were genuine. In other words, it was, in effect, an instruction for appellant on the whole case and made a farce out of the issue as to Rheiner being the agent of appellant alone in negotiating the loans, and not of the bank. It assumed that loaning money for depositors was within the powers and duties of the bank and dispensed with all inquiry into the doctrine of ultra vires as applied to the acts of Rheiner, if acting for the bank.

[3,4] The second, third, fourth, fifth, sixth, seventh, eighth, and ninth assignments of error should not be considered. Each of them complains of giving certain charges or refusing others without giving even the substance of the charges. A reference to bills of exception without giving the substance of them does not comply with the rules, and it is not incumbent upon an appellate court to search the record for matters that should be supplied by the appellant. However, we have consulted the bills of exception referred to in the assignments and find that the charges asked were properly refused. If Rheiner was the agent and special representative of appellant and acted in lending the money not as cashier or agent of the

bank, then it did not matter that he converted the money of appellant to his own use, so far as the bank was concerned. In this connection, it may be stated that there was no adequate proof that Rheiner had converted any money of appellant to his own use. Appellant had the notes, he now wishes declared forgeries, in his possession for seven or eight years, and yet did not ascertain that they were forgeries. Appellant had colluded with Rheiner to lend money for him and deprive the bank of loans to which it was entitled, and now when his conspirator has been shown to be a defaulter and that the loans made by him for appellant are not satisfactory, he seeks to make the principal, against whom the conspiracy had been formed, responsible for the acts of the unfaithful servant. Rheiner was the agent of appellant, and not the agent of the bank, in making the loans, as found by the jury. It was not an issue as to whether the bank had notice of the relations between appellant and Rheiner. All of the testimony tended to show that appellant and Rheiner did not desire that the bank should know that Rheiner was lending money for appellant, but studiously concealed it from the bank. The evidence clearly showed that the loaning account of appellant was closed and a certificate of deposit delivered to appellant on or about April 23, 1916, and such settlement was fully accepted and agreed to by appellant, and such testimony tended to show that appellant, by his laches for more than two years, was estopped from claiming anything from the bank. There was not a particle of evidence tending to show that appellant expected or desired that Rheiner should act, in lending the money, for the bank; but, on the other hand, appellant and Rheiner did all they could to prevent the bank discovering anything about the loans. It follows that there was no such issue, and the court acted properly in refusing to place it before the jury.

[5] If the bank had known that Rheiner had authority to draw out the money deposited in the loan account of appellant, that would not charge the bank with knowledge that Rheiner was lending or pretending to lend it for appellant, nor make the bank liable for his conversion of it.

[6] The interests of the bank and appellant were directly antagonistic in the lending of money, and every loan made by Rheiner was depriving the bank of the opportunity and right to make loans. Under the circumstances if, as all the testimony shows, Rheiner was the agent of appellant in making the loans, he could not be the agent of the bank also. It was not within the scope of the agency of Rheiner to make loans in the name of the bank for depositors, and the bank was not bound by his acts in making such loans, and there was no evidence of ratification of his unauthorized acts, if such acts

could be ratified. *Henderson v. Railroad Co.*, 17 Tex. 560, 67 Am. Dec. 675; *Bank v. Jones*, 18 Tex. 823. Rheiner did not claim to be acting as agent for the bank, but altogether as agent of appellant.

[7] The rule imputing notice to the principal of the acts of agents is usually based upon the theory that it is the duty of the agent to communicate to his principal the knowledge possessed by him relating to the subject-matter of the agency, and the presumption that he has performed that duty. But this presumption is destroyed where the agent, though nominally acting as such, is in reality acting in his own or another's interest, and adversely to that of his principal. *Mechem on Agency*, § 1815; *Kauffman v. Robey*, 60 Tex. 311, 48 Am. Rep. 264; *Texas Loan Agency v. Taylor*, 88 Tex. 47, 29 S. W. 1057; *Allen v. Garrison*, 92 Tex. 546, 50 S. W. 335; *Cooper v. Ford*, 29 Tex. Civ. App. 253, 69 S. W. 487; *La Brie v. Cartwright*, 55 Tex. Civ. App. 144, 118 S. W. 785; *Allen v. Railroad*, 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185.

As said in the last-cited case by the Massachusetts' court:

"The general rule is that notice to an agent, while acting for his principal, of facts affecting the character of the transaction, is constructive notice to the principal. * * * There is an exception to this rule when the agent is engaged in committing an independent fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act. It is sometimes said that it cannot be presumed that an agent will communicate to his principal acts of fraud which he has committed on his own account in transacting the business of his principal, and that the doctrine of imputed knowledge rests upon a presumption that an agent will communicate to his principal whatever he knows concerning the business he is engaged in transacting as agent. It may be doubted whether the rule and the exception rest on any such reasons. It has been suggested that the true reason for the exception is that an independent fraud committed by an agent on his own account is beyond the scope of his employment, and therefore knowledge of it, as matter of law, cannot be imputed to the principal, and the principal cannot be held responsible for it. On this view, such a fraud bears some analogy to a tort willfully committed by a servant for his own purposes, and not as a means of performing the business intrusted to him by his master. Whatever the reason may be, the exception is well established."

[8] In this case we may assume that the bank knew that appellant had deposited his money in the bank, that Rheiner had the authority to draw it out whenever he desired, and still this would not charge the bank with knowledge that Rheiner had authority from appellant to lend the money for him, and certainly not that Rheiner had appropriated appellant's money to his own use and benefit and had forged notes to hide his crime. Up-

on no ground could the bank be charged with such knowledge. When Rheiner drew the money and loaned or misappropriated it, he clearly acted outside the scope of his authority and was not acting as the agent of the bank, but as the agent of appellant.

In the case of *Brookhouse v. Union Publishing Co.*, 73 N. H. 368, 62 Atl. 219, 2 L. R. A. (N. S.) 903, the facts were that one Moore was the guardian of the plaintiff, and also treasurer of the defendant, and used the defendant corporation for his private banking purposes, depositing money with its general funds and crediting his account, and charging his account as he withdrew it. He withdrew from his guardian bank account money, for which he received drafts payable to himself as guardian or order. These he indorsed and directed the assistant treasurer of defendant to deposit to his credit. He afterwards checked out the money for his personal use. The ward sought to charge the defendant with notice of the fraudulent character of the transaction. The court held that the defendant was an innocent conduit through which the guardian temporarily passed the money, and that it could not be charged therefor.

The evidence in this case shows collusion by appellant with Rheiner to obtain services from the latter which he as agent of the bank was not authorized to perform, and which deprived the bank of making loans, and no presumption of notice can indulged for the protection of a party to such collusion. As said in a New York case:

"The rule which charges the principal with what the agent knows is for the protection of innocent third persons, and not those who use the agent to further their own frauds upon the principal." *Nat. Life Ins. Co. v. Minch*, 53 N. Y. 144.

[9] It was not within the scope of the agency or implied power and authority of Rheiner as cashier of a national bank to agree with a party not connected with the bank to conduct the business of lending for him, from which the bank did not and could not derive any appreciable benefit, direct or indirect. The acts of Rheiner were clearly *ultra vires*, and did not bind the bank. The bank had no authority under the act creating it to enter into a contract for loaning money of a depositor such as existed between appellant and Rheiner. U. S. Rev. St. § 5136 (U. S. Comp. St. § 9601). The powers granted to national banks are:

"To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidence of debt, by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by

obtaining, issuing and circulating notes according to the provisions of this title."

The powers are clearly defined, and, while national banks are authorized to lend money, there is no semblance of authority for lending money as the agent of its depositors. Such authority, if granted and exercised, would eventually destroy the great privilege of lending money for themselves given national banks, and involve them in complications which would almost inevitably lead to destruction. Especially would this be true when the lending is done without remuneration to the bank, and on the other hand is an expense in taking up the time of agents that should be used in the interest of the bank. No possible good could result to the bank from loans of money made for depositors. The Federal Reserve Act (38 Stat. 251) has no application, whatever, to the Uvalde National Bank, as defining its powers. The acts for which it is sought to hold that bank occurred before the enactment of the Federal Reserve Act, and, of course, it does not have any application to such acts, if it ever could apply to such bank.

[10, 11] If appellant had entered into a contract with Rheiner as cashier of the bank, and under that contract had deposited money to be invested in loans by the bank, and the cashier had embezzled the deposits, there is some authority for holding that the bank would be liable for the deposits, even though the agreement to invest was *ultra vires*; but where the money is deposited as in this case and the cashier is authorized and paid as an individual to act for the depositor in performance of acts, which, if performed by the bank, would be *ultra vires*, the depositor cannot recover. And when there has been collusion between the cashier and the depositor to secure the services of the cashier, not as representative of the bank, but adversely to it, there can be no doubt that the bank would not be liable for the misappropriation of funds drawn out of the bank under authority of the depositor to be used to the detriment of the bank.

The evidence shows clearly that appellant made Rheiner his agent, not as an agent of the bank, for he acted secretly and under cover with Rheiner and clearly indicated that he did not wish the bank to know anything about his relations with Rheiner nor have any connection with his loans. He and Rheiner sought to use the bank as a mere conduit for their schemes, and he concealed all his transactions with Rheiner from the bank until his friend had embezzled his money and absconded, and then he sought to make the victim of his scheming liable for his friend's perfidy. The trial court properly held, under the facts, that such liability would not attach.

The judgment is affirmed.

SIGNOR TIE CO. v. TEXAS IRON ASS'N.
(No. 2247.)

(Court of Civil Appeals of Texas. Texarkana.
June 3, 1920.)

Appeal and error \S 1011(1)—**Finding on conflicting evidence conclusive.**

There being sufficient evidence to justify the finding, it is conclusive notwithstanding conflicting evidence.

Appeal from District Court, Cass County;
H. F. O'Neal, Judge.

Action by the Texas Iron Company against the Signor Tie Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Bibb & Caven, of Marshall, for appellant.
E. A. Allday and Hugh Carney, both of Atlanta, for appellee.

HODGES, J. The appellee sued the appellant to recover the sum of \$984.51 as the balance due for a lot of railroad cross-ties sold to the appellant in October, 1914, and March, 1915. In its original petition the appellee alleged that the ties were delivered to the appellant under the terms of an express contract specifying the grades and prices. In addition to exceptions and a general denial, the appellant specially pleaded that the ties sued for had been purchased by it from one Estel Vance, alleging that Vance was the sole owner and had a right to make the sale. To this special plea the appellee filed a general denial. In a trial before the court judgment was rendered in favor of the appellee for the full amount of the debt, together with legal interest thereon to the date of the trial. The court filed the following findings of fact:

"First. I find that the Texas Iron Association sold and delivered to Geo. W. Signor Tie Company, by negotiation through letters and over phone all the ties said iron association owned on or about October 15, 1914, on the right of way of the Texas & Pacific Railway near Springdale, Tex., for the following prices, to wit: 28 cents for first-class red oak ties; culls at 8 cents; 36 cents for white oak ties; 14 cents for culls; said ties subject to inspection and acceptance by Texas & Pacific inspector.

"Second. I find that the said Texas & Pacific inspector took after inspection on October 15, 1914, 1,297 first-class red oak ties and 97 culls; on March 20, 1915, 5,817 first-class red oak ties, 541 red oak culls, 2,771 first-class white oak ties, 389 white oak culls, 190 first-class red oak ties, 221 red oak culls, 1,544 first-class white oak ties, 895 white oak culls.

"Third. I find that a correct invoice of all above ties amounts to the sum of \$3,847.00.

"Fourth. I find that defendant paid thereon the sum of \$2,953.91, and is entitled to a further credit of \$11.48 extra leading charges, leaving a balance due of \$881.61 principal, with \$250.07 interest to date of judgment, said prin-

cipal and interest amounting to the sum of \$1,131.68.

"Fifth. I find that it was claimed by defendant that it had purchased prior to the time said ties were inspected and taken up by it from Estel Vance \$984.51 worth of said ties at above prices, and that said ties did not belong to plaintiff at said time; and on said contention I find that prior to the time defendant claims to have purchased this amount of said ties from said Vance the plaintiff had theretofore legally acquired title and possession of the same, and that said Vance did not have the right to sell them to defendant."

It is claimed in this appeal that the evidence shows that the appellant had purchased the ties in controversy some time before it made any contract with the appellee, and if the latter had any cause of action it was for a conversion. The testimony upon that issue is conflicting. There was sufficient evidence to justify the court in finding that the ties were sold and delivered to the appellant after the contract was made between the parties to this suit.

The remaining assignments, we think, are without merit, and the judgment will be affirmed.

TEXAS ELECTRIC RY. v. WHITMORE.
(No. 6174.)

(Court of Civil Appeals of Texas. Austin.
April 14, 1920. Rehearing Denied
May 19, 1920.)

1. Damages \S 54—**Mental suffering from disfigurement element of damages for personal injuries.**

Where plaintiff in a personal injury action brought against a street railroad company alleged that he brooded over the fact that his body had been scarred and disfigured, and that he became depressed and suffered great mental and physical pain as a result of such disfigurement and the loss of the use of his arm, such mental suffering might be considered by the jury in estimating damages.

2. Appeal and error \S 1060(1)—**Argument of counsel in personal injury case that defendant's attorneys were superior held not reversible error.**

In a personal injury action against a street railroad company, argument of plaintiff's counsel that the case was an unequal contest because of the superior skill and ability of defendant's counsel, and that defendant had a paid claim agent and paid general attorneys, whereas plaintiff was lacking in these facilities, while irrelevant and perhaps improper, held not reversible error.

3. Street railroads \S 117(10)—**Negligence in failure to keep lookout held question for jury.**

In an action for injuries to a soldier in a collision between defendant's street car and a truck with a trailer, evidence as to the failure

of the motorman to keep a proper lookout *held* sufficient to justify the submission of such issue to the jury.

4. Street railroads \S 117(34)—Whether failure to sound warning was proximate cause of injuries held for jury.

In an action for injuries to a soldier in a collision between defendant's street car and the trailer of a truck crossing the track, whether the motorman's failure to sound warning was the proximate cause of the injuries *held* for the jury.

5. Street railroads \S 117(34)—Whether speed of car was proximate cause of injuries in collision held for jury.

Whether the speed of defendant's car was the proximate cause of injuries in a collision with a truck crossing the track *held*, under the evidence, for the jury.

6. Street railroads \S 117(10)—Whether motorman saw stop signal by companions of person injured held for jury.

Whether or not defendant's motorman saw a signal to stop given by members of crew on an army truck, struck while crossing the track, *held* for the jury.

7. Street railroads \S 114(2)—Evidence held to show that defendant owned street car.

Evidence *held* to justify a finding that defendant was the owner of the tracks upon which the collision occurred, so as to warrant an inference that the street car belonged to defendant.

8. Appeal and error \S 930(1), 1004(1)—Verdict will not be disturbed unless manifestly excessive in the view most favorable to plaintiff.

A verdict will not be disturbed on appeal unless it is manifestly excessive, and the appellate court is required to take the evidence in the view most favorable to the party recovering the damages.

9. Damages \S 132(8)—\$15,000 held not excessive in action for injuries in street car accident.

\$15,000 damages *held* not excessive in an action by a soldier, 22 years old, for personal injuries sustained in street car collision, where it appeared that plaintiff's left arm and shoulder were disabled, that he had suffered great pain, that the injuries were permanent, that terrible scars were left, and that his usefulness as an expert mechanic was virtually destroyed.

Appeal from District Court, McLennan County; H. M. Richey, Judge.

Action by Don H. Whitmore against the Texas Electric Railway to recover for personal injuries. Judgment for plaintiff, and defendant appeals. *Affirmed*.

Templeton, Beall, Williams & Calloway, of Dallas, and Sanford & Harris, of Waco, for appellant.

Alva Bryan and W. E. Terrell, both of Waco, for appellee.

BRADY, J. This is a suit by appellee against appellant for damages for personal injuries, alleged to have been received by appellee from a collision between a street car, alleged to have been owned and operated by appellant, and an army truck and trailer on which was loaded a wrecked airplane; appellee being on the trailer at the time of the accident. It was averred that appellee was a soldier in the mechanical branch of the aviation section of the United States army, and, in company with other soldiers, was carrying the wrecked airplane on an army truck to the camp. The accident occurred between Eighth and Ninth streets on Austin avenue, in the city of Waco; the trailer being struck by the street car while crossing the track.

Appellant answered by demurrers, general denial, and a plea of contributory negligence. The case was submitted to the jury upon a general charge, embracing the following issues of negligence: (a) The alleged failure of the motorman to keep a proper lookout. (b) The failure of the motorman to sound the gong, ring the bell, or blow the whistle on the street car. (c) The operation of the street car, at the time and place of the collision, at a high and dangerous rate of speed. (d) The failure of the motorman to stop the car and avert the collision after having seen a signal given by members of the truck crew, who had gotten off the truck or trailer onto the street. The jury returned a verdict for the plaintiff for \$15,000, and judgment was rendered accordingly.

There is evidence to support a finding as to each of the grounds of negligence submitted by the court in the main charge. The pertinent facts as to the questions presented in the assignments discussed in the opinion will be there stated.

Opinion.

The first assignment of error complains of the action of the trial court in overruling a special exception to a portion of appellee's petition, alleging:

"That he broods over the fact that his body has been scarred and disfigured, and as a result thereof is depressed and suffers great mental and physical pain as a result of said disfiguration and the loss of the use of said arm."

The point is specifically made that mental anguish suffered by an injured person by reason of the fact that he broods over a scarred and disfigured body is too remote to be the subject of compensation. In appellant's brief the following testimony by appellee on this point is quoted:

"Before I was injured I was always proud of the fact that I had good-looking arms and shoulders for a young fellow, but now I have a big old bone sticking up there and a big old scar there. I participated in athletics and swam all summer long, and it does not look very

good now. I always feel like I do not want anybody to see it. It is an ugly looking place. Feel like I will always have to keep it hid."

Appellant, as authority for the proposition that mental anguish of such a character is too remote, cites the case of *Railway v. Dickens*, 54 Tex. Civ. App. 637, 118 S. W. 612, a decision by this court. Appellant specially relies upon this statement in the opinion by Chief Justice Fisher:

"* * * Anguish of the mind, wholly sentimental, arising from the contemplation of a disfigurement of the person, cannot be considered for the purpose of swelling the damage. * * * The law regards supposed injuries to sentimental feelings of this character as too remote and speculative to allow it as an element of damages in cases where no malice exists."

The statement just quoted was made by Chief Justice Fisher in connection with an argument of counsel, and does not seem to us to be applicable to the question raised in the instant case. The cases cited in support of the doctrine seem to recognize that mental anguish, when the natural or reasonable result of the injuries sustained, is a basis for the recovery of damages, and they condemn only the allowance of damages for mental anguish wholly sentimental.

The following authorities sustain the proposition that mental suffering, which an injured person experiences as the result of contrasting his injured condition with his previous state, may be considered by the jury in estimating damages for such injuries. *M., K. & T. Ry. Co. v. Miller*, 29 Tex. Civ. App. 460, 61 S. W. 978; *Western Union Tel. Co. v. Simmons*, 32 Tex. Civ. App. 578, 75 S. W. 822; *St. Louis S. W. Ry. Co. v. Cleland*, 50 Tex. Civ. App. 499, 110 S. W. 126; *Decatur Cotton Seed Oil Co. v. Belew*, 178 S. W. 612; *Chicago, R. I. & G. R. Co. v. Smith*, 197 S. W. 614; *Townes on Torts*, p. 162.

[1] The facts in the above cases, touching mental suffering, differ only in degree from those of the instant case, and we think announce the doctrine prevailing in this state. Therefore we hold that it was not reversible error for the trial court to overrule the special exception involved in this assignment.

The second point presented in appellant's brief is the failure of the trial court to instruct the jury not to consider a certain portion of the argument of counsel for appellee. This argument related to the statement of counsel, in substance, that the case was an unequal contest, because of the superior skill and ability of appellant's counsel, and the fact that appellant had a paid claim agent and paid general attorneys, whereas appellee was lacking in these facilities or advantages.

[2] We have carefully considered the argument in question, and while we think it was irrelevant and in the main perhaps impro-

per, we are persuaded that it was not calculated to influence or prejudice the jury against appellant, and that it did not have such effect. We do not think it presents reversible error, and the assignment is overruled.

[3] The next assignments complain of the submission of the several grounds of negligence to the jury, because there was no evidence supporting any of these issues. With this contention we cannot agree. As to the first issue, it is sufficient to say that there was evidence that the motorman was standing on the front of the street car, at and before the time of the accident, and after the trailer was struck and the street car had stopped the motorman stated, "I will open the door," and he did open it, and he stated to some of the occupants of the truck and trailer that he did not see them. There was testimony that there was no obstruction between the street car and the trailer at the time and just before the accident, and nothing to prevent the motorman seeing the same had he been keeping a proper lookout. There was testimony tending to show that the motorman was looking ahead, but the conflict was sufficient to raise the issue and to take it to the jury. The motorman did not testify, and the jury were entitled to consider all the circumstances as well as the statement of the motorman above referred to.

[4] As to the second issue, the failure of the motorman to sound the gong, ring the bell, or blow the whistle on the street car, it is claimed that there was no evidence to show that such failure, if any, had any causal connection with the injuries received by appellee. While the testimony was conflicting, there was evidence that neither the bell, gong, nor whistle was sounded after the street car left Eighth street, and that the truck and trailer passed over the track from 25 to 75 feet ahead of the street car, and that the appellee had his back turned to the street car and did not see it. There was also evidence to the effect that when appellee first saw the car it was right on him, and he had no opportunity to extricate himself from danger. Under these circumstances, we think it was for the jury to say whether or not the failure to sound the warning was a proximate cause of the injuries.

[5] As to the issue of operating the car at a high and dangerous rate of speed, there was evidence that the street car was being run at a rate of speed at least 18 miles an hour, and that its speed was not slowed down before striking the trailer. The accident was on one of the principal streets of the city. As the truck had passed safely over the track and the street car struck only the trailer, it was manifestly a question for the jury, under these circumstances, to determine whether the speed of the car was a prox-

mate cause of the injury, and had a direct connection with the injuries.

[6] With reference to the remaining ground of negligence submitted, the failure of the motorman to heed the signal given by members of the truck crew, the evidence was conflicting as to whether the motorman saw the signal. There was evidence that he was looking straight ahead in crossing Ninth street, and that the accident was just past Ninth street, and that just before the accident occurred one of the men on the right-hand side of the truck jumped off and flagged the street car. There is no direct proof that the motorman saw the signal. He did not testify, but in view of the fact that it was a bright, sunshiny day, that there were no obstructions between the street car and truck and trailer, that the front end of the car, where the motorman was standing, was practically all glass, and the facts above recited, it was a question for the jury to say whether or not the motorman saw the signal. If he did see it in time to have stopped or sufficiently lessened the speed of the car to avert the injury, the causal connection is plain.

The next question which will be discussed is the claim that it was not shown by competent evidence that the street car which collided with the trailer was owned, operated, or controlled by appellant, and that therefore the record evidence does not connect appellant with the accident, and no legal liability has been shown. It was not specially pleaded or claimed by appellant that it did not own the street railway, or the street car in question, nor that the motorman operating the same was an employé of appellant, although these facts were peculiarly within the knowledge of appellant. It was shown that the motorman took the names and addresses of passengers on the car, and that the claim agent of appellant procured statements from these passengers and procured the personal attendance of some of them at the trial.

Appellant itself offered in evidence the following question and answer of the witness W. E. Yates:

"At the time the front end of the truck passed on the track of the defendant company just prior to the accident, did you or not at said time notice where the street car was at said time? If you say that you did, where was the street car at the time in question? State if the street car you now mention is the same street car that hit the truck or trailer on which plaintiff was riding. A. I noticed that the street car was on the east side of Eighth street at the time the front end of the truck passed on the track of defendant company just prior to the accident, and this was the same street car that hit the trailer."

[7] There was other testimony, not necessary to recite, from which the jury might reasonably have inferred that the street car belonged to appellant, and that the motorman

and conductor thereon were employes of the company. The interrogatory and answer just quoted is, in the circumstances of this case, sufficient proof that the appellant was the owner of the tracks upon which the accident occurred, and brings this case within the rule stated by the Supreme Court in *Railway Co. v. Miller*, 98 Tex. 270, 83 S. W. 182, wherein it is said:

"It is a sound proposition, often applied, that the corporation, shown to be the owner of a railroad, in the operation of which a wrong has been done, is presumed to be in the possession and operation of its road."

This case is also affected by the rule stated by the court in *Bank v. Mill Co.*, 207 S. W. 400, as follows:

"The force of evidence, though slight, is greatly increased by the failure of the opposite party to rebut it, where it is obvious that the means to do so are readily accessible to the party."

See, also, *El Paso Electric Railway Co. v. Terrazas*, 208 S. W. 387; *Railway Co. v. Scholz*, 209 S. W. 225.

We conclude that the evidence was sufficient to take this issue to the jury, and there was no error of the trial court in relation to the same. The assignments raising this question will be overruled.

[8] The remaining question to be discussed is the claim that the verdict was excessive, and that the case should be reversed for this reason. It is now settled law in this state that a verdict will not be disturbed upon appeal, unless it is manifestly excessive; and in deference to the verdict the appellate court is required to take the evidence in the view most favorable to the party recovering the damages. *Burnett v. Anderson*, 207 S. W. 540; *El Paso Electric Ry. Co. v. Allen*, 208 S. W. 739; *Decatur Cotton Oil Co. v. Belew*, 178 S. W. 607; *G., H. & S. A. Ry. v. Hansen*, 58 Tex. Civ. App. 584, 125 S. W. 63; *T. & P. Ry. v. Williams*, 196 S. W. 230; *K. C., M. & O. Ry. v. Durrett*, 187 S. W. 427; *Batson-Milholme Co. v. Faulk*, 209 S. W. 837; *G., H. & S. A. Ry. v. Butts*, 209 S. W. 419; *G., H. & S. A. Ry. v. Still*, 45 Tex. Civ. App. 169, 100 S. W. 176; *Witte v. Railway Co.* (Sup.) 6 S. W. 618; *Cent. R. Co. v. Fisher*, 18 Tex. Civ. App. 78, 43 S. W. 584; 4 *Corpus Juris*, p. 869 et seq.; *G., C. & S. F. Ry. v. Harriett*, 80 Tex. 73, 15 S. W. 556.

[9] We have carefully examined the evidence in the record as to the nature and extent of appellee's injuries and as to his pecuniary loss, and while the verdict seems large, we cannot say that it is unreasonably so, nor that we are authorized to conclude that it was the result of passion, prejudice, or other improper influence. It was shown that appellee was a young man, about 22 years of age, of strong and robust health prior to the accident; that as the result of

the negligence of appellant's employes he was injured by some character of instrument, which has never been determined, entering his body under his left armpit and coming out at the base of the neck and above his left shoulder; that his left shoulder blade was cracked, and that the muscles, tissues, blood vessels, flesh, and everything, from the point of entrance to the point of exit of the instrument causing the wound, were destroyed. He suffered great pain, not only in the hospital and during the operations, but for months afterwards. He suffered great loss of blood, and a part of the pectoral muscle which controls the arm was destroyed, and the blood supply to that part of his arm permanently lost. There was evidence that his injuries were permanent, and appellee exhibited his injured body to the jury, which showed terrible scars under his armpit and a gaping wound on his left shoulder and at the base of his neck. It was shown that he has no use of his arm in a forward movement, which seemed to be of great value, if not indispensable, in the business for which he had qualified himself—that of an expert mechanic. There was also testimony that appellee's eyes were affected by the accident, and that his hair turned gray, although it seemed to have resumed its natural color at the time of the trial.

Appellee had an education above that of the average mechanic, including a four-year public school course, and a two-year course in forestry at the Kansas University; that prior to entering the army he had worked in a bank at Wichita, Kan., drawing a salary at the rate of \$1,600 a year. At the time of his injury he was drawing \$44 per month, with the rank of chauffeur in the army. There was testimony that he had diligently applied himself to become an expert mechanic, and expected to follow that avocation upon leaving the army. There was evidence that as an expert mechanic appellee might reasonably expect to earn as much as \$160 per month, and that his usefulness in this business was virtually destroyed, and his ability to earn anything in other occupations greatly impaired and lessened because of the permanent injury to his arm.

Considering the long life expectancy of appellee, his mental and physical sufferings, the nature and probable permanency of his injuries, and his lost earning ability, we do not feel justified in either reversing the case for the alleged excessiveness of the verdict, or in ordering a remittitur. The assignments complaining of the size of the verdict are each overruled.

The only other assignment in the brief complains that the trial court should have granted a new trial, because the great preponderance of the evidence shows that the collision was due to the negligence of the

driver of the truck, and that this was the proximate cause of the injury. We do not deem it necessary to discuss this contention, which we do not regard as supported by the record.

Having concluded that there is no reversible error shown, the judgment will be affirmed.

Affirmed.

HINES, Director General of Railroads, et al.
v. KELLY. (No. 2283.)

(Court of Civil Appeals of Texas. Texarkana.
May 13, 1920.)

1. Railroads \S 5½, New, Vol. 6A Key-No. Series—Federal Director General's order fixing venue of personal injury suits invalid.

So much of General Orders Nos. 18 and 18a issued by the federal Director General of Railroads in 1918, as undertook to fix the venue of personal injury suits against the Director General, was invalid.

2. Appeal and error \S 1060(1). — Refusal to permit reading of answer to jury harmless, unless jury not permitted to read pleadings after retirement.

In absence of contention and proof showing jury were not permitted to read and consider all of defendant's pleadings after retirement, reversible error in the action of the trial court in refusing to permit defendants to read certain paragraphs of their answer to the jury is not shown.

Appeal from District Court, Harrison County; P. O. Beard, Judge.

Suit by W. G. Kelly against Walker D. Hines, Director General of Railroads, and another. From a judgment for plaintiff, defendants appeal. Affirmed.

F. H. Prendergast, of Marshall, for appellants.

Jones, Sexton, Casey & Jones, of Marshall, for appellee.

HODGES, J. The appellee sued the Director General, Walker D. Hines, and Pearl Wight, receiver of the Texas & Pacific Railway Company, for damages resulting from injuries received by him while an employé in the railway service. The injury was caused by a collision between a motorcar and a handcar on which the appellee was riding. He was caused to fall backward and sustain injuries to his shoulders, back, neck, and other portions of the body. Appellee recovered a judgment against the appellants for the sum of \$5,000.

[1] The facts show that the appellee was injured in April, 1919, at Reisor, in the State of Louisiana, and that he resided at Reisor

at the time of the injury. The suit was filed in the district court of Harrison county, Tex. The appellants presented in the trial court a motion to dismiss the suit because of the facts above stated. They offered in evidence, and here refer to, general orders No. 18 and No. 18a, issued by the Director General of Railroads in 1918. The latter contains the following requirement:

"It is therefore ordered that all suits against carriers while under federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose."

The court overruled the motion, and the case was tried upon its merits. No effort was made by the appellants to continue or postpone the trial, nor is there anything in the record to indicate that all of the witnesses needed did not appear and testify. In the case of *El Paso & S. W. Ry. Co. v. Lovick*, 218 S. W. 489, our Supreme Court held that so much of the orders of the Director General as undertook to fix the venue of suits of this character was invalid. That decision supports the action of the trial court in overruling the motion to dismiss the case.

[2] No reversible error is shown in the action of the court in refusing to permit the appellants to read to the jury certain paragraphs of their answer. It is not contended that the jury were not permitted to read and consider all of appellants' pleadings after their retirement; nor is it insisted that appellants were deprived of any particular defense by reason of the action of the court.

The judgment is affirmed.

SOVEREIGN CAMP, WOODMEN OF THE WORLD, v. PIPER. (No. 6400.)

(Court of Civil Appeals of Texas. San Antonio May 12, 1920. On Motion for Rehearing, June 9, 1920.)

1. Death §2(1) — Insurance §665(5)—Death established by direct proof or circumstances; presumption of death in seven years.

In a suit against an insurance company on a life policy, the death of insured may be established, like any other fact, by direct proof or circumstantial evidence, and after expiration of seven years the presumption of the death of a party will arise from an unexplained absence without information concerning him.

2. Death §2(2)—Absentee presumed to have died shortly after leaving home for his work.

Under Rev. St. 1911, art. 5707, where a member of a mutual benefit society, of happy disposition, fond of wife and children, left home to go to his work and was never seen again, an irresistible presumption arises that he died

shortly after leaving home, so that a subsequent forfeiture of his policy for nonpayment of dues was ineffectual.

3. Insurance §693—Provisions against absence being evidence of death of member of benefit society void.

In view of Rev. St. 1911, art. 5707, provisions in the by-laws of a mutual benefit society against absence or disappearance of a member from his residence unheard of for any length of time, being held to be evidence of the death of such member, are null and void.

4. Insurance §812—Limitations do not run against action on policy until seven years from disappearance of insured.

Limitations do not begin to run against an action on the policy of a member of a mutual society who disappeared from home until the expiration of seven years from the disappearance, when the beneficiary's cause of action accrues under the presumption of death.

On Motion for Rehearing.

5. Insurance §815(1)—Petition stated cause of action on mutual benefit society's policy.

In a wife's action on her husband's policy issued by a mutual benefit society based on presumption of his death after seven years' absence, allegations of petition, though general, held sufficient to state cause of action in the absence of exception, the allegations, with the society's admissions, being sufficient to meet requirements that conditions precedent to recovery should be pleaded.

6. Pleading §34(7)—Intendments indulged in favor of petition not attacked by special exception.

When a petition is not attacked by special exception, every reasonable intendment will be read into its allegations to sustain it.

7. Pleading §34(7)—Amendable petition sustains judgment.

If a petition shows that it is amendable so as to meet every objection, it is sufficient to sustain a judgment.

8. Pleading §205(2)—Defective averment not reached by general demurrer.

A general demurrer admits the facts pleaded to be true, but denies that they constitute a cause of action or ground of defense, and, if enough is stated to enable the court to see that a good cause of action exists, however defectively, the insufficiency or defectiveness of the averment cannot be taken advantage of by a general demurrer.

Appeal from District Court, Bexar County; J. T. Sluder, Judge.

Suit by Mrs. Mary Piper against the Sovereign Camp, Woodmen of the World. From judgment for plaintiff, defendant appeals. Affirmed.

El. D. Henry and Atlas Jones, both of San Antonio, for appellant.

W. A. Wurzbach, of San Antonio, for appellee.

FLY, C. J. Appellee instituted suit against appellant to recover \$3,000, alleged to be due on a policy of insurance issued by appellant on the life of Charles Piper, the husband of appellee, who it was alleged in the petition, died prior to December 1, 1911. The cause was tried without a jury, and judgment rendered in favor of appellee for the amount for which she sued.

The facts show appellant is a fraternal benefit association or society, which has a subordinate body in Bexar county, Tex., from which a benefit certificate was issued to Charles Piper insuring his life for \$3,000 in favor of his wife, Mary Piper. About 10 o'clock on the morning of October 20, 1910, Charles Piper left his home and wife and five children, and she has never seen or heard of him from that hour until the time of trial of this cause on November 24, 1919. He was natural and in his usual jolly mood when he left. He had always lived happily with his family, and he had the reputation of being a good man. He had \$700 on his person about the time of his disappearance. He had charge of a yard gang of about 24 men on a railroad running out of San Antonio. After the disappearance of Charles Piper, Mrs. Piper paid all dues and assessments from November 10, 1910, to February, 1913, inclusive. Charles Piper was suspended for nonpayment of dues on April 1, 1913. On the back of the certificate, and contained in the laws of appellant, was the following provision:

"The absence or disappearance of the member from his last-known place of residence for any length of time shall not be sufficient evidence of the death of such member, and no right shall accrue under any certificate of membership to his beneficiary or beneficiaries nor shall any benefits be paid until proof has been made of the death of the member while in good standing."

That provision was amended in 1911 so as to read:

"The absence or disappearance of a member, whether admitted heretofore or hereafter, from his last-known place of residence and unheard of, shall not be regarded as any evidence of the death of such member, nor give or create any right to recover any benefits on any certificate or certificates issued to such member or on account of such membership, in the absence of proof of his actual death, aside from and unassisted by any presumption arising by reason of such absence or disappearance, until the full term of his life expectancy at his age of entry, according to the Carlyle table of life expectancy, has expired, and then only in case all assessments, dues, special assessments, and all other sums now or hereafter required under the laws of the order be paid on behalf of such member within the time required until the expiration of the term of such life expectancy, and this by-law shall operate and be construed as a waiver of any statute of any state or country and any rule of the common law of any state or country to the con-

trary. In the event the payments are not made as above provided, said member shall stand suspended and cannot be reinstated except in the manner as provided in these laws as to reinstatement of living members."

The court found that Charles Piper died about October or November, 1910, but there was no testimony to that effect, unless the fact it is presumed that a man absent and unheard of for seven years is dead carries with it the presumption that he died about the time of his disappearance. If that presumption arises, then Charles Piper was dead in April, 1913, when the suspension for nonpayment of dues took place, and of course it amounted to nothing and could not affect the insurance.

[1] In a suit with an insurance company on a life policy the death of the insured may be established, as any other fact, by direct proof or circumstantial evidence, and after the expiration of seven years the presumption of the death of a party will arise from an unexplained absence without information concerning him. Under such circumstances, without any direct proof of death, the justifiable conclusion will be sustained that the party is dead. *Prinum v. Stewart*, 7 Tex. 178; *Modern Woodmen v. Ghromley*, 41 Okl. 532, 139 Pac. 306, L. R. A. 1915B, 728, Ann. Cas. 1915C, 1063, and notes; *Holland v. Nance*, 102 Tex. 177, 114 S. W. 346.

In article 5707, Rev. Stats. Texas, it is provided:

"Any person absenting himself beyond sea or elsewhere for seven years successively shall be presumed to be dead, in any cause wherein his death may come in question, unless proof be made that he was alive within that time."

It will be noted that nothing is said in the statute about the absence being unexplained or that no information was obtained of him during the period of time mentioned, and in the case of *French v. McGinnis*, 69 Tex. 19, 9 S. W. 323, it was held that the statute required only proof of absence for seven successive years beyond the sea or elsewhere, without proof that he was alive during that period, to raise the presumption that the person was dead. The court said:

"The statute is clear and explicit, and needs no construction, and the charge was in conformity to it."

In the case of *Sovereign Camp, Woodmen of the World, v. Ruedrich*, 158 S. W. 170, this court held:

"Under the common-law rule it was necessary to show that the absent one had not been heard from by his relatives or friends for seven years, but under the statute mere proof of absence of one from his home, beyond the sea or elsewhere, for seven successive years, raises a presumption of death; which can be destroyed by proof of the existence of the absent one within that time."

That decision was approved by the Supreme Court.

[2] The evidence showed that Charles Piper was a man of a happy disposition; that his domestic relations were pleasant and agreeable; that he was very fond of his wife and children and devoted to his home. About 7 o'clock on the morning of October 20, 1910, he left his home and went to his work, but, as was often the case with him, returned about 10 o'clock for some light refreshments. After he had eaten he left home in his usual happy way, having on his person about \$700. He had about 24 Mexicans under his authority as yardmaster, and he left his home to go back to where they were at work. He was a man of excellent reputation and thoroughly satisfied with his home and job. He has never been seen or heard of by any of his family or friends since he left his home on the morning of October 20, 1910. Under these facts the presumption that he died shortly after leaving his home is irresistible. It was utterly inconsistent with his habits, disposition, and surroundings for the inference to arise that he went away without a word of farewell and left all that was dear to him in the world. Death alone gives the answer to the question of what became of Charles Piper after leaving his wife, children, and home. As said by the Supreme Court of Iowa in *Lisdale v. Life Ins. Co.*, 26 Iowa, 170, 96 Am. Dec. 136:

"Evidence of character, habits, domestic relations, and the like, making the abandonment of home and family improbable, and showing a want of all those motives which can be supposed to influence men to such acts, may be sufficient to raise the presumption of death, or from which the death of one absent and unheard from, may be inferred, without regard to the duration of such absence."

Justice, charity, and a due regard for a past life of probity and honor would demand that any unexplained and unnecessary absence from home and loved ones was caused by an irresistible force, such as death. Any other supposition would be too unjust, uncharitable, and improbable to be entertained.

Under like circumstances, when a man had disappeared and had not been heard from by his family for nearly two years, the Court of Civil Appeals at Dallas, in the case of *Sov. Camp, W. O. W., v. Robinson*, 187 S. W. 215, through Judge Talbot, held:

"There is much authority to the effect that, where one has been absent and unheard of for seven years, the presumption arises that he is then dead, but not that he died at any particular time theretofore, and that whoever finds it important to establish death at any particular period must do so by some kind of evidence. The evidence, however, need not be direct or positive; it may be circumstantial according to many of the adjudicated cases. * * * Those courts have adopted the doctrine of *Tisdale v.*

Insurance Co., and hold with the Supreme Court of Iowa that the court or jury might, in a proper case, infer that the death of the absent person had occurred before seven years had expired, even though he was not exposed to some peril which would be apt to shorten his life, and that the conclusion of death at an earlier period could be drawn upon proof of any facts which, according to common experience, made it probable the party, if alive, would have communicated with his friends."

In that case the policy had been forfeited, and it became necessary for the plaintiff to establish the fact of the death of the insured before the date of the forfeiture. The evidence was no stronger in that case than in this, and yet the court held that it was sufficient. The Texas case is fully sustained by authorities cited in it as well as others. *Bradley v. Modern Woodmen of America*, 146 Mo. App. 428, 124 S. W. 69; *Springmeyer v. Sov. Camp, W. O. W.*, 144 Mo. App. 483, 129 S. W. 273; *Johnson v. Sov. Camp, W. O. W.*, 163 Mo. App. 728, 147 S. W. 510. It is stated in the last-named case that:

"Formerly the character of evidence necessary to establish death short of the seven-year period was that the person claimed to be dead must have been exposed to some peril or afflicted with some serious disease. But other character of evidence will now answer the purpose, as that the person was of good habits, comfortably and happily situated in life, of cheerful temperament, pleasantly and happily associated with friends and family, and other facts incompatible with his desertion and remaining away from family and friends without communicating with them."

The evidence in this case has met all the requirements named in the Missouri case, and the court was justified in finding that Charles Piper was dead before the policy was forfeited by appellant in April, 1913.

[3] The provisions in the laws of appellant against absence or disappearance of a member from his residence and unheard of for any length of time, being held to be evidence of the death of such member, are null and void. No corporation can, by a provision in its regulations, set aside a law of Texas, and make rules of evidence to suit its own ends and desires. No such preposterous and dangerous authority has ever been granted to a corporation in Texas, or tolerated by its courts, and when beneficiaries are compelled to sue a fraternal association in order to obtain insurance due them they cannot be met by rules of evidence formulated by such association which practically repeal rules made by a Legislature of Texas. *Mystic Circle v. Hoskins*, 171 S. W. 812; *W. O. W. v. Robinson*, herein cited.

Appellee for three years after the disappearance paid all dues and assessments, and probably would have continued to pay such dues and assessments had she not been informed by the secretary of the local body

that the insurance would not be paid no matter how much she paid. She then ceased the payments. She said, "When I did not hear from him, I thought he was dead," but she hoped and paid the assessments, until she was told by the secretary that there was nothing to be gained by it. Within two months after the seven years had elapsed, when the statute declared that Charles Piper was dead, she instituted this suit. She had the right to wait until the statutory period of seven years had expired before she brought an action for the insurance. It was, in effect, admitted in a letter written by the general attorney of appellant to the attorney of appellee on October 30, 1917, that if appellee showed the death of Charles Piper occurred at any time prior to his suspension in April, 1913, appellant would be liable. He wrote:

"It will be seen from the above that unless proof can be given of the death of the above named on or before April 1, 1913, the society cannot entertain a claim under said certificate."

[4] There was no claim that the statute of limitation had interposed in behalf of appellant. Limitation under the facts of this case did not begin to run until the expiration of seven years from the time that Charles Piper disappeared. *Knights of Pythias v. Wilson*, 204 S. W. 891. The cause of action did not accrue until October 20, 1917. Appellee could not have made satisfactory proof of the death of her husband, as required in the certificate, until the proof was furnished by the presumption created by article 5707, and necessarily limitation could not begin until that time.

If it were true that limitation should begin to run from the time that an absent one was suspended for nonpayment of dues, insurance companies could refuse acceptance of dues from friends of the party who had disappeared and proceed to suspend him, and then when the time had arrived for the presumption of death to arise to meet a claim for insurance with the plea of limitation; in other words, the insurance company demands proof that the party absents himself was dead when the suspension took place, and, when that demand is met, claims that limitations should begin to run from the date proved instead of the date when death was established by the statutory provision. The statute of limitation would have no application in such a case and would not begin to run until the expiration of seven years from the time of the disappearance of the insured from his home.

The judgment will be affirmed.

MOURSUND, J., entered his disqualification in this case.

On Motion for Rehearing.

FLY, C. J. The third assignment of error assails the petition on the ground that its

allegations are not sufficient to form the basis for a judgment, and complaint is made in the motion for rehearing that it was not considered. However, the assignment was considered and thought to be without merit, and we adhere to that opinion. The petition was assailed in the lower court only through a general demurrer, and that appears to have been merely formal and perfunctory, as no action of the court was invoked thereon. The only proposition under the assignment attacks the petition on the ground "that it failed to allege the terms and conditions precedent set out in the contract of insurance between the insured and the defendant, and failed to allege that said terms and conditions precedent had been complied with."

[8] It is alleged in the petition that Charles Piper was a member in good standing of Sam Houston Camp No. 55; that at the time of his death all his dues and assessments had been paid, and that he was a member in good standing of the association, and had been a member in good standing for more than two years, and that the facts as to his disappearance were given to appellant; that demand had been made for the amount of the policy; and that payment had been denied because the "absence or disappearance of a member from his last-known place of residence for any length of time shall not be sufficient evidence of the death of such member, and no right shall accrue under his certificate of membership to a beneficiary or beneficiaries nor shall any benefit be paid until satisfactory proof has been made of the death of the member while in good standing." It was further alleged that it was impossible to make any other proof of the death of Charles Piper, except upon the presumption of death from an absence of seven years. The allegations, while general, are sufficient to state a cause of action in the absence of exception thereto. Appellant in its answer admits that it issued to Charles H. Piper a beneficiary certificate, and claims to have duly suspended him on April 1, 1913, because of failure to pay dues for February and March, 1913. That was an admission that Charles H. Piper was in good standing up to that time, which meant that he had complied with all conditions precedent to his good standing at that time. The petition alleged that the insured had disappeared on October 20, 1910, and that appellee sought to pay all assessments becoming due, but they were refused by the clerk of the subordinate camp. The allegations of the petition with the admissions of appellant were fully sufficient to meet the requirement that conditions precedent to recovery should be pleaded. If Charles H. Piper was in good standing in March, 1913, as admitted by appellant, he had paid all entrance fees, one advanced assessment of Sovereign Camp fund assessments and camp general fund, physi-

clan's examination fee, been properly obligated or introduced, and, as alleged, the beneficiary certificate delivered to him. An admission of membership in good standing was an admission that everything had been done to make him a member in good standing.

[6-8] When a petition is not attacked by special exception, every reasonable intentment will be read into its allegations to sustain it, and, applying this rule to the petition in this case, it was ample to sustain the judgment. In the trial court appellant sought to evade the payment to a widow of one of its members who had been paying it money for years, on the ground that he had been suspended for nonpayment of dues, and that the claim of the widow was barred by four years' limitation, but in this court it is sought to destroy the judgment on the ground that the petition failed to make certain allegations. The allegations were sufficient, however, to justify a reading into them by intentment of everything necessary to meet the decisions cited by appellant. If a petition shows that it is amendable so as to meet every objection, then it is sufficient to sustain a judgment. Under the Texas rule:

"The general effect of a general demurrer is to admit the facts pleaded to be true, but to deny that they constitute a cause of action or ground of defense, and the only question to be considered under it is whether any cause of action or ground of defense is described in the pleading demurred to. Consequently, if sufficient be stated to enable the court to see that a good cause of action exists, however defectively, the insufficiency or defectiveness of the averment cannot be taken advantage of by a general demurrer."

In the case of *Northwestern Ins. Co. v. Woodward*, 18 Tex. Civ. App. 496, 45 S. W. 185, it is stated by this court:

"A defective statement of a cause of action is not subject to a general demurrer. If it is so stated that it is amendable, it is good against a general demurrer."

There is no merit in the motion for rehearing, and it is overruled.

CRENSHAW v. STALLINGS. (No. 1660.)

(Court of Civil Appeals of Texas. Amarillo.
May 5, 1920. Rehearing Denied
June 23, 1920.)

Bills and notes \S 129(3)—Note not specifying time for payment due on demand.

Where neither a note nor the contract pursuant to which it was executed fixed a day of payment, the general rule that a promissory note in which no time is specified for payment is due on demand applied, and suit could be brought thereon after payment demanded and refused.

Appeal from District Court, Collin County; F. E. Wilcox, Judge.

Suit by Mrs. P. A. Stallings against A. B. Crenshaw. From judgment for plaintiff, defendant appeals. Affirmed.

R. C. Merritt and Wallace Hughston, both of McKinney, for appellant.

Abernathy & Smith, of McKinney, for appellee.

HALL, J. September 4, 1906, appellant and appellee entered into a written contract, the material terms of which are as follows:

"(1) That the said P. A. Stallings, in consideration of the covenant of the said A. B. Crenshaw, hereinafter set forth, does by these presents demise, lease and farm let to the said A. B. Crenshaw the following described land, being about 187 acres, situated about 1½ miles southwest of Nevada, Texas, and known as the P. A. Stallings place. To have and to hold the same to the said A. B. Crenshaw during the said P. A. Stallings' natural life; and the said A. B. Crenshaw, in consideration of the leasing of the premises as above stated, covenants and agrees with the said P. A. Stallings to pay the said P. A. Stallings at Nevada, Texas, as rent for the same the sum of four hundred and no/100 hundred (\$400.00) dollars per year, payable as follows: It is agreed and understood that the said A. B. Crenshaw is to pay to the said P. A. Stallings such sum, not to exceed the \$400.00, at such time as the said P. A. Stallings may choose, for her actual living expenses.

"(2) It is also agreed and understood that the said A. B. Crenshaw shall, in consideration of repairing and keeping repaired at the said A. B. Crenshaw's expense, the above premises, have all rent money for his own use except that which the said P. A. Stallings shall have for her actual living expenses.

"(3) * * *

"(4) It is agreed and understood that the said P. A. Stallings and the said A. B. Crenshaw shall, on the first day of each January, have a full and complete settlement of all business transacted during the previous year unless providentially prevented.

"(5) The covenants herein shall extend to and be binding upon the heirs, executors and administrators of the parties to this contract."

Mrs. Stallings, the appellee, testified: That she was 75 years old in January. That the defendant Crenshaw was her son-in-law. That Crenshaw's wife died in April, 1918, or 1917. That she lived with Crenshaw and his wife up to the time of her daughter's death and for a short while thereafter. That she left because she was not satisfied, and it seemed that Crenshaw did not want her there. That she had nothing to do with the preparation of the contract; Crenshaw had it prepared and brought it to her to sign. When she decided not to live in the house with him and his children any longer she asked him for money to build a room for herself as an addition to her son's house so she

could live with him. That her son lived in one of the western drouth-stricken counties. She asked for \$500 for that purpose, and her request was refused. That she regarded the building of this room as an addition to her son's house as necessary for her comfort and happiness. It further appeared that, in accordance with the contract, about the 1st day of January of the first year after its execution, the parties had a settlement, and Crenshaw executed to Mrs. Stallings a note for the difference between \$400, the amount stipulated as the annual rent and the amount of money which had been advanced by Crenshaw to Mrs. Stallings for the previous year. Annually thereafter, it appears that this difference was added to the amount due, and a new note executed for the increased sum. This practice continued until February, 1918, when the following note was executed:

"\$3,134.60

Nevada, Texas,

"February 21, 1918.

"— After date, for value received I promise to pay to Mrs. P. A. Stallings, or order, thirty-one hundred thirty-four and ⁶⁰/₁₀₀ dollars at Nevada, Texas, to bear interest at the rate of — per cent. per annum from —. And further hereby agree if this note is not paid when due to pay all costs necessary for collection, including ten per cent. for attorney's fees.

"Due in accordance with a certain contract dated September 4, 1906, and payable in accordance with the same.

"[I. R. Stamps, 64 cents] A. B. Crenshaw.

"March 14, 1918. By cash on within note, \$30.00."

This suit is filed to recover the amount of the note. The defendant, Crenshaw, in due time filed his plea in abatement, alleging that the suit was prematurely brought. The trial court rendered a judgment in favor of the plaintiff for the full amount of the note, interest at 6 per cent., and attorney's fees.

Under several assignments it is insisted that the suit was prematurely brought because the note by express provision was made payable in accordance with the terms of the contract and by the terms of the contract plaintiff's right to recover was not shown. It appears from the evidence that both the note and the contract were prepared by Crenshaw, or at his instance, and the latter presented to Mrs. Stallings for her signature; that he was custodian of both the contract and the original note, together with its several renewals. If there is any uncertainty in their terms, they must, under these facts, be construed most strongly against the appellant. It will be seen that the note does not fix the date of its maturity, but expressly provides that it is due and payable in accordance with the contract. The contract provides in paragraph 1 that appellant shall pay appellee rent not to exceed \$400 per year

at such time as the said Mrs. Stallings may choose, for her actual living expenses. The effect of paragraph 2 is that Crenshaw should be entitled to retain for his use all of the \$400 rent not necessary for the actual living expenses of Mrs. Stallings. It was contemplated by the parties, as appears from the language of paragraph 4, that on the 1st day of each January, the parties should have a full and complete settlement of all business transacted during the previous year. The note sued upon is the result of these annual settlements. There is nothing in the oral testimony of the parties to indicate when final payment should be made by Crenshaw of the amount of annual rent due Mrs. Stallings over and above her living expenses. The note, itself is a promise to pay these sums, with interest and attorney's fees. Since neither the note nor the contract fix the date of payment, the general rule that a promissory note, in which no time is specified for payment, is due upon demand applies. The uncontradicted evidence shows that payment was duly demanded and refused. C. J. vol. 8, p. 405; note 69, citing *Kampmann v. Williams*, 70 Tex. 568, 8 S. W. 310; *Chambers v. Hill*, 28 Tex. 472; *Salinas v. Wright*, 11 Tex. 572. A failure to pay the note upon demand entitled appellee to sue upon it and recover the principal, together with interest at 6 per cent., and the attorney's fees, as provided therein. Appellee's pleadings and evidence are sufficient to sustain the judgment for the attorney's fees.

The judgment is affirmed.

GATEWAY PRODUCE CO. v. SUNSET FRUIT & PRODUCE CO. et al. (No. 2289.)

(Court of Civil Appeals of Texas. Texarkana.
June 3, 1920.)

1. Appeal and error \S 966(2)—Ruling on motion for continuance not disturbed in absence of abuse of discretion.

Court's ruling on motion of continuance for absence of testimony will not be disturbed on appeal in the absence of abuse of discretion.

2. Continuance \S 26(12)—Refusal to continue for testimony of absent witness held proper in absence of showing of diligence.

Where plaintiff had three months within which to have process issue to compel witness to appear before notary public and give his testimony, court's refusal to continue the case upon the ground that supplemental interrogatories had been propounded to such witness, who had failed to answer them, in order to prosecute legal process to compel such witness to testify, was not error; sufficient diligence not having been shown by plaintiff.

3. Garnishment \S 218—Proceeds of seller's draft on buyer delivered to assignee of seller's account against buyer held to belong to assignee intervenor.

Facts in evidence showing that seller shipped goods to its own order and assigned its account against buyer, and delivered draft on buyer with bill of lading to assignee, who intervened in garnishment proceedings, held to support court's finding that the proceeds of draft in hands of bank to which assignee had sent it for collection belonged to assignee intervenor, and could not be reached by seller's creditor.

Appeal from District Court, Bowie County; Sam. H. Smelser, Special Judge.

Action by the Gateway Produce Company against the Sunset Fruit & Produce Company, in which the American Commercial Bank intervened. Judgment for intervenor, and plaintiff appeals. Affirmed.

Wheeler & Robison, of Texarkana, for appellant.

King & Estes, of Texarkana, for appellee.

LEVY, J. The appellant sued the Sunset Fruit & Produce Company for damages for breach of contract and obtained a judgment by default against it. At the time of filing the suit the plaintiff sued out a writ of garnishment against the Texarkana National Bank, claiming that the bank had funds in its hands belonging to the defendants. The garnishee bank answered that it, acting as a collecting bank, had received from the American Commercial Bank of Wapato, Wash., claiming to be the owner thereof, a draft for \$1,176 and had collected it against the Gateway Produce Company, and prayed that the said bank be made a party to the garnishment proceedings. The American Commercial Bank filed a plea of intervention, setting up that it was the owner of the draft by assignment and delivery for a valuable consideration, and as such owner was entitled to the proceeds collected in payment of it, and prayed for judgment for the money. The plaintiff by supplemental petition denied that the Sunset Fruit & Produce Company owed the intervenor and had assigned the draft, and specially asked that the intervenor be required, if the draft had not been paid, to apply the funds then in its hands to the payment of its claims and debts against the Sunset Fruit & Produce Company. The court, after hearing the evidence, entered judgment that the plaintiff take nothing by reason of the garnishment proceedings and that the intervenor recover of the garnishee and the plaintiff the sum of money held by the garnishee by virtue of the writ of garnishment.

The first assignment of error complains of the overruling of the appellant's motion for a continuance of the cause. The application alleges that—

"The plaintiff desires the continuance of this cause in order to procure some additional testimony of J. P. Denham, who resides in Wapato, Wash., and who is the cashier and the active officer of the intervenor."

It appears from the bill of exception that on June 3, 1919, before the trial of the case on January 12, 1920, the depositions of the witness J. P. Denham were filed in the court, and for the purpose of further developing certain facts supplemental or additional interrogatories were propounded by the plaintiff and crossed by the intervenor and were forwarded to a notary public in Wapato, Wash. The witness, it is further alleged, "has failed and refused to answer said interrogatories," and "the notary public holding said depositions in this case has no power to force him to give his depositions in this case." The testimony sought is material, it is alleged, to the plaintiff's suit.

[1, 2] Assuming that the additional evidence sought was material in the case, yet the trial court may have properly overruled the motion, we conclude, on the ground of the want of sufficient diligence to have the witness testify, if such could be done through legal process. And if the trial court did not abuse the discretion lodged in him to grant continuances of this character, then this court cannot disturb the ruling. It reasonably appears from the application that the months of October, November, and December, 1919, passed without any effort to have process to issue to compel the witness to appear before the notary public and give his testimony. We conclude that the assignment must be overruled.

[3] By the second assignment of error it is contended that the court should have rendered judgment for the plaintiff and not for the intervenor. The question in the case was that of priority of claims against the funds garnished. If the intervenor was, as contended by it, the owner of the draft and the proceeds collected in payment thereof, then the funds garnished were not subject to the plaintiff's garnishment lien. The court's conclusion on all the facts in evidence was that the intervenor was the owner of the draft and the proceeds of collection at the time of the garnishment. It is believed that the facts support the court's conclusion and judgment. Denison Bank & Trust Co. v. People's Guaranty State Bank, 218 S. W. 561.

It appears that the Sunset Fruit & Produce Company on the 13th of September, 1918, entered into a contract to sell the appellant two carloads of apples and then breached the contract, resulting in damage to the appellant in the sum of \$750. On the 20th of November, 1918, the appellant bought from the Sunset Fruit & Produce Company another car of apples for the sum of \$1,176, which

apples were shipped under a shipper's order bill of lading, showing that the apples were consigned to the order of the Sunset Fruit & Produce Company, Texarkana, Ark., notify Gateway Produce Company. It further appears that when the Sunset Fruit & Produce Company procured the bill of lading it made out an account against the Gateway Produce Company for \$1,176 as the purchase price of the car of apples, and then sold and assigned said account to the American Commercial Bank of Wapato, Wash., and at the same time drew a draft on the Gateway Produce Company in favor of said bank for the amount of the account and delivered the draft and the bill of lading mentioned to the bank along with the assigned account. The account had the following indorsement signed by the Sunset Fruit & Produce Company, to wit: "For value received we hereby assign above account to the American Commercial Bank of Wapato, Washington."

The bank, in consideration of the assignment and delivery of the account, draft, and bill of lading, advanced to the Sunset Fruit & Produce Company \$940, in evidence of which it took from the company a note payable on or before 30 days from date. At the time of this transaction the American Commercial Bank held an unpaid note against the Sunset Fruit & Produce Company for \$3,500, and it was understood that the difference between the advancement and the \$940 and the amount of the draft in controversy should be applied in payment of this above debt. The American Commercial Bank immediately forwarded the draft, together with the bill of lading attached, to the Texarkana National Bank for collection for its own account. Upon the draft and bill of lading above mentioned reaching the Texarkana National Bank, it notified the Gateway Produce Company, and that company immediately paid the draft and received the bill of lading. These facts would be sufficient, without setting out the other facts, to support the court's findings.

The third assignment of error does not present reversible error, and it should be, we conclude, overruled.

The judgment is affirmed.

BARTLETT et al. v. STATE ex rel. DUMONT REALTY CO. (No. 592.)

(Court of Civil Appeals of Texas. Beaumont.
May 26, 1920. Rehearing Denied
June 23, 1920.)

1. Quo warranto \S 62—Appeals must be prosecuted to term of appellate court in session.

Under Rev. St. 1911, art. 6401, appeals in quo warranto must be prosecuted to the term

of the appellate court in session at the time judgment was rendered in the district court, and respondents, having abandoned their appeal, cannot have the case reviewed on writ of error.

2. Quo warranto \S 62—Respondents should have appealed during term in session when judgment rendered.

Under Rev. St. 1911, art. 6401, and rule 7 for the Courts of Civil Appeals (142 S. W. x), to give a Court of Civil Appeals jurisdiction of appeal from judgment in a quo warranto proceeding respondents should have filed their appeal in it not later than the first Monday in July, 1918, during the term of the court in session when the judgment was rendered in the trial court, and should have filed transcript on appeal within 20 days after perfecting appeal.

3. Quo warranto \S 62—Writ of error improperly prosecuted not saved by theory statute applies only to portion of judgment.

Writ of error prosecuted by respondents in quo warranto proceedings, who failed to file their appeal in the Court of Civil Appeals during its term in session when judgment was rendered, and to file transcript on appeal within 20 days thereafter, cannot be saved on any ground that Rev. St. 1911, art. 6401, applies only to the portion of the judgment which is for ouster, where dismissal of the portion of the appeal for ouster disposes of all portions of the judgment directly affecting respondents.

4. Quo warranto \S 62—Question raised by motion to dismiss writ of error jurisdictional.

Where there is motion to dismiss writ of error prosecuted by respondents in a quo warranto proceeding on the ground that appeal was not perfected or transcript filed within time, under Rev. St. 1911, art. 6401, and rule 7 for the Courts of Civil Appeals (142 S. W. x), the question raised by the motion is jurisdictional, and leaves the court no discretion relative to dismissing writ.

5. Appeal and error \S 187(3)—Absence of necessary parties fundamental error which cannot be waived.

The absence of necessary parties is a question of fundamental error, and cannot be waived.

Error from District Court, Harris County;
A. R. Hamblen, Special Judge.

Action in the nature of quo warranto by the State of Texas, on the relation of the Dumont Realty Company, against L. L. Bartlett and others. To review judgment for plaintiff, defendants bring error. Writ of error dismissed.

Bradley & Fogle, of Houston, for plaintiffs in error.

Hutcheson, Bryan & Dyess and E. T. Branch, all of Houston, for defendant in error.

WALKER, J. This was an action in the nature of quo warranto instituted by the

state of Texas, upon relation of Dumont Realty Company, against L. L. Bartlett, H. C. Gatton, S. B. Glazener, and G. A. Dutton. It was alleged that Bartlett was acting as mayor, Gatton and Glazener as commissioners, and Dutton as tax collector of the city of South Houston, Harris county, Tex.; that a void effort had been made by the village of South Houston to accept the provisions of title 22, chapter 1, of the Revised Statutes of Texas, in lieu of title 22, chapter 14, under which the village of South Houston was incorporated in 1915; and that respondents, though holding under a pretended election, were without authority to act in any official capacity, and that all their pretended acts were null and void. It was further alleged that in acting for the city of South Houston, they had issued interest-bearing warrants, which had been sold, and had passed ordinances levying taxes to pay such warrants. It was further alleged that there was no such municipal corporation as the city of South Houston, because the acts of the village of South Houston in attempting to accept the provisions of title 22, chapter 1, were null and void. The petition concluded with the following prayer:

"Wherefore, plaintiff prays the court that the defendants be cited to appear and answer this petition, and for judgment that the city of South Houston is not incorporated under either article 1070 of the Revised Statutes of 1911, as amended by the Acts of the Thirty-Third Legislature, nor under chapter 1 of title 22 of the Revised Statutes of 1911, or under any other law of the state of Texas, and that the defendants be adjudged to be not entitled to the several positions now held or claimed to be held by them, and the several acts of the defendants and their predecessors be adjusted (adjudged) to be null and void, and for such other and further relief, special and general, in law and in equity, to which the plaintiff may be justly entitled, and for costs of suit."

Judgment was entered declaring null and void the efforts of the village of South Houston to change the nature of its corporate existence, and declaring null and void the ordinances passed by the respondents, acting as a city commission of the city of South Houston, and declaring null and void the warrants and other obligations issued by them. As affecting the respondents, judgment was entered as follows:

"Defendant G. A. Dutton is without legal authority to collect any taxes assessed or levied under the void tax levies for year 1916 hereinbefore referred to, and is without authority to collect for the year 1917 more than 25 cents on the \$100 valuation of property for current expenses, and the acts of the said Dutton in collecting such taxes, and in applying the same or any part thereof to the payment of interest on the aforesaid warrants in the sum of \$15,500, were null and void.

"L. L. Bartlett does not now and has not at any time legally held the position nor has he

legally exercised the powers of mayor of the city of South Houston, as attempted to be created as a town of 600 or more population.

"H. C. Gatton and S. B. Glazener are not now and have not at any time legally held the position of or legally exercised the powers of commissioners of the city of South Houston, as attempted to be created a city of 600 or more population.

"L. L. Bartlett as mayor, and H. C. Gatton and S. B. Glazener as commissioners, are now and have been since their election on April 4, 1916, de jure officers of the village of South Houston, as originally incorporated, with only the powers and rights of officers of a village incorporated under the provisions of chapter 15, title 22, Revised Statutes of 1911, and no other rights or powers.

"It is further ordered, adjudged, and decreed that the plaintiffs, the state of Texas, and the relator, Dumont Realty Company, do have and recover of and from the defendants L. L. Bartlett, H. C. Gatton, S. B. Glazener, and G. A. Dutton all costs in this behalf expended, for which let execution issue."

Judgment was entered in this cause in the trial court in January, 1918. Motion for new trial was overruled February 15, 1918. Respondents gave due notice of appeal. However, no appeal was perfected. On the 22d day of January, 1919, respondents filed petition for writ of error. Service was had on the 24th of January, and transcript was filed in the Court of Civil Appeals for the First Supreme Judicial District on the 21st of April, 1919. Afterwards this cause was duly transferred to this court. Defendants in error have moved to dismiss this writ of error because not filed in time.

[1] Under article 6401, appeals in quo warranto must be prosecuted to the term of the appellate court in session at the time judgment was rendered in the district court. *Fontaine v. State*, 69 Tex. 510, 6 S. W. 816; *Livingston v. State*, 70 Tex. 393, 11 S. W. 115; *Kendall v. State*, 51 S. W. 1102. Respondents did not do this, but, having abandoned their appeal, are seeking to have this case reviewed on writ of error. This is without warrant of law. *Livingston v. State*, supra.

Under rule 7 for the Courts of Civil Appeals (142 S. W. x):

"Transcripts of appeals from judgments in proceedings in quo warranto shall be filed in the Court of Civil Appeals within 20 days after appeal is perfected." *State v. Nelson*, 170 S. W. 814.

[2] In order to give this court jurisdiction of this case, respondents should have filed their appeal in the appellate court not later than the first Monday in July, 1918, and should have filed the transcript on appeal within 20 days after perfecting their appeal. As they failed to do this, we are forced to dismiss this writ of error.

[3] Respondents seek to avoid the force

of this article and the decisions cited by us on the ground that they apply only to that portion of the judgment which is for ouster, citing *Oriental Oil Co. v. State*, 135 S. W. 724; *Cole v. State*, 163 S. W. 354; 2 McQuillan on Municipal Corporations, § 809. These decisions cannot save this writ of error. If we dismiss that portion of the appeal which is for ouster, then we have disposed of all portions of the judgment directly affecting the respondents. Their rights are completely separable from the rights of the warrant holders, and their attempted appeal does not give us jurisdiction of the other portions of the judgment.

[4] The question raised by this motion to dismiss is jurisdictional, and we have no discretion in the matter. *State v. Nelson supra*.

[5] Messrs. Harris, McCall & Graham, attorneys at law, have filed with us, since submission, an amicus curiae brief, suggesting that the warrant holders were necessary parties to any proceeding affecting the warrants, and praying that this cause be reversed on fundamental error. Defendants in error have answered this brief, suggesting that the judgment of the trial court, in so far as it undertakes to affect parties not before it, is an absolute nullity. The absence of necessary parties is a question of fundamental error, and cannot be waived. *Bule v. Cunningham*, 29 S. W. 801; *Channel Co. v. Bruly*, 45 Tex. 6. But, as stated above, in our view of this case, we have nothing before us, and are without authority to do otherwise than to dismiss this writ of error. In as much as it appears on the face of the judgment that necessary parties were absent in the trial court, and that the judgment, as affecting them, is null and void, and that their rights are separable from the rights of respondents, even if we are wrong in declining to take jurisdiction of this writ of error, under rule 62a for the Courts of Civil Appeals (149 S. W. x.), we would hesitate to reverse the case.

Writ of error in all things dismissed, on the error suggested by Messrs. Harris, McCall & Graham.

BAKER v. BEATTIE. (No. 2269.)

(Court of Civil Appeals of Texas. Texarkana.
June 10, 1920. Rehearing Denied
June 17, 1920.)

1. Master and servant §3(1)—Contract of employment not absolutely void for fraudulent statement.

A contract of employment is not absolutely void by reason of a false representation by the servant that he had never been paid more than \$100 in settlement of damages for personal injuries, such a fraudulent statement only

affording ground for avoidance or annulment of the contract at the option of the master, and until actual termination the relation continues to exist.

2. Master and servant §139—Proximate cause of switchman's injury defined.

Where foreman directed cars to be switched onto a clear track, but instead they were switched onto a different track, where they bumped into standing cars, injuring a switchman operating a brake, the efficient cause of the injury was the impact of the cars and not the switching onto the wrong track.

3. Master and servant §213(3)—Risk of injury from impact of switched cars assumed.

Impact of box cars being switched is a risk ordinarily incident to the work of a switchman, which he assumes, and he cannot recover for injuries caused by being wrenched while operating a brake on top of a box car by an impact of the force usual and ordinary in the switching business.

4. Master and servant. §297(2)—Findings held inconsistent.

Where the legal effect of a part of the findings of a jury is to establish actionable negligence, and the effect of part of the findings is to establish a want of negligence, but only ordinary assumed risks, the verdict becomes so uncertain by reason of the inconsistent findings that it cannot be made the basis of a judgment.

Appeal from District Court, Harris County; Ewing Boyd, Judge.

Action by W. A. Beattie against James A. Baker, receiver. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The appellee sues for damages for alleged personal injuries received while performing the duties of a switchman in the yards of appellant at Houston, Tex. The negligence alleged was:

"That the signal was given for the train upon which he was working to go down into an empty track, but that such signal was negligently and carelessly transmitted to another employe on the switch engine, or was negligently or carelessly given to the employe, or was negligently or carelessly transmitted by one employe to another; and that the employes of the defendant carelessly and negligently shoved the cars upon which the plaintiff was working onto a track containing other cars, and carelessly and negligently jammed or bumped the cars upon which he was working suddenly and violently against the other cars already on said track; and that said violent bumping of said cars threw or twisted him around the brake staff, his foot catching and body twisting, and by reason of which he was injured."

And then follows a description of the injuries. The defendant pleaded general denial, contributory negligence, and assumed risk, and specially that plaintiff in his written application for employment as a switchman made false answers to procure the posi-

tion, and that because of these fraudulent misstatements the relation of master and servant did not exist, and the plaintiff was consequently a trespasser upon the cars at the time of his injury.

The case was submitted to the jury on special issues, and their findings are: (1) That the act on the part of the employes in heading the seven cars on which the plaintiff was riding into a different side track than the one directed by the foreman to be used, causing them suddenly or violently to be bumped against other cars standing on said side track, was negligence; (2) that such negligence proximately caused the injuries to the plaintiff; and (3) that the plaintiff was not guilty of any contributory negligence. The jury further answered:

"No. 7. Did the cut of cars on which W. A. Beattie was riding collide with the other cars with unusual force, or with the force that is usual and ordinary in the switching business? Answer: They collided with the force usual and ordinary in the switching business."

"No. 13. Do you or do you not find that the injuries of the plaintiff, if any, were due to any risk arising in the discharge of his duty as a switchman and ordinarily incident to such work, or do you find that such injury, if any, resulted from the negligence of the servants and employes of the defendant? Answer: We find that the injury resulted from the negligence of the servants and employes of the defendant."

"Special issue requested by the defendant: Do you believe from the evidence the cars came together with unusual force and that plaintiff discovered that they would do so in time, by the exercise of ordinary care on his part, to have protected himself from injury, and failed to use ordinary care to so protect himself? Answer: No."

The evidence shows that the plaintiff was a switchman in the yards of Houston, and at the time in question was one of a switch crew of three, working under a foreman. It was necessary for the crew to place 35 or 40 freight cars on the tracks at the freight house on Commerce street. These cars were loaded with merchandise and were being placed for the purpose of unloading them. The foreman, in the hearing of appellee, directed 7 cars to be put into a sidetrack known as "city No. 1," which at that time was clear of any cars. Appellee was then directed by the foreman to ride on top of the 7 cars so as to stop them by means of the brakes when they reached the end of the track. The cars were not headed into the track directed by the foreman, but by some misunderstanding were headed into the adjoining side track, called "house track No. 2." The latter track had on it at the time 12 merchandise cars. After directing the 7 cars to be put on the side track the foreman uncoupled them from the other cars and then the switch engine put them in motion. According to appellee's evidence, supported by the other witnesses:

"All the kick you had to give those cars was to have the engine shove the slack against them so you can raise the coupling pin, and they will roll by gravity the rest of the way."

The 7 cars struck against the cars already on the side track, and, as appellee says:

"When they struck it twisted me around the brake staff, threw my body around, and my foot caught on something, I don't know what it was, and twisted my left knee," causing injury.

Wm. H. Wilson, Samuel B. Dabney, and John M. King, all of Houston, and J. H. Ranson, of Bryan, for appellant.

K. C. Barkley, of Houston, for appellee.

LEVY, J. (after stating the facts as above). [1] Appellee had been in the employ of the appellant for nearly two years. In his application for employment in the first instance the appellee incorrectly stated his age and his name, and answered "No" to each of the following questions:

"(14) Have you ever sustained a serious or permanent personal injury?"

"(15) Have you ever had, or have you now, a lawsuit against any railway company or the receiver thereof?"

"(16) Have you ever been paid more than the sum of \$100 at one time in the settlement of a claim or lawsuit for damages for personal injuries sustained or alleged to have been sustained by you?"

Appellee had sustained a former injury of his left knee while employed as a switchman in Louisiana, and had been paid for the injury more than \$100 by judgment of the court. Appellant insists, under appropriate assignments of error, that as the appellee had procured his employment as a switchman by false statements the contract of employment would be void and the relation of master and servant would not exist. This contention should, it is thought, be overruled. The contract of employment not being rescinded or canceled at the time of the injury, the appellee would be held to be an employe of the appellant. The contract of employment would not be absolutely void because of the alleged fraudulent statements. The alleged fraudulent statements would only afford grounds for a voidance or annulment of the contract of employment at the option of the company. And until the contract of employment was actually terminated by the company on the ground of the alleged fraudulent statements, the relation of master and servant would legally continue and exist. It is stated in Labatt on Master and Servant (2d Ed.) vol. 1, § 96a:

"A contract is not rendered void ab initio by the fact that the master was induced by the servant's fraud to enter into it. Such fraud constitutes a ground for dismissing the servant, or a defense to an action for the wages stipulated." *Railway Co. v. Harris*, 48 Tex. Civ. App. 434, 107 S. W. 108; *Lupher v. Railway*

Co., 81 Kan. 585, 106 Pac. 284, 25 L. R. A. (N. S.) 707.

[2-4] It is contended that the findings of the jury are inconsistent with each other and authorized, as a matter of law, a different judgment, and that the court erred in rendering judgment on the verdict for the plaintiff. It is believed that the contention should be sustained. The jury made the finding that in switching the seven cars into house track No. 2, causing the sudden or violent impact against the cars already on the track, there was negligence proximately causing the injuries to the plaintiff. If this finding were all the findings made, then a judgment thereon for the plaintiff was legally warranted. But the jury further found as a fact that the impact of the cars was not with "unusual force," but only "with the force usual and ordinary in the switching business." This later finding was further emphasized by the further finding in the special requested issue that (1) the cars did not "come together with unusual force," and (2) that "the plaintiff did not discover that they would do so in time to use ordinary care to protect himself from injury." There does not appear in the evidence that there was any shunting or kicking of the cars in the operation of the same. If there were no other findings than the latter findings of fact, a judgment for the appellant was legally authorized on the ground that there can be no recovery for injuries due to the ordinary risks of the particular work. There is, then, as seen, repugnancy in the several findings in matters material to the issues involved in the case. The mere fact that the cars were switched into house track No. 2 instead of side track No. 1 did not occasion any injury. The real and efficient cause of the injury was the impact of the cars. This impact, the jury finds, was (1) a sudden and violent jam or bump, but (2) not with "unusual force" and "with the force usual and ordinary in the switching business." Appellee as a switchman would know that every impact is in some measure forcible. If, as found by the jury, the impact causing the injury was a risk ordinarily incident to the work being done, then the employé assumes that risk and cannot recover. 4 Thompson on Negligence, § 4613; 18 R. C. L. p. 676. The railway company would not be guilty of negligence if only the ordinary risk of the work is established as being the cause of the injury. Accordingly, if the risk to which the injury was due was an ordinary one, the appellant is not liable, even if the employé did use ordinary care for his safety. The further finding of the jury on question 13 would not make the verdict certain. The question called for a legal conclusion. Where the jury finds the facts particularly, the court then decides the law arising on them. And where, as here, the legal effect of a part of the find-

ings is to establish actionable negligence, and the effect of a part of the findings is to establish a want of any negligence but only ordinary assumed risks, the verdict becomes so uncertain by reason of the inconsistent findings that it cannot be made the basis of a judgment.

The judgment is reversed, and the cause remanded for a new trial.

STARR et al. v. BROOKS et al. (No. 2273.)

(Court of Civil Appeals of Texas. Texarkana. May 26, 1920. On Motion for Rehearing, June 24, 1920.)

1. Tenancy in common ⇐45—Conveyance of specific part, ratified by cotenant, operates as partition.

When one tenant in common conveys a specific part of the common property, the conveyance may be ratified by the other cotenant and made to operate as a partition or conveyance in severalty, and the nonconveying tenant may recognize such deed by conveying in like manner the remainder of the common property by metes and bounds.

On Motion for Rehearing.

2. Vendor and purchaser ⇐245—Whether junior purchase was in good faith and for value held for jury.

In trespass to try title, where plaintiffs claimed under a deed conveying an undivided half interest executed in 1848, and defendants claimed under a deed executed in 1846, but not recorded until 1853, evidence of assertion of title by plaintiff's predecessors in interest for more than 70 years, with payment of taxes and active steps towards protecting the lands from trespass, held sufficient to require the submission to the jury of plaintiff's purchase in good faith for a valuable consideration without notice of the first conveyance.

Appeal from District Court, Anderson County; John S. Prince, Judge.

Suit by Mrs. Clara C. Starr and others against B. H. Brooks and others to recover realty. Judgment for defendants, and plaintiffs appeal. Reversed and remanded for another trial.

F. H. Prendergast, of Marshall, and A. G. Greenwood, of Palestine, for appellants.

N. B. Morris and Mills Reeves, both of Palestine, for appellees.

HODGES, J. The appellants filed suit in the court below to recover of the appellees 800 acres of land described as a part of the Polly Scritchfield league, situated in An-

derson county. This appeal is from a judgment in favor of the defendants below, based upon a peremptory instruction given by the court. The facts show that Augustus Hotchkiss is the common source of title. Hotchkiss conveyed an undivided half interest in the property in 1846 to J. P. Smythe. Smythe's deed was not recorded until November 30, 1853. The appellees claim under Smythe. Hotchkiss conveyed the entire tract of land in 1848 to A. H. Donaldson, under whom the appellants claim title.

The first question is: Which of these conveyances should have priority? Under the statute of 1840, which then governed the registration of deeds, a junior purchaser, in order to postpone a prior unrecorded deed, had the burden of proving that he purchased in good faith, for a valuable consideration, and without notice of the first conveyance. *Ryle v. Davidson*, 102 Tex. 230, 115 S. W. 28. Appellants contend that the act of 1841 is the law that should be here applied, and that this statute changed the rule imposed by the act of 1840. The act of 1841 will be found in volume 2, page 627, of Gammel's *Laws of Texas*. After carefully considering that act, we are of the opinion that it did not modify the controlling part of the act of 1840, or in any way alter the rule above stated. The case of *Ryle v. Davidson* involved a junior conveyance made in 1846, and the question before the court was: Should it have priority over an unrecorded deed made in 1835? Without discussing the act of 1841, the Supreme Court applied the law of 1840, thereby holding that it should control as to deed executed at that time. The important facts in that case are not materially different from those here involved.

Appellants concede that there was no direct evidence to show that any of those claiming under the conveyance to Donaldson had paid a valuable consideration, or had purchased without notice of the Smythe deed; but they insist that there are circumstances disclosed in the evidence which would have authorized the jury to find those essential facts. The circumstances were, in substance, the payment of taxes practically every year by the claimants under Donaldson, the ejection of trespassers, and their actual claim of ownership. It appears that none of the parties were ever in actual possession of any portion of the tract of land, but that some of those who claimed under the Donaldson deed had brought suit and ejected trespassers. It was also shown that the appellants and those under whom they claimed had paid all the taxes, and that the appellees had never reimbursed them, or offered to reimburse them, for any part of the money so paid. It is true, as stated in the case of *Holland v. Nance*, 102 Tex. 181, 114 S. W. 346, that proof of the payment of

a valuable consideration and a purchase without notice of a prior unrecorded deed may be made by circumstances. But the circumstances here relied on are not sufficient to supply that proof. The lapse of a great length of time alone has never been held to be a circumstance strong enough to meet the requirements of the statute. *Rogers v. Houston*, 60 S. W. 447; *Rogers v. Pettus*, 80 Tex. 427, 15 S. W. 1093; *Bremer v. Case*, 60 Tex. 152. In the last case referred to the court held that where the parties to the transaction had died, and no direct proof could be made that the subsequent purchaser had or had not notice of a prior conveyance, upon proof being made that the subsequent purchaser paid a valuable consideration, the presumption might be indulged that he paid without notice of a prior conveyance. But in this case there is no evidence that any of the purchasers of the Donaldson title ever paid a valuable consideration, and hence no basis for the presumption referred to above. It is true the holders of the Donaldson title paid the taxes; but, being the owners of an undivided half interest, it was their duty to keep the taxes paid. They also had the right to eject trespassers from the premises. Such conduct was not inconsistent with the title which they had a legal right to assert. It is that situation which distinguishes this case from that of *Holland v. Nance*.

[1] Appellants further contend that under the conveyance to Donaldson they became owners of at least an undivided half interest in the land, and in the trial below should have had a judgment for title to that interest. It is conceded that some time prior to the institution of this suit the appellants had sold off to third parties 875 acres of the common property, describing the tracts conveyed by metes and bounds. Approximately 800 acres, or less than half, is all that remained of the original grant. Appellants, in effect, assert the proposition that, notwithstanding they had sold for their own exclusive benefit more than one-half of the common property, they were entitled to share equally with the appellees in the remainder. We do not agree to that contention. When one tenant in common conveys a specific part of the common property, that conveyance may be ratified by the other cotenant, and thus made to operate as a partition or conveyance in severalty. The nonconveying tenant may recognize such a deed by conveying in like manner the remainder of the common property by metes and bounds; and when this is done it practically amounts to a partition of the land, and both deeds may be treated as effective. 7 R. C. L. pp. 882, 883, and cases cited in the notes. When the appellants conveyed more than their half of the common property, they had no right to demand and re-

ceive any portion of the remainder, without alleging and proving that the portion they conveyed was less valuable than that which remained. The original petitions in this case were in the form of an action of trespass to try title, and the pleas were "not guilty." The appellees, as defendants, were therefore not required to specially plead any equitable rights to entitle them to defeat the claim of the appellants. There was no proof offered that one portion of the land was more valuable than another, or what was the value of any portion of the land. It appears that the tract here sued for was uninclosed, and not in the actual possession of any claimant.

A decision of these questions, we think, settles this controversy, and the judgment is affirmed.

On Motion for Rehearing.

[2] We have concluded, upon further consideration, that the facts of this case, so far as they relate to the circumstances tending to show a purchase for value and without notice of the senior conveyance to Smythe, cannot be distinguished from those which controlled the Supreme Court in disposing of the case of *Holland v. Nance*, above referred to. While the conditions are different in the respects pointed out in the original opinion, the difference is not such as to destroy the probative force of material circumstances from which a purchase for value and without notice might have been inferred. The evidence shows that for more than 70 years those claiming under the Smythe conveyance, made in 1846, asserted no title to the land and undertook to exercise no acts of ownership over it. The evidence further shows that during all that time those claiming under the junior conveyance to Donaldson did assert title, and a part of the time took active steps towards protecting the land from trespassers. There is nothing to indicate that their claim was less than what it purported to be—title to the entire interest. It further appears without dispute that those who could have testified to the bona fides of the purchase from Hotchkiss, the common source, were dead; and the only method by which the appellants can now establish those essential facts is by resort to the circumstances attending the conveyance and the subsequent claims of the parties. While the circumstances relied on are not conclusive evidence of those essentials required to establish the appellants' title, they are such that the jury might take into consideration in determining that issue.

For the reasons stated we feel that justice requires that this case be reversed, and the cause remanded for another trial, and it is accordingly so ordered.

GERMAN et ux. v. HOUSTON & T. C. R. CO. (No. 6197.)

(Court of Civil Appeals of Texas, Austin.
May 5, 1920. Rehearing Denied
June 16, 1920.)

1. New trial \S 53—Disqualification of juror does not render verdict void; "competent."

In view of Const. art. 16, § 19, and Rev. St. 1911, arts. 5114, 5115, 5117, 5194, 5206, a juror under 21 years of age is incompetent and disqualified, the word "competent" in the statute meaning legally qualified, but such disqualification does not render the verdict void where the question was first raised on motion for new trial.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Competent.]

2. New trial \S 44(1)—Conduct of jury in considering foreman's statements and a map drawn by him held to warrant a new trial.

In an action for plaintiffs' ejection from defendant's train after being carried beyond destination, the jury's consideration of its foreman's map drawn partly from information not in the evidence and the foreman's statement that he knew defendant's witnesses, and that he was credible, and that foreman had once been carried past his station and was taken to the next station and carried back without extra charge, where there was a question of contributory negligence in plaintiffs' voluntarily getting off the train between stations, constituted misconduct of jury warranting new trial.

3. Appeal and error \S 978(3)—Discretion of court in refusing new trial for misconduct of jury reviewable.

The discretion of the trial judge in refusing a new trial for misconduct of the jury in considering evidence of their foreman given while deliberating on verdict is subject to review upon appeal.

Appeal from District Court, McLennan County; H. M. Richey, Judge.

Suit by L. R. German and wife against the Houston & Texas Central Railroad Company. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

W. L. Eason and W. B. Carrington, both of Waco, for appellants.

Stribling & Stribling, of Waco, for appellee.

BRADY, J. L. R. German and his wife brought this suit against the Houston & Texas Central Railroad Company for damages by reason of being ejected from defendant's train near Bremond, Tex. The basis of the action was the claim that the railroad company was negligent in not informing plaintiffs of their arrival at Bremond, although the conductor had personally promised to notify them, and the ejection of plaintiffs from the train during a hard rain, after

having carried them about a mile and a half beyond the station. Rough and insulting treatment by the conductor in ejecting plaintiff's wife and grandchild and injuries resulting were alleged.

The issues made by the pleadings and the evidence are sufficiently indicated by the answers of the jury to the questions submitted by the court. They were, in substance, that the agents of defendant did not fail to announce, in a sufficiently distinct voice to notify passengers, the arrival of the train at Bremond, and that the conductor did not fail to personally notify plaintiffs of such arrival; that the conductor did not use actual force upon Mrs. German in ejecting her, if he did eject her from the train; that the failure of defendant to take plaintiffs back to the Bremond depot was not negligence; that the conductor did not eject plaintiffs from the train; that plaintiffs knew, or by the use of ordinary care could have known, when the train reached Bremond in time for them to have alighted therefrom; that they voluntarily got off the train after it had left the station at Bremond, and that such action was contributory negligence; that the failure of plaintiffs to go to a lodging house in Bremond was contributory negligence; that the exposure to the weather was the proximate cause of the injuries, if any, to the health of Mrs. German and to German, and also of the injuries, if any, to Mrs. German's wearing apparel. The jury found that the reasonable market value of the hat and dress of Mrs. German was \$26, but found that there were no damages to plaintiffs because of physical pain or mental anguish. On the verdict judgment was rendered for the defendant.

Opinion.

[1] The first assignment complains of the refusal of the trial court to grant a new trial because one of the jurors was not competent to try the case, not being a qualified voter. The undisputed evidence shows that this juror was not 21 years of age until about 3 weeks after the trial, but the point was not raised until after the verdict, and appeared for the first time in the motion for new trial.

It is conceded by appellants' counsel that there are numerous authorities holding that a mere disqualification of a juror will not render a verdict void, but it is contended that this is not the rule when the juror is made incompetent by statute. A distinction is sought to be made between incompetency and disqualification, but we cannot see the force of the contention. The statute provides that all male persons over 21 years of age are competent jurors, "unless disqualified under some provision of this chapter." We think it is clear that the word "competent," as used in the statute, means legally qualified. A person is as much incompetent or disqualified

to serve as a juror when not a freeholder or householder, for instance, as when he is not over 21 years of age. Each of such grounds of disqualification renders him incompetent as a juror, not only as to the particular case, but in any case. Without further discussion of the question, we overrule the assignment; and in support of our holding cite the following authorities: Constitution of Texas, art. 16, § 19; articles 5114, 5115, 5117, 5194, and 5206, tit. 75, R. S. 1911; *Railway v. Woodward*, 26 Tex. Civ. App. 389, 63 S. W. 1051-1054; *Rice v. Dewberry*, 93 S. W. 719; *Schuster v. LaLonde*, 57 Tex. 29; *Newman v. Dodson*, 61 Tex. 96; *Sinsheimer v. Edward Well Co.*, 61 Tex. Civ. App. 209, 129 S. W. 187; *Railway v. Broughton*, 212 S. W. 669; *Givens v. State*, 103 Tenn. 648, 55 S. W. 1111; *Blair v. Paterson*, 131 Mo. App. 122, 110 S. W. 616; *Wassum v. Feeney*, 121 Mass. 93, 23 Am. Rep. 258; *Johns v. Hodges*, 60 Md. 215, 45 Am. Rep. 722; *Salisbury v. McClaskey*, 26 Hun, 262; *Brewer v. Jacobs* (C. C.) 22 Fed. 217; 12 Corpus Juris, 233.

[2, 3] It is next contended that the court should have set aside the verdict and granted a new trial because of misconduct of the jury. In brief, this claim is based upon the conduct of the foreman of the jury, Mr. Eaves, in showing to the jury a large map which he had himself drawn, showing Bremond station and objects in that vicinity, including distances marked to certain points, and the conduct of the same juror in having stated to the jury, in substance, that he was personally acquainted with one of defendant's witnesses, T. J. Smith, whom he had known since boyhood, and that for this reason he believed his testimony was true.

Before announcing our conclusion, we will briefly consider these two grounds of alleged misconduct. It appears that Mr. Eaves did prepare and exhibit such a map to the jury, and that he drew the same not only from the evidence, but also, in part at least, from his own knowledge of the town of Bremond and its environments, to which he had not testified. On the map he showed a hotel and lodging house, when the evidence showed but one, and he testified that he had marked the location of a semaphore near the depot, which was not shown by the evidence, and had marked certain distances not based upon the evidence, including the distance to the cattle guard, beyond which it was claimed plaintiffs were ejected from the train. While most, if not all, of the jurors who testified stated that they based their verdict entirely upon the evidence, it was shown that some of the jurors considered this map in determining locations and distances. It appeared that two or three of the jurors were at first for awarding damages to the plaintiffs in a substantial amount, one of the jurors having testified that they yielded to the

majority because they were mostly farmers, and were tired and wanted to go home.

Touching the question of the probable effect of the statement of Mr. Eaves, the foreman, that he personally knew Mr. Smith, and that he believed he was a credible witness, it was shown that the testimony of Smith was directly in conflict with plaintiffs' testimony as to whether or not the name of Bremond station was called, and as to whether or not plaintiffs were notified of the arrival of the train at Bremond. In fact, Smith testified that he personally notified them of the arrival of the train in time for them to have gotten off, which they denied. Mr. Smith also testified that when plaintiffs got off the train he had walked to the front and did not see the conductor do anything to them. Plaintiffs claimed that the conductor applied force in ejecting them from the train. Mrs. German stated that the conductor caught her by the arm and pulled her off the train into the rain and mud. The testimony of plaintiffs was to the effect that they had to cross over a cattle guard, and they had to go about a mile and a half back to the station, which took them about a half hour.

There is also another alleged ground of misconduct, consisting of the claim that Mr. Eaves, the foreman, also stated to other members of the jury that he had once made a trip near Tyler, Tex., was carried past his station, but that the conductor took him to the next station, and then carried him back to where he wanted to go, without any extra charge. At least two jurors testified that Eaves made substantially the above statement, although he denied it on the hearing of the motion for new trial. One of the issues submitted to the jury was the alleged contributory negligence of plaintiffs in voluntarily getting off the train into the rain when carried past the station of Bremond, instead of going on to the next station and returning to Bremond on another train.

It is strongly insisted by appellee that none of these matters constituted misconduct on the part of the jury, but, if they did, the question of granting a new trial is by statute committed to the discretion of the trial judge, and, unless that discretion was clearly abused, the case should not be reversed for the alleged misconduct.

The Supreme Court, in *H. & T. O. R. R. v. Gray*, 105 Tex. 43, 143 S. W. 606, held that the discretion vested in the trial judge in such a matter by our statute is not final nor an arbitrary one, but its exercise may be reviewed by an appellate court, when it clearly appears that the rights of the parties have been disregarded.

This court, in the case of *Dunnaway v. Austin Street Ry. Co.*, 195 S. W. 1159, has held to the same effect, and that, where it appears altogether probable that the statement of a juror, not based upon the evidence, had influence upon other jurors in determining material issues, it is such misconduct as entitles the injured party to a new trial, and the trial court exceeded its discretion when it overruled that contention.

The following cases may also be cited as showing a review by the appellate courts of the discretion of a trial judge in refusing to grant a new trial for misconduct of the jury: *South Tex. Mfg. Co. v. Dozier*, 158 S. W. 1052; *S. L. B. & M. v. Vick*, 210 S. W. 250; *Andrews Lbr. Co. v. M., K. & T. Ry.*, 158 S. W. 1194; *Manes v. Case Thresh. Mach. Co.*, 204 S. W. 236; *Fave v. Bowers*, 33 S. W. 183; *Goar v. Thompson*, 19 Tex. Civ. App. 330, 47 S. W. 65; *G., C. & S. F. Ry. Co. v. Matthews*, 28 Tex. Civ. App. 92, 66 S. W. 592, 67 S. W. 788; *St. L. & S. W. v. Roberts*, 196 S. W. 1004; *Corpus Christi Ry. v. Kjellberg*, 185 S. W. 432; *Peppercorn v. City*, 89 Wis. 38, 61 N. W. 80, 46 Am. St. Rep. 818; *Garside v. Ladd Watch Case Co.*, 17 R. I. 601, 24 Atl. 473; *Gilbert v. State* (Cr. App.) 215 S. W. 110. Without expressly approving the conclusion of the courts in all of these cases upon this subject as to the particular facts involved, we cite them as showing the trend of the decisions, especially where it is thought that the rights of parties have been disregarded.

In the instant case, without attempting to point out specifically wherein the misconduct complained of probably affected the jury's verdict, we are clearly of the opinion that it did probably influence the jury in respect to several material issues as to which the evidence was sharply conflicting. We are reluctant to disturb the finding of a trial judge on a matter of this kind, which is largely committed to his discretion, but when we are convinced that a party's rights have been disregarded, and that probable injury resulted from misconduct of the jury, we will not hesitate to review the trial court's action, and to reverse the case, since it thus appears that the discretion devolved by statute has been exceeded. Such is our conclusion in this case when all the acts of misconduct are considered, and, believing that the appellants have not had that fair and impartial trial which the spirit of our laws accords a litigant, and it being impossible to say how far the verdict of the jury was influenced in this case by what we regard as improper conduct of the jurors, although it may have been from no improper motive, we reverse the case for another trial.

Reversed and remanded.

**WARD COUNTY WATER IMPROVEMENT
DIST. NO. 2 v. WARD COUNTY IRR.
DIST. NO. 1 et al. (No. 1114.)**

(Court of Civil Appeals of Texas. El Paso.
May 20, 1920. Rehearing Denied
June 17, 1920.)

1. Waters and water courses \Leftrightarrow 247(1)—Water improvement district not empowered to maintain action to adjudicate riparian water rights not acquired by it.

A water improvement district established by commissioners' court under Acts 35th Leg. (1917) c. 87 (Vernon's Ann. Civ. St. Supp. 1918, arts. 5107—1 to 5107—117), while authorized to sue and be sued, and under sections 1, 24, and 108 (sections 5107—1, 5107—24, 5107—108) empowered to provide for irrigation of the land in the district, to own and construct reservoirs, etc., to acquire right of way, and to acquire water rights and privileges in any way that an individual or corporation may, cannot maintain action to adjudicate riparian water rights; it not having acquired them.

2. Continuance \Leftrightarrow 8—Refusal to continue to bring in parties held proper where exception to petition of no right to assert the cause of action had been sustained.

Where exception to petition to determine riparian water rights had been properly sustained on the ground that it was not alleged plaintiff owned the rights, and that it could not assert a right not owned by it, and there was no offer to amend, there was no error in refusing continuance to bring in riparian owners and contractual water right owners, there being no case left to continue, and such owners not being necessary parties to the suit. Rev. St. 1911, art. 1848.

3. Appeal and error \Leftrightarrow 927(2)—In absence of showing, grounds of motion to dismiss cross-action granted to be assumed true.

In the absence of any showing to the contrary, the grounds of a motion to dismiss cross-action granted must be assumed true.

4. Abatement and revival \Leftrightarrow 8(2)—Cross-action between defendants held properly dismissed pending a suit involving its subject-matter.

Cross-action of one defendant against another is properly dismissed on plaintiff's motion, where to permit its prosecution would necessitate continuance of the cause, and where there is a suit pending between one defendant and the predecessor in interest of the other involving the subject-matter of the cross-action.

Appeal from District Court, Martin County; Chas. Gibbs, Judge.

Action by the Ward County Water Improvement District No. 2 against the Ward County Irrigation District No. 1 and the Cedarvale Canal Company. Plaintiff's suit and cross-action of the Cedarvale Canal Company against its codefendant were dis-

missed, and plaintiff and defendant Cedarvale Canal Company appeal. Affirmed.
See, also, 214 S. W. 490.

Gaines & Corbett, of Bay City, Jno. H. Boogher, of Grandfalls, Lee Monroe, of Pecos, and Garrard & Baker, of Midland, for appellants.

J. E. Starley, of Pecos, and H. G. Russell, of Barstow, for appellee.

HIGGINS, J. This suit was brought by Ward County water improvement district No. 2, appellant here, hereinafter referred to as district No. 2, against Ward County irrigation district No. 1, hereinafter referred to as district No. 1, and the Cedarvale Canal Company.

By its first amended petition filed October 21, 1919, the plaintiff in substance alleged as follows: That it was a duly organized irrigation or water improvement district under the laws of Texas, and that district No. 1 was an irrigation district under Texas laws, and the Cedarvale Company was a foreign corporation claiming the right to do business in this state; that plaintiff had incurred heavy financial obligations in the purchase of canals, laterals, ditches, dams, headgates, reservoir rights, water rights, and water appropriations, and had issued its interest-bearing bonds in the sum of \$65,000 secured by a lien upon the land situate in the district; that the plaintiff was organized for the purpose of acquiring the unappropriated waters of the Pecos river and furnishing same for irrigation purposes to the lands within the district, and also for appropriating, owning, and controlling appropriations of the waters of said river and furnishing same to said lands for irrigation purposes and domestic uses, and also for the purpose of operating canals for the benefit of the owners of riparian lands in the district abutting on said river so that the waters to which said lands were entitled for domestic and irrigation purposes might be delivered to them in the most economical and efficient manner; that about 43,000 acres of land were included in the district, about 33,000 acres thereof being riparian to the Pecos river; said riparian lands were described and the respective owners thereof named; that said lands were granted by the state prior to 1895. The petition further sets up various appropriations of water from the Pecos river for irrigation purposes made by various persons between the 6th day of September, 1890, and subsequent dates, and that the plaintiff was the successor in interest of the original owners of said appropriations and the irrigation systems of such appropriators, and that it and its predecessors in interest had been using said irrigation systems and making use of said water ap-

propriations for about 24 years; that the defendants had each constructed dams in the Pecos river, thereby diverting from the river the waters thereof and conveying the same through their irrigation systems and supplying the same for irrigation purposes to lands adjacent to the systems of defendants, thereby depriving the plaintiff of the waters of the river, to which it was entitled.

There are other allegations of the petition which are quite lengthy, but the foregoing outlines the material allegations pertinent to this appeal.

The plaintiff sought to have its right to the waters of the river established, and asked that the defendants be enjoined from diverting any of the waters of the river and delivering same to nonriparian lands, and that they be restrained from using any of such water which would result in decreasing the flow of the stream so as to interfere with plaintiff taking water for the proper irrigation of lands in its district, and that the rights of the defendants to the waters of the river be declared to be subordinate to the plaintiff's rights.

The plaintiff voluntarily took a nonsuit as to any and all causes of action set up in its petition "other than the rights to litigate the questions involved in the claim to riparian water rights of said stream." As to this remaining cause of action the court sustained an exception urged by the defendants and dismissed the suit. The sustained exception was to the effect that the petition was "insufficient in law in that it bases its cause of action upon the ownership of riparian lands, which ownership is vested in other parties, and not in the plaintiff, and said petition does not allege that the plaintiff is the owner of said riparian lands, or said riparian rights, and it cannot assert a cause of action herein not owned by it."

The plaintiff appeals from the dismissal of its suit upon the sustaining of the foregoing exception, and the Cedarvale Company appeals from the action of the court in striking out and dismissing a cross-action set up by it against its codefendant, district No. 1. The appeal of the original plaintiff in the cause, district No. 2, will be first considered.

[1] The petition does not allege that the plaintiff has in any wise acquired the riparian water rights of the lands situate in its district riparian to the Pecos river, but its contention, under its first assignment, in effect is that by virtue of the incorporation of the district under the provisions of chapter 87, General Laws of the Thirty-Fifth Legislature (Vernon's Ann. Civ. St. Supp. 1918, arts. 5107—1 to 5107—117) the plaintiff "became a municipal corporation which took and held in trust, for the use and benefit of the lands within the district, all of the rights of each acre of land within the district, whether such rights were riparian,

prescriptive or appropriative," and therefore entitled to maintain this suit. This is the substance of the appellant's contention as set forth in its brief and written argument.

Chapter 87 of the Acts of the Thirty-Fifth Legislature and its subsequent amendments (Acts 36th Leg. [1919], c. 77) authorizes commissioners' courts to establish water improvement districts in their respective counties. Districts so established are authorized to sue and be sued. Among other powers conferred they are authorized to provide for the irrigation of the land included in the districts, to own and construct reservoirs, dams, wells, etc., to acquire the necessary right of way therefor, and they are vested with "full authority and right to acquire water rights and privileges in any way that any individual or corporation may acquire the same," and their boards of directors are authorized to construct all works and improvements necessary for the irrigation of lands in the district and the conveying of water for such purpose and all other purposes authorized by section 59, art. 16, of the Constitution. See sections 1, 24, and 108 of original act (Vernon's Ann. Civ. St. Supp. 1918, arts. 5107—1, 5107—24, 5107—108) and its amendments.

It will be noted that by the voluntary nonsuit of the plaintiff its cause of action narrowed down to litigation concerning the riparian water rights of the riparian lands within its district. These riparian water rights were appurtenant to the riparian lands and were owned by the various owners of those lands. The law under which the appellant is incorporated specifically authorizes the acquisition by it of water rights and privileges, but, as was said by Justice Gaines in *Mud Creek Irrigation Co. v. Vivian*, 74 Tex. 174, 11 S. W. 1078, "the law does not confer such rights and privileges themselves." In the opinion of the majority the question presented by the appellant is ruled against it by the principle announced in the case cited. In that case the irrigation company sued as a corporation created under the general law for the purpose of constructing and maintaining irrigation canals. By its suit it sought to enjoin the appellees from maintaining a dam on Mud creek above the point at which the waters of the creek entered its works. A demurrer to the petition was sustained and the suit dismissed. In affirming the case Judge Gaines said:

"The action, judging from the averments in the petition, seems to be based in part upon the theory that the charter of the company by designation of the locality of the canal gave it the exclusive right of the water for irrigating purposes in that locality. This we think a mistake. The franchise granted by the charter was the usual powers and privileges conferred upon such corporate bodies as should be organized under the general law of incorporation, to-

gether with the right to acquire by gift, purchase, or condemnation such property as was necessary or proper to carry out the objects of its creation. Act April 23, 1874, § 58.

"The charter conferred the right to acquire water privileges, but it did not confer the privileges themselves. This principle was announced by this court in the case of *Tugwell v. Eagle Pass Ferry Company*, Austin term, 1888. We there held that the ferry company by becoming a corporation under the general law for the purpose of maintaining a ferry over the Rio Grande at Eagle Pass acquired no right to operate such ferry without procuring a ferry license from the commissioners' court of the county in which the town is situated. The corporation by filing its articles of incorporation in compliance with the law was authorized to establish and maintain a ferry as a corporation at the point designated in its articles, but it did not acquire the ferry privilege itself. So in this case the plaintiff by its incorporation became invested with the power to acquire as a corporation a privilege of using the waters of Mud creek for the purpose of irrigation, but it did not thereby obtain a right to the use of the waters. That right remained to be acquired, which could have been done by either purchase or condemnation, provided the use was a public one.

"It is true that the act of March 10, 1875, provides that 'any * * * canal company shall have the free use of the waters and streams of the state,' but the provisions of that act applied as well to ordinary companies as to corporations. Laws 2d Sess. 14th Leg. 77. Besides we are of the opinion that the provision could be held only to apply to streams upon the public lands of the state, since the Legislature had no power to take away or impair the vested rights of riparian owners without providing for the payment of a just compensation. If the defendants or the owners of the land along the stream in controversy had the right to use the water for the purposes of irrigating their lands, that right remained unaffected by the plaintiff's incorporation or by the legislation of the state passed for the encouragement of irrigation."

The majority recognizes that the law under which the appellant is incorporated is very different from that under which the Mud Creek Irrigation Company was incorporated. The petitions in the two cases are perhaps otherwise distinguishable, but it is the view of the majority that the question presented by this appeal is ruled by the principles announced in the cited case.

The title to the riparian water rights appurtenant to lands abutting on the Pecos river and situate in appellant's district remained vested in the respective owners of these lands. Their title was not affected by appellant's incorporation. The law under which the appellant was incorporated and under which it operates expressly authorizes it to acquire these water rights, but in no wise undertook to confer same. Until it has in some manner connected itself with such riparian rights, it has no right to maintain a suit to enjoin other riparian owners or

water users from diverting and using such waters. Such right and user is not an infringement of any right of the plaintiff, but affects only the right of the riparian landowners in its district, and if they do not see fit to complain the plaintiff cannot do so. The action of the court upon the demurrer presents no error.

[2] By another assignment appellant complains of the action of the court in refusing to continue the case so that it might make all of the parties owning or controlling riparian rights or water contractual rights within its district parties to the litigation.

It appears from the motion that it was made after the court had sustained the exception to the petition. The sustaining of this exception eliminated the only remaining right asserted by the plaintiff, and, since there was no offer to amend, there was no case left to continue.

But, aside from this consideration, the riparian landowners in appellant's district and contractual water right owners therein were not necessary parties to this particular suit. They would not have been bound by any judgment which might have been entered, and their rights could not have been affected in any way. The cases cited by appellant in this connection have no application. These owners can bring an independent suit for the protection of their rights whenever they see fit to do so, and the action of the court in refusing the application of this appellant to continue the case so that it might make them parties presents no error. Article 1848, R. S.

The opinion and ruling of the majority is limited to the action of the lower court upon the demurrer and refusal to continue the case. They express no opinion upon any other matter.

[3,4] As to the appeal of the Cedarvale Company, complaining of the action of the court in striking out its cross-action against its codefendant, district No. 1, and dismissing the same, this matter presents no error. The grounds of the motion filed by district No. 2 asking that the cross-action be dismissed were that there was a former suit pending in the district court of Reeves county involving the subject-matter of the cross-action between district No. 1 and the predecessor in interest of the Cedarvale Canal Company, and further that to permit the prosecution of the cross-action would necessitate the continuance of the cause. In the condition of the record it must be assumed that the grounds of this motion were true, and, if so, the action of the court in striking out the cross-action and dismissing the same presents no error.

Affirmed.

WALTHALL, J. (concurring). The only question presented on this appeal to which I

care to refer arises on the sustained exception of appellee, Ward County irrigation district No. 1, and is to the effect that appellant bases its cause of action upon the ownership of riparian lands, and which ownership of the riparian lands is shown by the petition to be vested in the owners of the said lands, and not in plaintiff, the petition not alleging that the plaintiff is the owner of the riparian lands or riparian rights, and for that reason plaintiff shows no interest or right in itself to the land or water that it can assert against Ward County irrigation district No. 1. I am not sure that the case of *Irrigation Co. v. Vivian*, 74 Tex. 174, 11 S. W. 1078, referred to in the majority opinion, has the same application here as applied to the facts of that case.

Appellant is a water improvement district established by the commissioners' court of Ward county under chapter 87, General Laws 35th Leg., and by section 24 of the act authorized to do the things specified, and later herein more specifically stated, and issue bonds. While a corporation, authorized to sue and be sued, it is not a body created for profit, but one organized and established more as a political subdivision of the state, and having for its object the administration of the affairs of the water district in the management and ownership of rights to the use of water in the hands of those most interested in its intelligent and economic use, and to provide a method for acquiring the financial means for constructing a system of works necessary for the appropriation, distribution, and use of water, and incidentally to get from under the necessity of private corporations organized for the purpose of profit, and to enable the water consumers in the district to obtain water for their lands at first cost through the means of their own district organization. It is not my intention to write a discussion on the district policy or means of providing for the economic distribution of water in the arid portion of the state, but simply to make an observation on the water district system as provided, from my viewpoint, on the issue presented. I am under the impression that the case of *Mud Creek I. A. & M. Co. v. Vivian et al.*, referred to in the majority opinion, is not exactly in point and decisive of the one question presented here. There the corporation was organized for profit, and not for administrative purposes. In that case Judge Gaines makes the observation that the action is based in part upon the theory that the charter of the company by designation of the locality of the canal gave it the exclusive right to the water for irrigation purposes in the locality, and held that the franchise gave the company the right to acquire such property as was necessary or proper to carry out the object of its creation, but did not confer the privileges themselves. There being no

allegation that the company had acquired any interest in or right to use the waters of Mud creek, the exception was sustained. That opinion was delivered May 28, 1889. At that time we had no state law providing for the use of waters in the streams of the state other than the act of March 10, 1875 (Acts 2d Sess., 14th Leg. c. 63), which provided that any canal company could have the free use of the waters and streams of the state. At that time we had no statutory or other provision declaring the unowned and unappropriated waters of the ordinary flow of every flowing river or natural stream, and the storm, flood, and rain waters of every natural stream within the state, to be the property of the state, and that the right to the use of such waters might be acquired by appropriation for beneficial uses. Now, by edict of legislation, all such waters, and in fact all waters except the ordinary flow and underflow, may be acquired by appropriation, diverted and so used, except the ordinary flow and underflow of such waters as have become vested rights of riparian landowners. If our statutes are to be construed to mean that the riparian right to water and the right to appropriate and divert waters for purposes of irrigation runs only with the title or possessory rights to land, then, of course, to assert such rights it would be necessary for a private corporation organized for profit, and where the fee in lands are owned and taken in the name of a corporate body, to allege ownership or possessory right to land to which the rights would be appurtenant or allege that such rights had been acquired. The petition here does not assert ownership or possessory right to the lands mentioned to be in the corporate water district. Here, while the water district when established represents the combined interests of all of the lands in the district for purposes for which the district was established, it does not own the fee in the lands to be served with water, nor does it own the water rights appurtenant to such lands, nor does the petition allege the lands or water rights have been acquired by purchase or condemnation from the landowners.

The gist of the action being to adjudicate the respective rights of the landowners to the water in the two water districts, the question then presented by the sustained exception is: Does the corporation water district in the suit brought represent the real parties at interest? A brief review of the history and growth of water districts, culminating in several states in what are now corporation water districts, will possibly disclose more pointedly, as I conceive it, the point at issue presented by the exception. It is a general rule that the real parties at interest must be made parties to a suit; otherwise the interest not brought into the suit will not be committed by the results reached.

The contention made by the exception in the case at bar is that the suit cannot be sustained by the corporation water district without joining in the suit the landowners, for the reason that the corporation water district is not the real parties at interest, and that the real or main questions involved cannot, for that reason, be determined in a trial on the merits.

The community irrigating ditch or acequia for the purpose of supplying water to lands is an institution peculiar to the people living in that portion of the Southwest where irrigation is necessary or beneficial in the cultivation of lands for agricultural purposes. In arid regions early settlements were made along the banks of streams where water was reasonably certain to be available for irrigation at needed times. When a settlement was established the people by their joint effort would construct an irrigation canal or ditch sufficiently large to convey water to their several lands for the irrigation of crops. Each individual owned and cultivated a specific tract of land, and from the main canal or ditch laterals were run to these various tracts of land to be watered. The distribution of the water and the repair of the main canal or ditch was in charge of a major-domo or officer elected by the water users under the canal. The official would require the water users to contribute labor toward the repair of the ditch and its maintenance, and also make an equitable distribution of water to the various water users in proportion to the land to be irrigated. There the water official was and has always been held to be but the agent of the individual owners of the lands under the ditch. The water users under the community system had no right to any specific water in the stream, but a right of use of the water for the purpose stated, a species of tenants in common, each having a common interest in the flow of the water by reason of the community of labor furnished. The fact that such water was diverted into a ditch common to all water users, and owned in common with other water users, did not give such other users any interest in, or control over, the right to take water from the stream which each individual water user possessed by reason of his ownership of his land. Such water right was appurtenant to the land he owned. That right was a several right, and the officer of the water community, in diverting the water, acted only as the agent of the

water user. The act of the Thirty-Fifth Legislature, as we view it, is the outgrowth or development of the old water community system. It does not disturb or destroy individual ownership of the lands in the water districts into which they are incorporated, nor give to the incorporated water district the power to take away from the individual landowner the land or water owned by him. The act is administrative only, and for convenience gives a legal status to such organizations, in order to facilitate the distribution of the water and the establishment and maintenance of the canals. It does not attempt to interfere with the rights theretofore owned by the individual incorporators. It gives the right to the corporation to acquire water rights, but does no more, except as to the operation of the water system. If my interpretation of the act is sound, and the right, as expressed in the twenty-fourth section of the act, is to own and construct reservoirs, dams, wells, canals, etc., and to acquire the necessary right of way for and buy or construct all reservoirs, dams, etc., and other improvements required for the irrigation of the lands in such district by gift, grant, purchase, or condemnation, and it may acquire the title to any and all lands necessary or incident to the successful operation thereof, including the authority by purchase or condemnation to acquire rights of way for the enlargement, extension, or improvement of existing canals for the purpose of using such canals and ditches jointly with the owners thereof, it necessarily follows, it seems to me, that the individual landowner in the water district is a proper and necessary party in an action for an adjudication of water rights, where such rights are exercised through a corporation water district. The individual rights of the several landowners cannot be adjudicated in an action to which they are not parties. It is also my individual view that the corporations created under the act solely for administrative purposes can sue and be sued only where the gist of the action has reference to matters concerning the administration of the water district affairs, and not where the action involves the individual water rights of the participants under the water district. *Acequia Del Llano v. Acequia Del Llano Frio* (N. M.) 179 Pac. 235.

For the reasons stated, I concur in the result reached by the majority opinion.

DUNKEL v. AMARILLO BANK & TRUST CO. (No. 1664.)

(Court of Civil Appeals of Texas. Amarillo. May 5, 1920. Rehearing Denied June 9, 1920.)

1. Appeal and error ⇨662(3)—Qualification to bill of exceptions governs.

Where a bill of exceptions with qualification was accepted and filed as part of the record, the appellant is bound by the qualification where it conflicts with the facts stated in the bill.

2. Abatement and revival ⇨84—Plea in abatement cannot be filed after answer to the merits.

A plea in abatement cannot be filed after answer to the merits; consequently, that part of an answer alleging that the suit was prematurely brought, being a plea in abatement, and not having been filed in the due order of pleading, will be stricken.

3. Executors and administrators ⇨86(1)—On default of one of series of vendor's lien notes administrator may exercise option of declaring all due.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 3353, as to recovery of assets by executors and administrators, an administrator may, in proceeding to collect a series of vendor's lien notes, exercise an option to declare the entire series due on default in payment of any one of them or interest.

4. Appeal and error ⇨680(1) — Matter not shown to have been acted upon by court cannot be reviewed.

Where the record did not show that a general demurrer was ever submitted to the court or acted upon an assignment of error complaining of the sustaining of the demurrer cannot be reviewed.

5. Executors and administrators ⇨87—Administrator held not authorized to make agreement as to priority of liens.

Under Vernon's Sayles' Ann. Civ. St. 1914, arts. 3354 and 3355, an administrator does not have the authority, without the consent of the probate court, to agree that maker of vendor's lien notes may procure a loan on the land and pay off part thereof, postponing the security for the remaining notes as a second lien.

6. Bills and notes ⇨483—Answer held insufficient to state defense.

In an action on notes and to foreclose vendor's lien securing the same, the answer which set up an agreement by the administrator of the holder of the notes, that the maker should procure a loan and pay off part of the series and that the rest should be postponed to a second lien, held insufficient to state a defense, because not alleging facts sufficient to establish a binding agreement.

7. Bills and notes ⇨473 — Exception held properly sustained to answer, notwithstanding assertion it set up estoppel.

In an action on notes where it was sought to foreclose a vendor's lien securing the same,

the sustaining of exceptions to the answer was warranted despite the contention that an estoppel was set up in the averments, that intestate and his administrators had, at various times, agreed to extend the notes, etc., there being no allegation of fraud, and the assignment merely calling into review the action of the court in striking out that portion of the pleading which was really a plea in abatement.

8. Executors and administrators ⇨86(4) — Agreement by administrator to extend time unauthorized.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 3353, requiring administrator to use ordinary diligence to collect every claim due the estate, an administrator is without authority to agree that, on payment of a part of a series of vendor's lien notes, the remainder should be made a second lien subject to the loan procured to pay off the first of the series, and so a deposition of administrator tending to show such an agreement was properly excluded in an action on notes.

9. Bills and notes ⇨516 — Evidence insufficient to show any agreement for extending series of vendor's lien notes.

In an action on notes and to foreclose vendor's lien securing the same, evidence held insufficient to establish an agreement that, on payment of a portion of the notes, the remainder should be extended as a second lien, etc., there being nothing to show that defendant accepted any proposals as to such arrangement.

10. Bills and notes ⇨489(1)—Under pleadings proof not needed as to attorney's fees.

In action on notes, held that, on the pleadings, judgment for attorney's fees was not erroneous on the ground that there was no showing when the notes were placed in the hands of attorneys, and no proof that plaintiff had promised to pay the attorneys, or that the attorney's fees were reasonable.

11. Bills and notes ⇨129(2)—Suit sufficient notice of election to declare entire series of vendor's lien notes due.

Where a series of notes, secured by vendor's lien, provided that, on default in payment of one, the holder might declare all due, suit by an administrator, into whose hands the notes came, after default in the payment of the first, is sufficient notice of election to declare the whole series due.

12. Executors and administrators ⇨519(1)—Texas administrator alone has authority to make contracts as to disposition of property in that state.

Notwithstanding interest of another in an estate, or fact that he was administrator of that part of the estate located elsewhere, the Texas administrator is the only person within the state of Texas who can make contracts concerning property of the intestate within that jurisdiction.

Appeal from District Court, Carson County; W. R. Ewing, Judge.

Action by the Amarillo Bank & Trust Company against C. A. Duenkel. From judgment for plaintiff, defendant appeals. Affirmed.

I. E. Duncan, of Pampa, and Hoover & Willis, of Canadian, for appellant.

Turner & Dooley, of Amarillo, for appellee.

HALL, J. Joseph Fisher, now deceased, formerly owned a section of land in Carson county, and sold it to one F. L. Stokes, and took as part payment eight vendor's lien notes, the first in the sum of \$2,000, the other seven in the sum of \$1,571.42 each, payable two, three, four, five, six, seven, and eight years after date, respectively, each bearing interest at 8 per cent. per annum, and providing for 10 per cent. attorney's fees, if placed in the hands of an attorney for collection or if collected by suit. Thereafter, the appellant, Duenkel, purchased said land from Stokes and assumed the payment of said notes. Appellee sued to recover the amount due upon the notes and to foreclose the vendor's lien, alleging that all of the notes were declared due by virtue of the provision in each of them that failure to pay any note or interest should, at the election of the holder, mature all of them, and that the plaintiff had so elected to declare all of them due. Plaintiff sued as administrator of the estate of Joseph Fisher, deceased. At the return term of the court the appellant answered by general demurrer and general denial. The record fails to show that the demurrer was ever passed upon by the court.

At the second term the appellant filed his plea in abatement, upon the ground that the suit was prematurely brought, alleging that he had an agreement with Joseph Fisher in his lifetime to extend the first note for \$2,000 as to time of payment until November 27, 1918, and that the plaintiff had agreed with appellant that he might take a loan upon the said section of land of \$9,000, and apply the same to the payment of the notes in the order of their maturity, and for the balance of the debt a second lien should attach, inferior to the loan company's lien for the \$9,000; that appellant had procured the loan, and upon his offering to perform the said agreement that Messrs. Turner & Dooley had obtained possession of the notes, claiming to have them for collection, and demanded the 10 per cent. attorney's fees upon them; that by reason of the agreement for the loan, and part payment and subrogation of the lien, that the plaintiff had waived its right to declare any or all of the notes due, or to place them in the hands of an attorney for collection, and was estopped from collecting any of said notes except the ones due by their terms.

Defendant also pleaded in greater detail the agreement to allow him to procure the loan upon the land of \$9,000, and apply it in

partial payment of the series of notes, and postpone the balance of the notes to a second lien upon the land. It was alleged that the agreement was first made by Joseph Fisher to extend the time of payment on the first note for one year, in consideration of the additional amount of interest; that the agreement for the loan was first made with Glen M. Fisher, who was the administrator of the estate of his father, Joseph Fisher, in the state of Kansas, and that the agreement was he should secure the loan of \$9,000 and apply it as stated above; that this agreement was later confirmed and approved by a letter received from Messrs. Turner & Dooley, attorneys for plaintiff; however, that said attorneys, at the same time demanded their attorney's fees upon all of the notes; that appellant thereupon tendered to plaintiff all of the principal and interest that was then due upon said notes, which the plaintiff refused to accept, and that the administrator, Glen M. Fisher, notified defendant not to pay Turner & Dooley any attorney's fees, as he or his estate was paying them for their services. It is further alleged that the agreement of the parties constituted a waiver of the right to place the notes in the hands of an attorney and claim attorney's fees; also a waiver of the right to declare all of the notes due, defendant having relied upon their previous agreement and representations, and having complied with them by procuring the loan, and that had the plaintiff performed the agreement defendant could and would have paid off the notes that were due. The prayer was that the suit abate and that he recover his costs, or in the alternative that plaintiff should recover only the amount of the notes actually due, without attorney's fees, and be denied the recovery of the amount of the notes not yet due.

[1] Upon the filing of the plea in abatement appellee moved to strike it from the record because it was not filed at the first term of the court, and, having been filed after a general demurrer and general denial, was not in due order of pleading. The court sustained the motion, striking the plea in abatement from the record. The bill of exception to this action of the court was qualified by the trial judge in the following language:

"The foregoing bill of exception, No. 1, prepared and tendered by C. A. Duenkel, defendant, has been examined by me and is approved with the following qualification: Defendant offered no proof, either by his own testimony or by that of his counsel, or any one else, that at the February term of said court the parties to this cause had verbally agreed in open court that at said February term the defendant need not file his actual pleadings in the case in full but might only file a general demurrer and general denial, and that he could file same without prejudice to his rights to file any future pleadings he saw fit, whether in due order of

pleading or not. All that was done on said question was an unsworn statement by defendant's counsel, I. E. Duncan, to the effect that at the February term of court he understood that counsel for plaintiff agreed with him that he might file his dilatory plea at the next term of this court. This statement was denied by counsel for plaintiff, but no sworn testimony was offered by either party. No such agreement as claimed by defendant was made in open court, or in the presence and hearing of the court. The court did not refuse to permit defendant to offer any testimony, or to hear testimony concerning such alleged agreement, because none was offered. The statement in the bill that plaintiff offered proof as to the matters contained in said plea in abatement is incorrect. Neither party offered any proof thereon, and, consequently, the court did not refuse to hear any such evidence."

The bill, with the qualification, was accepted and filed as part of the record, and appellant is bound by the qualification where it conflicts with the facts stated in the bill.

[2] The court also sustained the appellee's first, second, and third special exception to the defendant's answer, which are in substance: (1) That the answer is insufficient because it seeks to set up a pretended agreement between the parties for the compromise and extension of the notes, which constitutes a material change in the security, in this: Its effect would have been to postpone part of the debt to the loan of \$9,000 mentioned in the pleading, and would have made said \$9,000 a first lien on all of the land; that no such agreement could have been made except under the order of the probate court of Potter county, where the administration is pending, and it is not alleged that any such order had been procured; (2) that the matters set up constitute a plea in abatement and are not filed in the due order of pleading; (3) that part of the answer which alleges "it would be harsh and inequitable to sell defendant's land under the present social unrest, same having suppressed the sale of property and the land will not satisfy the debt at forced sale," is wholly insufficient. That part of the answer alleging that the suit is prematurely brought is a plea in abatement, and, not having been filed in due order of pleading, the court did not err in striking it from the docket, since it was filed after an answer to the merits. *Drake v. Brander*, 8 Tex. 176; *Graham v. McCarty*, 69 Tex. 324, 7 S. W. 342; *Keator v. Whitaker*, 147 S. W. 608.

[3] By the second assignment it is insisted that the administrator could not elect to declare the entire series of notes due upon failure to pay any one of them or the interest, as therein provided. No decisions are cited to sustain this proposition. We think the effect of V. S. C. S. art. 3353, is to authorize the administrator, in the use of proper diligence, to declare the notes due and proceed to collect them.

[4] The third assignment is that the court erred in sustaining plaintiff's general demurrer to the defendant's answer. The record does not show that the general demurrer was ever submitted to the court or acted upon in any way.

The fourth and fifth assignments being based upon the same supposed state of facts are overruled.

[5, 6] It is insisted under the sixth assignment of error that an administrator has the authority to agree that the maker of notes due the estate may procure a loan to pay off part of the notes, postponing the security for the remaining notes as a second lien, and this without an order of the probate court. We do not so understand the law. The answer does not show that any such arrangement had been approved or authorized by the probate court of Potter county. V. S. C. S. arts. 3354 and 3355, provide that whenever an administrator may deem it to the interest of the estate to take any claims or property for the use and benefit of the estate in payment of any debt due the estate, or to compound bad or doubtful debts or to make promises or settlements in relation to claims in dispute or litigation, it shall be his duty to present an application in writing to the county court at a regular term thereof, representing the facts, and if the court, upon the hearing of such application, shall be satisfied that it will be for the interest of the estate to grant the same, an order to that effect shall be entered upon the minutes, setting forth fully the authority granted, and the administrator is further authorized on receipt of the amount due on a mortgage to release such mortgage. Nothing appears in the record to indicate that it would have been to the benefit of the estate for the administrator to waive the vendor's lien on the land and permit the appellant to borrow \$9,000, secured by a first lien upon the property, to credit said sum upon the debt and hold the remaining notes, secured by a second lien. From the record we entertain serious doubt whether a probate judge could have been convinced that such a course was to the best interest of the estate. From what is shown we think it would have been detrimental. In any event, since the answer failed to show the required order of the probate court, approving such an agreement, that part of the answer setting it up was subject to the exception. *Smith et al. v. Pate et al.*, 43 S. W. 312; *Smith v. Dibrell*, 31 Tex. 239, 98 Am. Dec. 526; *Trammell v. Swan*, 25 Tex. 475; *Browne v. Fidelity & Deposit Co.*, 98 Tex. 55, 80 S. W. 596. These and other authorities settle the question that administrators and guardians may act in material matters, such as the compromise and settlement of claims under agreements of the nature alleged by appellant, only under express authority obtained from the probate

court, and that the effect of the statute is to change the rule of the common law in this particular. Appellee's contention is that the defense urged by the defendant is insufficient because the answer does not allege a binding agreement for an extension of time or for changing the security and creating a second lien in favor of the estate for part of the indebtedness. We think this contention is sound. *Ward v. San Antonio Insurance Co.*, 164 S. W. 1048; *Astin v. Mosteller*, 152 S. W. 495.

[7] It is insisted under the seventh assignment that the court erred in sustaining the special exception to the answer, because by the plea that the intestate and his two administrators together had at different times agreed to the extension of the first note for more than a year, and had agreed to accept payment by means of a loan on the land, etc., appellee was estopped from declaring all of the notes due and from placing them in the hands of attorneys. This assignment merely calls into review the action of the court in striking out the plea in abatement. There is no allegation of fraud on the part of the administrator, and because of the lack of such an allegation the authorities cited by appellant have no application. The evidence does not sustain appellant's contention that the Texas administrator, or its attorneys, ever made an agreement for the extension of time and postponement of the lien in consideration of the payment of \$9,000. The court's action in sustaining the third special exception is unquestionably correct.

[8] Appellant insists, under the ninth assignment, that the court erred in excluding the deposition of Glen M. Fisher, to the effect that he and the attorney for the estate in Kansas had agreed, more than a year after the first note was due, to allow defendant to procure a loan of \$9,000, and pay that amount on the notes in the order of their maturity and give a second mortgage to secure the other notes. We think any agreement on the part of the administrator to the effect alleged would be a violation of the provisions of article 3353, V. S. C. S., requiring the administrator to use ordinary diligence to collect every claim due the estate, and rendering the administrator and his bondsmen liable in the event of a failure to use such diligence.

[9] The tenth, eleventh, and twelfth assignments are based upon similar rulings. The allegation is that Glen M. Fisher as administrator agreed with defendant, as above set out, but the evidence tendered to sustain the allegation would not have shown any agreement between appellant and the defendant to that effect. The principal evidence relied upon is the letter from appellee's attorneys, Turner & Dooley, to appellant, in which they say:

"We have not heard from you in reply to our last letter and we desire to close this matter up in some way. We have a letter from our clients, authorizing us to close up this deal by way of paying \$9,000 cash and giving a second mortgage to secure the four notes at \$1,571.42 each, providing that you pay the interest due to date and our fee. If this cannot be done we shall have to institute foreclosure proceedings."

Clearly, this letter cannot be construed as an agreement for the extension, even though it had been shown that the probate court of Potter county had approved the proceeding. It was not shown that Duenkel ever replied to this letter from Turner & Dooley, or notified them that he was ready to comply with the requirements by paying the \$9,000 plus the interest and attorney's fees. None of the evidence sought to have been admitted would have in any degree benefited appellant. Appellant made no tender of the \$9,000, or any amount, in an effort to make good his offer to carry out his alleged agreement. If the evidence had been admitted the effect would have been to sustain the plea in abatement, and the court could not, in the absence of a tender, have granted appellant any relief.

[10] Under the thirteenth assignment it is insisted that the court erred in rendering judgment for the attorney's fees, because there was no showing when the notes were placed in the hands of attorneys, and no proof that plaintiff had promised to pay the attorneys, or that the attorney's fees were reasonable. These questions have been settled by the decisions in this state contrary to appellant's contention. *First National Bank of Eagle Lake v. Robinson*, 104 Tex. 167, 135 S. W. 372; *Stewart v. Thomas*, 179 S. W. 886; *Coleman v. Garvin*, 158 S. W. 185; *Johnston v. Branch Banking Co.*, 143 S. W. 193; *Kerr v. Morrison*, 25 S. W. 1011. These authorities establish the propositions: That it is not necessary for the holder of a note to prove when the notes were placed in the hands of an attorney; that the plaintiff had promised to pay the attorneys; that the attorney's fees were reasonable; for an allegation that the notes were placed in the hands of attorneys would be taken as true, and it is not necessary to offer proof thereon when the petition so alleges.

[11] The institution of the suit within a reasonable time after default in the payment of the first note is sufficient notice of the election by the administrator to sue; no further notice to the appellant was necessary. *Machine Works v. Reigor*, 64 Tex. 89; *Chase v. Bank*, 1 Tex. Civ. App. 595, 20 S. W. 1027; *Bonnell v. Prince*, 11 Tex. Civ. App. 399, 32 S. W. 855.

[12] The only remaining observation necessary to be made in disposing of the issues presented here is that Glen M. Fisher a resident of Kansas, could not, by agreement

made with appellant, bind the administrator of the estate pending in the courts of Texas. An administrator in this state has the exclusive right to possession of the property within the jurisdiction of the court, and is the only person who can make any contracts concerning the property.

We find no reversible error in the record, and the judgment is affirmed.

ELLERD v. SODEBERG. (No. 1668.)

(Court of Civil Appeals of Texas. Amarillo.
May 19, 1920. Rehearing Denied
June 23, 1920.)

1. Appeal and error \S 499(3)—Assignment to rejection of testimony not considered where exceptions do not show objections, etc.

Assignments of error to the rejection of testimony are not entitled to consideration where the bills of exceptions do not show the objections made to the evidence nor the ground on which they were sustained.

2. Contracts \S 173—Independent promissory representations no defense unless fraudulently made.

Persons who employed an architect to make plans were liable for his services despite non-performance of his statements as to financing the building, which were independent promissory representations, unless fraudulently made without intent to perform.

3. Evidence \S 441(7)—Parol evidence contradicting writing inadmissible.

Where a contract to compensate an architect was in writing, parol evidence contradicting, varying, or modifying its terms by showing an oral agreement of the architect to finance the building was inadmissible.

Appeal from District Court, Hale County;
R. C. Joiner, Judge.

Suit by Frederick Sodeberg against Reuben M. Ellerd. From judgment for plaintiff, defendant appeals. Affirmed.

W. B. Lewis, of Plainview, and Bryan, Stone & Wade, of Ft. Worth, for appellant.

Williams & Martin, of Plainview, for appellee.

BOYCE, J. Appellee, Sodeberg, brought this suit against R. M. Ellerd and J. J. Ellerd on a written contract dated November 21, 1916, and copied later. It was alleged that said contract was a settlement contract; that plaintiff had theretofore rendered services for the defendants as an architect in the drawing of plans for a hotel building which defendants proposed to erect in the city of

Plainview; that the plaintiff was demanding in payment for his services so rendered a sum largely in excess of the amount stated in said settlement contract; that on said 21st day of November, 1916, the parties agreed upon a settlement of plaintiff's claim and evidenced their agreement by a writing signed by the said R. M. Ellerd and J. J. Ellerd reading as follows:

"In the event of our failure to finance the construction of hotel building contemplated for us in the city of Plainview, Tex., and our abandonment of the proposition, we agree to pay to F. Sodeberg \$1,500 for balance due for architectural services to date. This November 21, 1916.

"[Signed] Reuben M. Ellerd.

"We do hereby agree that Mr. Sodeberg is, from and after this date, fully released from all further obligations or contractual obligations in connection with this matter.

"[Signed] Reuben M. Ellerd.

"John J. Ellerd."

Plaintiff further alleged that the defendants had failed to finance the construction of said building and had abandoned the project, and that he thereupon became entitled to the payment of the said sum of \$1,500 mentioned in said contract.

The appellant Ellerd answered that plaintiff had a good cause of action as set forth in the petition, except so far as it might be defeated in whole or in part by the facts of the answer constituting a good defense, so as to secure the opening and close within the provisions of rule 81 for the district and county court. We can convey a better understanding of the case by copying that part of the answer material to the decision of the assignments presented on this appeal than we could by attempting to describe said allegations in general terms. That part of said answer is as follows:

"Now comes the defendant, R. M. Ellerd, and in answer to plaintiff's petition says that he did execute the agreement sued upon, but at said time and before said time the plaintiff had made certain material statements which were believed by the said Ellerd and relied upon by him. The representations were as follows: (a) 'Plaintiff stated that he could and would finance the deal with cheap Oakland money.' That by reason of the above representations defendant began to negotiate with plaintiff, and, had it not been for said representations, defendant would not have considered the claims of plaintiff, but would have considered architects just as good near at home who could have been secured at a less price. That plaintiff has failed to finance said erection of building, thereby making all of the alleged services rendered by plaintiff of no value to this defendant. That, had the plaintiff not made said representations, this defendant would not have considered him as an architect in this matter, and, if plaintiff has been damaged in any way, it is because of

his making representations and agreements that he did not carry out as he agreed. This defendant says that he is now willing, ready, and able to carry out his part of the contract, and, if plaintiff will do as he agreed to do, finance this deal with cheap Oakland money, then he will accept the same and carry out his part of the contract."

The answer is followed by a "cross-action" which reads as follows:

"Defendant says that he has paid the plaintiff the sum of \$650, which he is not entitled for the reason that the consideration in the plans for the erection of this proposed building has wholly failed as hereinbefore set out; wherefore he prays judgment for said \$650."

On the trial of the case the defendant offered evidence as to oral representations or promises of the plaintiff to "finance the construction of the building with cheap Oakland money" and to show that at and prior to the execution of the contract of settlement the defendant had paid the plaintiff \$650 on the contract of employment. The testimony offered, as shown by the bills of exception was as to oral promises or representations made, and was about as general and indefinite as the allegations of the answer. The court sustained the objections to this testimony and gave the jury a peremptory instruction to find for the plaintiff.

[1-3] All of the assignments are based on the ruling of the court in rejecting the testimony referred to. The assignments are not entitled to consideration for the reason that the bills of exception do not show the objections made to the evidence, nor the ground on which they were sustained. *Progressive Lumber Co. v. Marshall & E. T. Ry. Co.*, 106 Tex. 12, 155 S. W. 177; *Alexander v. Fletcher*, 177 S. W. 514; *Hall v. Ray*, 179 S. W. 1137. However, we have considered the assignments, and are of the opinion that they present no error. All of the evidence offered was on the theory that the representations or agreements on the part of the plaintiff to

procure the money to be loaned to the defendants with which to construct said building constituted the consideration for the contract of employment, and that noncompliance therewith amounted to a failure of consideration for the contract which would defeat recovery of anything thereon, and would entitle defendant to recover the amount already paid. We think this position is untenable, whatever construction might be placed on the indefinite allegations of the answer. If the statements of the defendant as to financing the building be regarded as independent promissory representations, the answer setting them up constitutes no defense, for the reason that there is no allegation that they were fraudulently made; that is, made without intention of performing them. If the allegations be considered sufficient to allege an agreement as a part of the contract of employment that the plaintiff would finance said project, the answer and evidence offered thereunder make no defense to the suit, because the contract in question expressly releases the plaintiff from all such obligations. Even if it was the purpose of the defendant to allege and prove an agreement made at the same time and as a part of the contract of November 21, 1916 (and we hardly think that this construction can be placed either on the pleading or evidence offered thereunder), the evidence would nevertheless have been objectionable because such agreement is inconsistent with the terms of the writing, and there are no allegations that would authorize the admission of parol evidence to contradict, vary, or modify the terms of the writing. This agreement of November 21, 1916, appears to evidence an agreement of accord or settlement between the parties. Whatever may have been the previous rights and obligations of the respective parties, they appear to have been merged into and settled by this agreement, and there is no allegation that would have justified the court in setting it aside.

The judgment of the trial court will be affirmed.

JACKSON et al. v. WALLACE et al.
(No. 8375.)

(Court of Civil Appeals of Texas, Dallas.
May 8, 1920. Rehearing Denied
June 12, 1920.)

Death — Evidence held to require submission of issue of absentee's death.

Proof that one against whom a judgment had been entered was seen alive within less than seven years of the date of the trial held to require submission to the jury of the issue as to whether he was dead when the suit was filed.

Appeal from District Court, Navarro County; H. B. Daviss, Judge.

Suit by J. E. Wallace and others against J. T. Jackson and others, for an injunction. Decree for petitioners, and defendants appeal. Reversed and remanded.

W. W. Ballew, of Corsicana, for appellants.

Jack & Jack and Callicutt & Johnson, all of Corsicana, for appellees.

RAINEY, C. J. The statement of the case, taken from the appellants' brief, is correct, and is as follows:

"On June 5, 1911, appellees filed their petition in the district court of Navarro county, Tex., for an injunction against J. T. Jackson, and M. S. Clayton, sheriff of Navarro county, Tex., to enjoin the sale of 118 acres of land on John Beauchamp survey, in Navarro county, Tex., which land had been advertised for sale on the first Tuesday in June, 1911, by virtue of an order of sale issued upon a judgment rendered in the district court of Navarro county, Tex., in cause No. 7700, styled J. T. Jackson v. J. C. Wallace, rendered on the 24th day of March, 1911. The plaintiffs, appellees herein, alleged they were the owners of said land, and the heirs of J. C. Wallace, who they alleged was dead when said suit was filed and judgment rendered; and they alleged numerous other alleged defects in said judgment. Injunction was issued upon said petition. Defendant J. T. Jackson filed his original answer in due time, and amended answer on October 25, 1918.

"Gibson & Callaway, a firm composed of El J. Gibson and L. R. Callaway, intervened in said cause, and alleged they were interested in the subject-matter of said suit, claiming to own an undivided one-third interest in said land. First and second amended pleas of intervention were filed, and the trial was had upon second amended plea of intervention. Plaintiffs filed numerous supplemental petitions, of date January 24, 1919, March 13, 1919, and answer to intervention January 27, 1919. Defendant filed supplemental answer to all of the various supplemental petitions of plaintiffs, consisting in the main of exceptions upon points stated therein. Interveners Gibson & Callaway filed exceptions to answer of plaintiffs and supplemental plea.

"The case went to trial May 15, 1919; and during the trial S. H. Jack, W. H. Jack, J. S. Callicutt, and L. A. Johnson were allowed to intervene, claiming interest under original plaintiffs, and W. W. Ballew intervened, as assignee of Gibson & Callaway.

"The court gave peremptory instruction for plaintiffs and intervening plaintiffs for all of lot 19, containing 14 acres, and an undivided two-thirds interest in lot 9, 20 acres; lot 12, 40 acres; lot 14, 11 acres; lot 15, 23.5 acres; lot 17, 10½ acres—and for W. W. Ballew, intervenor, for undivided one-third interest in lots 9, 12, 14, 15, and 17, without rents, and against J. T. Jackson and M. S. Clayton for all of the land. The jury returned verdict under instructions of the court as directed. Defendant Jackson and intervenor W. W. Ballew excepted to the charge of the court, and requested special charges, which exceptions and special charges were refused. Motions for new trial were filed by defendant Jackson and intervenor W. W. Ballew, and overruled June 28, 1919. Exceptions duly taken, notice of appeal given, and appeal perfected to Court of Civil Appeals.

"The court gave a peremptory charge for appellees, and refused appellants' special charge as follows: 'You are instructed that an absentee is presumed to be alive until his death is proved, and there has been no legal evidence offered by plaintiffs that J. C. Wallace was dead at the time the suit of J. T. Jackson v. J. C. Wallace was filed in February, 1910, or at date of judgment, March 24, 1911, and you are therefore instructed to return a verdict in favor of J. T. Jackson.'"

Plaintiffs sued as heirs of J. C. Wallace and claimed by reason thereof to be the owners of the land. Their petition shows that there was no necessity for an administration, but prayed for an injunction, alleging the death of J. C. Wallace, proof of which was essential for a recovery under the evidence, which was totally lacking. There was testimony tending to show that Wallace was alive within less than seven years of the date of trial, and which raised an issue not authorizing the court to assume that death was presumed, and warranted a charge to that effect. There was evidence showing that J. C. Wallace was seen alive, which required the court to submit that issue to the jury, and which precluded the court from giving the jury a peremptory instruction to find for appellees.

Besides alleging that J. C. Wallace was dead at the time of the rendition, the petition alleged, in substance, that the judgment had become extinct when the court reviewed it. The evidence does not show definitely whether or not the judgment had become extinct, which, if it had, can be shown upon another trial and can be taken advantage of. *Boyd v. Ghent*, 95 Tex. 46, 64 S. W. 929.

For the reasons stated, the judgment is reversed, and cause remanded.

ANDERSON BROS. v. PARKER CONST. CO. (No. 554.)(Court of Civil Appeals of Texas. Beaumont.
June 1, 1920.)**1. Arbitration and award ¶64—Award will be avoided for bias or intimidation.**

While arbitrations are favored in law, and every reasonable intendment will be indulged in to support them, a showing of fraud, bias, or intimidation will avoid an award.

2. Arbitration and award ¶85(4)—Fairness and intimidation held issues for jury.

In a building contractor's action for a balance alleged to be due on an award of arbitration, which defendants sought to avoid on the ground of unfairness of one of the arbitrators and intimidation towards the board on the part of the plaintiff, evidence held sufficient to require the court to submit the issues of fairness and intimidation to the jury.

Appeal from District Court, Liberty County; D. F. Singleton, Judge.

Action by the Parker Construction Company against Anderson Bros. Judgment for plaintiff on an instructed verdict, and defendants appeal. Reversed and remanded.

E. B. Pickett, Jr., and C. H. Cain, both of Liberty, for appellants.

Campbell, Myer, Myer & Freeman and Stevens & Stevens, all of Houston, for appellee.

WALKER, J. This suit was instituted by appellee against the appellants to recover the balance due on a house-building contract. Appellee specially pleaded that the difference between it and appellants, by agreement of all parties, had been duly arbitrated, and under the award of the arbitrators a balance was due them of \$2,600.35. Appellants answered by general denial, and by special plea to the effect that the building was not according to contract, and claimed damages in the sum of about \$5,000. They also admitted in their plea that an effort had been made to arbitrate the difference between them and appellees; that two of the arbitrators had rendered an award, but they sought to avoid the award on the ground that it was tainted with fraud, unfairness, partiality, intimidation, and other improper influences. On the conclusion of the testimony, the trial court instructed a verdict for the appellees. The only proposition submitted by appellants challenges the correctness of this ruling.

Appellants and appellee sought to adjust their differences, growing out of the construction of a brick storehouse in the town of Cleveland, by arbitration. Appellants selected one arbitrator, a Mr. Isaacks, the appel-

lees selected another arbitrator, a Mr. Morin, and these two selected a third, T. C. Edminster. The arbitrators held their first meeting in Cleveland. At this time appellant Anderson and his attorney appeared before them. Morin requested the attorney to withdraw from the room, stating that they did not want any attorney in the case. Edminster and Isaacks examined the roof of the building, about which complaint was made; but Morin refused to do so, stating he would take the word of the other arbitrators as to the condition of the roof. This meeting did not last long. They adjourned and called a second meeting at Houston. According to the testimony of appellants, their attorney went to Houston on the day of this meeting, and had an express agreement with counsel for appellee that no attorney would appear before the arbitrators. After this agreement, counsel for appellants returned to his home in Liberty. When the arbitrators came together for this meeting, appellant Anderson, a Mr. Halcomb, agent for the appellee, and the attorney for the appellee, appeared before the board. Again, according to appellants' testimony, there was an agreement between appellants and appellee that they should leave the board and not return until a decision had been reached. Appellant Anderson did leave, and did not return. Mr. Isaacks, one of the arbitrators, testified that, a short time after Anderson left the room, Halcomb and his attorney returned to the room and remained until the board adjourned. The board met in a balcony in a storeroom. Isaacks stated that Halcomb and his attorney were from 20 to 100 feet from them during their deliberations; that after deliberating until 11 or 12 o'clock—that is, near midnight—the board decided it was not possible to come to an agreement, and adjourned. Down in the front part of the store, Halcomb came to them and asked them if they had reached an agreement. When he found that no agreement had been reached, he requested them to make another effort, stating that the matter had been unadjusted a long time; that, if he was not going to get more than \$1,000 out of the deal, he wanted to know it; that he wanted the matter closed up, and whatever the board did would be entirely satisfactory to him; that after this assurance and on this request from Halcomb, the board went back to the balcony, and after a reasonable deliberation reached an adjustment on every item in the dispute between the parties; that in the adjustment they allowed about \$960 for the roof on the building; that appellants had a claim based on a clause in the contract allowing them \$10 a day for delay in construction; that he agreed with the other arbitrators to waive this \$10 a day item on condition that they would agree with him on the amount to be allowed for the roof; that

Edminster, in compromising the two items—that is, the roof item and the damages for delay—agreed to his proposition; that Morin said nothing either way; that after the adjustment was reached they began dictating it to a stenographer, and, when the roof item was reached, Halcomb and his attorney violently protested against the allowance, saying that it was unjust, inequitable, unfair, and illegal; that Halcomb and his attorney came up to the balcony where the arbitrators were, and entered into quite a lengthy discussion of the matter, objecting most vigorously to what had been done; that he (Isaacks) protested against their interfering with the deliberations of the board, stating that they ought to get down and out; that Mr. Anderson was not there, and had no attorney there, and that their presence was unfair; that the other two arbitrators refused to sustain him in his protests as to the presence of Halcomb and his attorney, but permitted them to take part in their deliberations, and that over his protest the meeting again adjourned; that he stated to them that he didn't know that he would have anything further to do with the board; that the matter had been fairly and honestly adjusted, and that there was no excuse for adjourning the board at that time.

Edminster testified:

"The truth of the matter is that, if Mr. Myer [the attorney] and Mr. Halcomb had not interrupted our proceedings and objected to our decision, that decision that we had already made would have been signed by all three of the arbitrators, and would have been our final decision."

The testimony further shows that most of the decision had been reduced to writing when Halcomb and his attorney went to the balcony.

Appellee's version of the facts is quite different from the statement made by Isaacks, and possibly under their statement no error is shown; but it was the duty of the jury, and not of the court, to pass on the facts and weigh the testimony.

[1, 2] We recognize that "arbitrations are favored in law, and every reasonable intentment will be indulged in to support them." *Hill v. Walker*, 140 S. W. 1159. But a showing of fraud, mistake, bias, undue influence, or intimidation will avoid an award made by them. In this case the award was made by two of the arbitrators, Morin and Edminster. Morin was selected by the appellee. It is undisputed in the record that, the only time an attorney for the appellant appeared before them as such arbitrators, Morin refused to let him remain in the room, and requested that he withdraw. It is also undisputed that when the attorney for the appellee appeared

before him (according to the testimony of appellants, uninvited) he refused to request the withdrawal of such attorney, but listened to him and followed his suggestions as to the law by which they were to be governed. This conduct on the part of Morin was sufficient to raise an issue of fact against his fairness as an arbitrator. Again, the testimony of appellants clearly shows improper conduct on the part of Halcomb and his attorney after the award had been reached, of such a nature as to raise an issue of intimidation on their part towards the board. When the award was finally made, instead of allowing the \$960, as was agreed to by all three of them, they allowed only \$150, and altogether refused Anderson's claim for damages based on the clause of the contract allowing \$10 per day for delay.

The agreement of the arbitrators, adjusting the differences between the parties, according to appellants' testimony, was not only fair and equitable, but was also a lawful agreement, and one which the courts would have enforced. Halcomb and his attorney, in their protest before the board against the fairness of the award, failed to consider the fact that the award also included an adjustment of the damages growing out of delay in constructing the building. Notwithstanding by their presence Halcomb and his attorney had violated the agreement shown by appellants' testimony, if they had done nothing more than enter a formal protest to the award, or presented an argument on request of the board, we would not be inclined to hold that their conduct raised an issue of fact against the award. But Isaacks testified that they intruded themselves before the board; that they refused to go down when requested; that they precipitated a very bitter discussion, and challenged the award as being unfair, unjust, and inequitable, and one which the courts would not enforce. So violent was their protest that the meeting broke up in disorder. Two of the arbitrators refused to conclude the agreement, and in their final award rendered a decision vastly different from the one which had been honestly and fairly reached. The final award was to the prejudice of appellants in the sum of about \$800. Edminster testified that they heard no new evidence between the second and third meetings. What, then, had entered into the case, causing this radical deduction in the sum to be allowed appellants? Appellants say it was fraud, bias, prejudice, and intimidation. In our judgment, the facts of this case raise this issue, and error was committed in instructing a verdict for appellees.

The judgment of the trial court is reversed, and the cause remanded.

HINES v. FLINN. (No. 1119.)

(Court of Civil Appeals of Texas. El Paso.
May 20, 1920. Rehearing Denied
June 17, 1920.)

1. Master and servant ⇨103(2)—Duty to keep tool in condition defined.

If there was nothing to indicate to injured section foreman that the temper of a maul has been changed since it was furnished him, or that he knew the dangerous condition in which it was because not properly tempered, he was not under duty to send it to the blacksmith shop to be properly tempered, as required by the railroad's rules.

2. Master and servant ⇨103(2)—Duty to furnish safe tool nondelegable.

The duty of furnishing a safe and suitable maul or sledge for use in his work by its section foreman is a nondelegable duty of a railroad, of which it cannot relieve itself by charging the foreman with its performance.

3. Master and servant ⇨286(7)—Negligence in furnishing hammer question of fact.

It cannot be said as a matter of law, without reference to the use made of it, that because a hammer or maul is a simple appliance a master, when furnishing it to his servant, does not owe to him the duty to use ordinary care to see it is reasonably suitable and safe to use in the work to be done.

4. Master and servant ⇨286(7)—Negligence in furnishing defective hammer held for jury.

In an action for injuries to a railroad section foreman, struck in the eye by a sliver from a maul or hammer, question of negligence in furnishing such hammer held for jury.

5. Master and servant ⇨219(3)—Assumption of risk of injury from defective hammer defined.

If a railroad was negligent in furnishing to its section foreman and his men an untempered hammer, unsafe in the particular work, a defect which, in the exercise of ordinary care, would not have come to the foreman's knowledge, the road cannot escape liability on any theory the foreman assumed the risk.

6. Master and servant ⇨288(12)—Assumption of risk jury question.

In an action for injuries to a railroad section foreman, when a maul or hammer slivered and the piece struck his eye, question of assumed risk held for jury.

Appeal from District Court, El Paso County; Ballard Coldwell, Judge.

Suit by E. L. Flinn against Walker D. Hines, Director General of Railroads, and the El Paso & Southwestern Railway Company of Arizona. From a judgment for plaintiff against defendant Director General, such defendant appeals. Affirmed.

W. M. Peticolas and Del W. Harrington, both of El Paso, for appellant.

Hudspeth, Wallace, Harper & Berkshire, of El Paso, for appellee.

WALTHALL, J. This suit was brought by appellee, Flinn, against appellants, Walker D. Hines, Director General of Railroads, and the El Paso & Southwestern Railway Company of Arizona, to recover damages for personal injuries alleged to have been sustained by him while in the employ of appellants as a section foreman on one of its lines of railroad in New Mexico. The facts are substantially without dispute and are as follows:

On February 3, 1919, Walker D. Hines was the Director General of Railroads, including the El Paso & Southwestern Railroad Company, and was then operating the lines of said company in New Mexico in interstate commerce, and Flinn was section foreman on the railroad at Victoria, N. M. On the day named it became necessary and a part of Flinn's duty to repair a part of the railroad track and switch, and to make the repairs it was necessary for Flinn to cut or remodel a tie plate, and in order to do so it became necessary to use a chisel and strike it with a chisel hammer or sledge; the hammer having been furnished appellee and other employes by appellant for that purpose. While Flinn was holding the chisel another of appellants' employes was striking it with the sledge, and while doing so the sledge slivered and a piece of the sledge flew off, striking Flinn in the eye, and caused the injuries of which he complains. The negligent act assigned was that the sledge furnished him was unsafe because it was too hard, brittle, not properly tempered, and for that reason when used in striking on another hard instrument it broke or slivered; that appellants knew, or by inspection could have known, of the defective condition of the sledge; and that Flinn was ignorant of its condition.

Appellants answered by general denial; denied Flinn's injury and the extent of it as alleged; alleged that the sledge or hammer was a common and ordinary tool, which, if defective, its defects were plain and apparent to Flinn, and that it was Flinn's duty to observe and know of its defects and not to use the sledge if it was in the condition as alleged; that if Flinn was injured same was due to ordinary risks incident to his employment, and that Flinn assumed the risk of using the sledge in the manner and in the condition it was in; that Flinn was section foreman, and if any inspection of the hammer was necessary to determine its condition it was his duty to make the inspection; that appellants' instructions con-

tained in its book of rules made it Flinn's duty to keep all tools in first-class condition, and when same needed repair to send same in to place designated by the head of the department and to make requisition for a new one. The case was dismissed as to the railroad company, and a verdict and judgment rendered against appellant, Walker D. Hines.

Appellant's insistence here is that the court was in error in refusing to peremptorily instruct the jury to return a verdict for appellant. While the error assigned is discussed under three propositions, they are to the effect that, where the evidence is uncontroverted and to the effect that the duty of inspection and keeping the tools and appliances in proper condition is on the employé, the employé complaining of injury by reason of such tools being in bad order or condition, and this defect being the proximate cause of the injury, such employé cannot recover; that where the duty of inspection is with the employé he is presumed to know the defects, if any, in the tools which it is his duty to inspect and keep in repair or replace with new or other tools, and that under such conditions the appellee assumes the risk, as a matter of law, of using such defective tool. Without stating all the evidence, we will state briefly such as seems relevant to the contention made.

Appellee testified: In his 25 years' experience he had occasion to handle mauls and chisels of that character; from his experience, when a tool has been broken he can judge whether or not it is properly made; had had the maul on the hand car before the accident and used it; it was a tool they used right along, but he never had any occasion to make a special examination of it; said:

"It was my duty and I did inspect tools and keep them in good shape as near as I could. * * * As to whether I stated a while ago that I had not inspected this hammer, I took it for granted it was a good maul because there were no defects. Yes; I looked at the maul; it looked perfectly good as far as I was concerned."

Welch testified: Was road master; was familiar with the duties of section foreman; the foreman is responsible for his tools; is supposed to know his tools are safe; quoted rule 280, which reads:

"Employés must keep their tools in first-class condition. When needing repair, they must be sent to the place designated by the head of the department. When a tool is no longer serviceable, the foreman must make requisition for a new one and send the old one to the place des-

ignated by the head of the department." "When tools break or wear out, the section foreman sends them to the blacksmith to be fixed, and it is the duty of the blacksmith to properly temper the tools. When a tool is too brittle it is liable to break. When a tool is properly tempered it will mash instead of break. Flinn made no requisition for new tools, mauls, or chisel. If a tool is not serviceable Flinn is supposed to order a new one. He is supposed to do so only when they are battered or broken. When a tool shows to have been chipped off, that is an indication that something is wrong and it should be sent in."

Paul Flinn, son of appellee, testified:

"My father was holding the chisel so the Mexican could cut the end of the tie plate off. * * * I examined the chisel maul after the accident occurred. On the face of the maul and the side it was all chipped off. Chipped off $1\frac{1}{2}$ " on the face, and about $1\frac{1}{4}$ " upon the side of the maul. I didn't find any other slivers around there. * * * This maul was chipped around the edge of the face and off the side. As to how many places I noticed this chip, on the other side of the maul there was maybe two small ones, and on the other side of the maul it was perfectly good. * * * I didn't see it break, but I was using it just a few minutes before. This new break I have referred to was a large chip off one side. It was a place about $1\frac{1}{2}$ " around the side of the face of the maul and $1\frac{1}{2}$ " up the side. The large chip off showed to be a new break. There were some small old chips off the opposite side; they had broken some time previous to that. Showed to be an old break. I do not know the exact time my father had been foreman at that place; I think about three or four months, maybe two months. * * * He had been using the tools all the time he had been there."

[1, 2] It seems to us that the extent of the duty appellee assumed in looking after the safe condition of the maul or hammer is well stated in the rule above quoted. He was to keep the tool in first-class condition; when it needed repair he was to send it to the place where it was to be repaired; the witness Welch added to the rule that when it was not in proper temper he was to send it to the blacksmith. The maul seems not to have had the proper temper, and for that reason, instead of mashing when used, it splintered when struck on the steel or iron plate. The evidence does not disclose that when the accident happened the maul was in a temper different from what it was when it was furnished Flinn. If there was nothing to indicate to Flinn that the temper of the maul for some reason had been changed since it had been furnished to him, or that he knew the dangerous condition in which it was because not in proper temper, we can see no reason why he should send it to the blacksmith shop to be properly

tempered. The duty of furnishing a safe and suitable maul is one, we think, of the nondelegable duties of the master of which he cannot relieve himself by charging his servant with its performance. It is a personal obligation the master owes to the servant. *Gulf, etc., Ry. Co. v. Johnson*, 1 Tex. Civ. App. 103, 20 S. W. 1123; *Railway Co. v. Pope*, 43 Tex. Civ. App. 616, 97 S. W. 534.

[3] It cannot be said, as a matter of law, without reference to the use to be made of it, that because a hammer or maul is a common and simple appliance the master, when furnishing it to his servant for use in the discharge of his duties as such, does not owe to him the duty to use ordinary care to see that it is reasonably suitable and safe for the servant's use in the service to be performed by him. If the hammer was to be used in a service not requiring a proper temper, it might be said that the master was not lacking in care in furnishing one not properly tempered; but we think it should not be so said as a matter of law when the use to be made of it required a proper temper when struck against a steel or iron plate to prevent it from being a dangerous instrument. *Houston & T. O. Ry.*

Co. v. Patrick, 50 Tex. Civ. App. 491, 109 S. W. 1097.

[4-5] We are of the opinion that the circumstances of this case, as disclosed by the evidence, were such as to have a jury determine the question of negligence vel non of the appellant upon a consideration of all the facts. The question of assumed risk depends upon the same considerations. As said by the Supreme Court in *Drake v. San Antonio & A. P. Ry. Co.*, 99 Tex. 240, 89 S. W. 407, in furnishing a tool of any kind, the master is bound to use ordinary care for the safety of the servant who uses it. If there was negligence on the part of appellant in furnishing the hammer which, because of its unfitness for the use to which it was to be put, exposed Flinn to a danger which in the exercise of ordinary care in doing his work would not have been brought to his knowledge, he cannot be held to have assumed the risk resulting from his employer's negligence. We have reached the conclusion that the issues of negligence and assumed risk under all the circumstances and facts shown were for the jury to determine, and that the trial court was not in error in refusing to give the peremptory instruction requested.

The case is affirmed.

MASSEY et al. v. ALLEN et al. (No. 8322.)

(Court of Civil Appeals of Texas. Dallas.
May 1, 1920. Rehearing Denied
June 19, 1920.)

1. Wills §94 — Essentials of instrument stated.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 7857, every will, except when wholly in the handwriting of testator, must be in writing and signed by testator, or by another at his direction and in his presence, and attested by two or more credible witnesses above the age of 14 years, by subscribing their names thereto in presence of testator.

2. Wills §293(1)—Evidence other than that prescribed by statute may be resorted to for probate.

While the method of Vernon's Sayles' Ann. Civ. St. 1914, art. 3267, is the preliminary rule for proving wills, other evidence may be resorted to, both in lieu of the statutory method and to supply lapses of memory on the part of the subscribing witnesses.

3. Wills §302(1)—Evidence held insufficient to prove due execution.

In proceedings to probate a will, evidence held insufficient, under Vernon's Sayles' Ann. Civ. St. 1914, art. 3267, to prove execution in compliance with article 7857.

4. Wills §165(1)—Declarations of testator inadmissible, except on issue of undue influence.

Though declarations of testator that he has made his will are not admissible, either on issue of execution or attestation, where it is alleged by contestants that proponents have exercised undue influence, such declarations, made within a reasonable period from execution, are admissible to show testator's state of mind and effect of such influence thereon.

5. Wills §822—Declarations of testator inadmissible in rebuttal.

In proceedings to probate a will, testimony of a devisee as to certain declarations of testator tending to show the will offered was the will he intended to make, such witness being called by proponents in rebuttal, should have been excluded.

6. Evidence §155(1) — Admission of illegal evidence does not authorize similar evidence for adversary.

The admission of illegal evidence on the part of one of the parties will not authorize his adversary to introduce similar illegal evidence in rebuttal, when excepted to.

7. Appeal and error §1050(1)—Testimony harmless, where party does not object to like testimony.

Where an objecting party permits like testimony to be introduced without objection, that admitted over his objection will be held harmless.

Appeal from District Court, Van Zandt County; Joel R. Bond, Judge.

Application to probate the will of W. J. Allen by John Allen and others, contested by R. R. Massey and others. From judgment admitting the will to probate, contestants appeal. Judgment reversed, and cause remanded.

Muse & Muse, of Dallas, and Simpson, Lasseter & Gentry, of Tyler, for appellants. Wynne, Wynne & Gilmore, of Wills Point, and Stanford & Sanders, of Canton, for appellees.

RASBURY, J. Appellants in the court below contested the application to probate the will of W. J. Allen, and the appeal is from the judgment of the court, entered upon special verdict of the jury, admitting it to probate. By requested peremptory instruction in the court below before verdict, and in various ways thereafter, appellants challenged the sufficiency of the evidence to warrant the probate of the will and as a consequence the submission of the case to the jury. In our opinion the contention must be sustained. We will not attempt to follow appellants' method of presenting the issue, but, in lieu thereof, state the reasons why, in our opinion, the evidence does not support the findings of the jury, which, aside from the issue of fraud and undue influence, were in substance that N. A. Matthews and K. F. Williams, subscribing witnesses to the will, signed same in the presence of W. J. Allen, the testator.

[1] To properly understand our conclusion, it will be of assistance to recall that every will, except when wholly in the handwriting of the testator, to have effect as such, must be in writing and signed by the testator, or by another at his direction and in his presence, and attested by two or more credible witnesses above the age of 14 years by subscribing their names thereto in the presence of the testator. Article 7857, Vernon's Sayles' Civ. Stats. That the essentials required by the article cited to constitute a will, when not wholly in the handwriting of the testator, concurred, are to be shown primarily (1) by the written affidavit of one of the witnesses, taken and subscribed in open court, or by their depositions if they are non-residents of the county or unable to attend court; or (2) if none of the witnesses are living, then by proof of the handwriting of the testator and the attesting witnesses by affidavit taken in open court or by depositions. Article 3267, Id. It has been decided that in the cases first enumerated—that is, when the will is proven by the affidavit of one of the attesting witnesses—"the clear inference is that it [the affidavit] must contain such [facts] as are necessary to concur

for the due execution of the will." *Tynan v. Paschall*, 27 Tex. 286-299 (84 Am. Dec. 619). The facts which must concur are those things enumerated in article 7857, *supra*, as the requisites for a will, as that it was signed by the testator, or by another at his direction and in his presence, and attested by two or more credible witnesses above the age of 14 years, by subscribing their names in the presence of the testator. Concerning proof of the will in the cases last enumerated, it was decided in the same case that, when the direct testimony of one or more of the subscribing witnesses—

"cannot be had, the statute also prescribes that it may be probated on proof by two witnesses of the handwriting of the subscribing witnesses, and also of the testator, if he was able to write. When this character of testimony can be resorted to, the statute indicates all that it is necessary to establish by the witnesses."

[2, 3] In short, when such proof is allowable, and it is allowable when that first required cannot be secured, the will may be probated on proof by two witnesses of the handwriting of the testator and the subscribing witnesses. Further, while the statutory method is the primary rule for proving wills, other evidence may be resorted to, both in lieu of the statutory method and to supply lapse of memory on the part of the subscribing witnesses. *Tynan v. Paschall*, *supra*. What, then, does the evidence disclose in that respect? The facts deducible from the testimony on that issue, as contained in appellees' brief, which we assume to be all the testimony, are these:

T. J. McKain, at the request of W. J. Allen, the testator, wrote the instrument tendered for probate and witnessed by R. F. Williams and N. A. Matthews in his office in Wills Point at the dictation and in the presence of Allen. When completed McKain read the instrument to Allen, and at his request signed Allen's name thereto; Allen making his "mark" to indicate such signature was his. After signing the will in the manner indicated, McKain advised Allen that two witnesses were required to the will, whereupon Allen left McKain's office to procure the witnesses. According to McKain's "best recollection," the witnesses signed as such in his office; Williams being accompanied to his office for that purpose by Allen. The signature, "N. A. Matthews," signed to the instrument offered as Allen's will as a witness, was shown by those qualified to know to be the genuine signature of N. A. Matthews, who was dead, and who was over 21 years of age at the time he signed same. R. F. Williams, the other witness to the will, testified to the genuineness of his signature, and that he was over 21 years of age when he signed it. The only

other fact he remembered in connection with the matter was that Allen requested him to go to McKain's office and sign a document, which he understood to be Allen's will. Otherwise his memory had lapsed. He could not recall whether Allen or any one else was present when he signed the will. He also testified that Matthews was dead and over 21 years of age at the time he signed the instrument.

It was also shown that Allen, the testator, while illiterate, was intelligent and a person of strong and determined character, accompanied by testimony of certain declarations of Allen, subsequent to making the will and prior to his death, the tendency of which was to show that he intended to dispose of his property in the manner provided in the will. Typical of these declarations was the statement to William Pilley that some of his children had not "treated him right," and that he had given his property to his son John, and left his grandchildren \$500 each, and had made a will accordingly; the declaration to Henry Gilchrist in his last illness, when he learned that his cash at bank was in excess of what he expected, "that John was going to get that money"; the statement to Jim Wilson that his son John would be manager of his property after his death. To Dick Sinclair he declared that he had made a will, so that none of the children would get anything, except John, and, when reminded that wills are often "broken," declared, "By God, I was present when this one was made." Declarations of like character were made to W. M. Massey, J. A. Vance, John Henry Jackson, and Andy Hawkins.

Such are the facts, and from them it appears, if the rule prescribed first by the statute is applied, that the only showing made by Williams, the living subscribing witness, is that he signed it, which is insufficient. On the other hand, if it be conceded that the next rule prescribed applies when one of the witnesses survives the testator, notwithstanding the statute declares it applies when all witnesses are dead, the showing in that respect is also insufficient, since, while the statute requires the handwriting of the testator and the witnesses to be proven by two witnesses, as matter of fact McKain only testified to the testator's handwriting and that of Matthews, and Williams to his own. In short, one witness only identified each signature, while to admit the will to probate two witnesses must identify each signature.

It is also apparent, from the facts we have recited, that the execution of the will was not otherwise proven, as it is said in the case so often cited herein may be done, when the primary rule cannot be complied with. If less witnesses are required to prove the will, when it cannot be done by the affidavits of the subscribing witnesses, it is none the less

certain that every essential required must be shown in some way, and in that respect the proof also fails; for, while it was shown that Allen signed, and that Williams and Matthews subscribed as witnesses, and that both were over the age of 14 years, there is no showing that both or either signed as witnesses in the presence of the testator.

It is true that the declarations of the testator which we have recited were shown, and that they tend to prove that Allen believed he had executed a will. In the only case cited in this opinion it was said concerning such declarations:

"Nor will the declarations and acts of a party, indicating a belief that he has a will, add but little, if any, strength to the other testimony adduced to prove its due execution."

The facts in the case at bar illustrate the force of the argument, for, while Allen's declarations clearly indicate the disposition he desired to make of his property, they have no tendency whatever to prove that the witnesses signed the will in his presence.

The case of *Hopf v. State*, 72 Tex. 281, 10 S. W. 589, is not, in our opinion, one that presents facts parallel to those in the case at bar. There not only was the genuine signature of Nelman, the testator, shown, but it was also shown by Bumpas, one of the witnesses, that he signed in Nelman's presence. It was further shown by one Toblion that Nelman in his presence requested Schul, the other subscribing witness, to sign what Nelman said was his will, and that Schul did, as requested, sign such paper. Such facts clearly support the inference, not that the witnesses signed in the presence of the testator, for that was shown directly, but that the paper Schul signed was the will. In the case at bar, however, there is nothing that such an inference could be founded on, since the evidence only discloses the naked fact that the witnesses signed the instrument.

[4] Complaint is made of the admission in evidence of the declarations of the testator heretofore recited, on the ground that they

prove neither the execution nor the attestation of the will. So stated, the contention is correct. However, it was alleged by appellants that appellees had exercised undue influence upon the testator to induce the execution of the will. When that issue is in the case, and the issue independently proved, such declarations in turn become admissible, when made within a reasonable period from the date of the execution of the will, for the purpose of showing the testator's state of mind and the effect of such influence thereon. *Scott v. Townsend*, 106 Tex. 322, 166 S. W. 1138.

[5-7] Amanda Glidden, a devisee in the will, was permitted over the objections of appellants, in rebuttal, to testify to certain declarations of the testator, tending to show that the will offered was the will he intended to make, being called as a witness by appellees, the proponents. The testimony should have been excluded. *Leahy v. Timon* (Sup.) 215 S. W. 951. It appears, however, from the record, that appellants were permitted by the court, over objections, to introduce similar illegal testimony favorable to them. That fact is urged as justification for admitting the testimony of Mrs. Glidden. It is the rule that the admission of illegal evidence on the part of one of the parties will not authorize his adversary to introduce similar illegal evidence in rebuttal, when objected to. *Dolson v. De Ganahl*, 70 Tex. 620, 8 S. W. 321; *Shiner v. Abbey*, 77 Tex. 1, 13 S. W. 613. The contention is not, in our opinion, within the rule that holds that, where the objecting party permits like testimony to be introduced without objection, that admitted over his objections will be held harmless. Appellants did not permit similar testimony to be introduced by appellees. What really transpired was that appellees permitted appellants to introduce illegal testimony favorable to them, and then sought to rebut its effect by contradictory illegal evidence.

Because of the errors pointed out, it becomes our duty to reverse the judgment and remand the cause for another trial, consistent with the views herein expressed.

BROYLES et ux. v. GILMAN et al.
(No. 1106.)(Court of Civil Appeals of Texas. El Paso.
May 20, 1920. Rehearing Denied
June 17, 1920.)**1. Trial \S 192—Court did not err in assuming admitted fact that defendant was assignee of oil lease.**

Where petition to cancel an oil lease alleged that certain defendants claimed an interest in the land under a sale or transfer, proof by such persons of a formal transfer was rendered unnecessary, in view of further fact that the plaintiff testified he received checks from such persons to cover rentals, and there was no error on part of court in assuming as an admitted fact that such persons were in privity with the lessee as assignees of his interest.

2. Mines and minerals \S 79(4)—Payment of rental by one of two assignees of oil lease payment for both.

Where \$20 was payable quarterly as rental on an oil lease assigned by lessee to two persons, and each of the assignees gave lessee a check for \$20 to cover the rental of his undivided interest and one of the checks was dishonored, there was no default by the assignees of the lease; the assignees filing a joint answer in an action by the lessor to cancel the lease, it being immaterial to a lessor as to who pays rentals due.

3. Mines and minerals \S 79(1)—Acceptance of quarterly rentals sufficient consideration for optional privileges in oil lease.

Acceptance of rentals provided for in an oil lease on failure of lessee to drill a well constituted a sufficient consideration for the optional privileges granted, and made the contract, which originally had only a nominal consideration of \$1, valid.

Appeal from District Court, Eastland County; Joe Burkett, Judge.

Action by J. N. Broyles and wife against R. F. Gilman and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

B. W. Patterson, of Cisco, and Alexander & Baldwin, of Ft. Worth, for appellants.

J. J. Butts, of Cisco, for appellees.

HIGGINS, J. On May 22, 1916, J. N. Broyles and wife, lessors, leased to R. F. Gilman, lessee, 320 acres of land situate in Eastland county. The material portions of the lease contract are as follows:

The lessors, in consideration of \$1 paid, granted, demised, and let unto the lessee all the oil, gas, etc., in and under the land, together with the exclusive right unto the lessee to operate, drill for, and mine said oil, gas, etc., and to lay and maintain pipe lines,

etc. The lease was for the term of five years from date, and as much longer as gas, oil, etc., was produced in paying quantities, yielding to the lessors one-eighth of all the oil produced, delivered free of expense into the tanks or pipe lines to the lessors' credit. The contract contains these further provisions:

"Lessees agree to commence a well on said premises within one year from the date hereof, or pay lessor 25 cents an acre per annum, payable quarterly in advance from the 22d day of May, 1917, until said well is commenced or this lease surrendered, which surrender is made complete and binding upon failure of lessee to make such payment. And the drilling of such well shall be full consideration to lessor for grant hereby made to lessee, with exclusive right to drill one or more additional wells on the premises during the existence of the lease. * * *

"The above rental shall be paid lessor in person or by check deposited in post office, directed to J. N. Broyles, Nimrod, Texas. And it is further agreed that upon the payment of one dollar lessee shall have the right to surrender this lease, and thereafter shall be released and discharged from all payments, obligations, covenants, and conditions herein contained, whereupon this lease shall be null and void, and that all conditions, terms, and limitations between the parties hereto shall extend to their heirs, personal representatives, and assigns."

The form of this contract is the same as that construed by the Ft. Worth Court of Civil Appeals in the recent case of *Hiltson v. Gilman*, 220 S. W. 140, not yet [officially] reported.

On September 26, 1918, Broyles and wife filed this suit against Gilman, Frances Ruben, and A. L. Cohen to cancel and set aside the above-described contract. In the petition it was alleged that the defendants Ruben and Cohen claimed some interest in the land through or under some kind of sale or transfer from Gilman; that the contract gave Gilman no right to sell or transfer, but, if he had such right, then such assignees acquired their interest subject to the burdens, conditions, defenses, and limitations contained in the lease. The defendants Ruben and Cohen filed a joint answer, setting up that they were the assignees of Gilman, and urging various defenses which it is not necessary now to mention. Upon trial before a jury a peremptory instruction was given in favor of the defendants, in accordance wherewith verdict was returned and judgment rendered. Error is assigned to the action of the court in giving the peremptory instruction; various propositions being urged why it was erroneously given.

[1] By the third proposition it is urged that the giving of the peremptory charge was improper, because there was no evidence to show that defendants Cohen and Ruben were legal assignees of Gilman, or owners of the

leasehold interest in the land, and, since Gilman had disclaimed, there was no evidence upon which the peremptory charge could be based. It is true there was no direct evidence offered of an assignment by Gilman to Ruben and Cohen, but plaintiff's petition alleged that Ruben and Cohen claimed an interest in the land under a sale or transfer from Gilman; and the allegations of the petition thus placed those defendants in privity with Gilman under the lease contract, and proof by said defendants of a formal transfer from Gilman was thus rendered unnecessary, in view of these allegations and the further fact that the plaintiff, J. N. Broyles, upon the stand testified that in May, 1918, he received checks from Ruben and Cohen to cover the rental installment due May 22, 1918, and that these two parties had paid the rental installment at the previous quarter. His testimony clearly shows that he recognized Ruben and Cohen as being assignees of Gilman, and it is quite evident from the record that upon the trial no question was raised as to Ruben and Cohen being assignees, and that they were treated by the parties as such. In the state of the pleading and the record as a whole, there was no error upon the part of the court in assuming as an admitted fact that Ruben and Cohen were in privity with Gilman as assignees of Gilman's interest in the land under the lease contract.

[2] The fifth proposition is as follows:

"This lease was a mere option, running first for a period of 12 months, and then from quarter to quarter, and as it provided that failure to pay any rental in advance should be a complete surrender of the lease, and the evidence showing that part of the rentals were paid, plaintiffs had the right to refuse to receive further rentals and forfeit the lease, which they did, and for this reason the court erred in giving the peremptory charge."

It is true that so far as the lessee was concerned it was entirely optional whether he commenced a well or paid the quarterly rentals as stipulated in the contract. The testimony shows that no well had been commenced upon the land, but that Gilman paid the quarterly rentals up until the time Ruben and Cohen acquired his rights, and that such payments were accepted by the appellants. It further appears that Ruben and Cohen paid the quarterly rental which became payable three months preceding May 22, 1918, and that same was accepted by appellants. By virtue of the cash payment made at the time the lease was executed and these quarterly payments thereafter made, the optional rights of the lessee and his assignees were secured until May 22, 1918. Those payments constituted the consideration which supported the contract and the optional right of renewal or extension of the privileges for the period of

3 months from May 22, 1918, by making payment of the quarterly installment due May 22, 1918. There being 320 acres of land covered by the lease, a payment of \$20 on or before May 22, 1918, would have secured to Ruben and Cohen an extension of their optional rights for 3 months. The record discloses that by letter dated May 14, 1918, the defendant Ruben wrote appellants as follows:

"Am sending \$20 in payment for my share of 320 acres. The other half will be paid by Mrs. Anna Cohen. If you do not receive the rest of the rental for the land, please let me know."

In this letter she inclosed a check for \$20. On May 18th defendant Cohen sent J. N. Broyles a check for \$20, with letter as follows:

"I am inclosing \$20 for 6 months rental for my share or half interest in the 320 acres assigned to Cohen & Ruben by Gilman. Please send me receipt."

The two checks of Ruben and Cohen were received by J. N. Broyles and cashed by him at his local bank. The check of Ruben, however, was dishonored by the bank upon which it was drawn, and Broyles repaid to the bank which cashed it for him the amount of the check. It thus appears that the defendant Ruben had failed to make any payment on or before May 22, 1918, as required by the contract; but the defendant Cohen did pay \$20, which was received by appellants, and which they have never repaid her, nor offered to refund. The total amount due on May 22, 1918, was \$20, and this amount was received by appellants from Cohen. It made no difference to the appellants which one of the assignees paid the rental due May 22, 1918. That was no concern of his. He had the right to insist upon the payment of \$20 as a condition precedent to the further extension of the optional rights of the assignees, but the lessors had no right to arbitrarily say by whom the stipulated amount should be paid. The defendant Cohen had the right to insist upon her co-owner paying her share of the stipulated rental, but they filed a joint answer in which they pleaded the said payment of \$20 made by the defendant Cohen, which payment covered the quarterly installment due May 22, 1918, and that by reason of such payment there had been no default in the payment of the installment due on May 22, 1918.

In view of the payment of this \$20 by the defendant Cohen, which was received and accepted by the appellants, the dishonor of the checks of Ruben is of no importance.

[3] The sixth proposition is as follows:

"Where there is only a nominal consideration, the real consideration being the drilling of a

well for oil, and both the drilling and the payment of rentals are entirely at the option of the lessee, with further right given the lessee alone to surrender the lease at any time by payment of \$1, or other nominal amount, the contract is unilateral and void for want of mutuality, and this status of the contract renews itself at the end of each option period. This being the character of this contract and evidence showing these facts, it was error to give the peremptory charge."

Upon the facts heretofore stated it appears that all rental installments had been paid up to and including the one due on May 22, 1918, and that all subsequent maturing installments have been tendered to the appellants. These payments made by the original lessee and his assignees, and the acceptance thereof by the appellants, constituted a sufficient consideration for the optional privileges granted to the lessee and his assigns, and made the contract valid. The testimony of the appellant, J. N. Broyles, shows that the contract was read to him before he signed it, and that he understood the same, and there is nothing in the evidence which would relieve him from the legal effect of the contract which he made.

The first, second, and fourth propositions are as follows:

First. "Where there is any evidence upon an issue, the question should be submitted to the jury. Plaintiffs having alleged the failure of defendants to drill and to pay rentals, and the plaintiffs' evidence having shown that no well was drilled, and that the rental on one-half of the land was not paid when due, the issue was for the jury, and it was error to give the peremptory charge for defendants."

Second. "The peremptory charge was error, because payment of the rental was not made on one-half of the land, and, this having been shown by uncontradicted evidence, the court should have charged the jury to find for plaintiffs for an undivided one-half of the land, or should have left that question to the jury for determination."

Fourth. "The peremptory charge was error, for the reason that there was no provision in the lease for the pro rata payment of the rentals, the contract authorized the payment only

on all the land, and, the evidence having shown payment on only one-half the land, the question of cancellation should have been left to the jury."

It will be noted that these last-mentioned propositions all proceed upon the theory that the payment of \$20 on May 22, 1918, by the defendant Cohen, would not operate to save the interest of the defendant Ruben. Upon the view heretofore expressed, this was a matter which did not concern the appellants. Twenty dollars was the correct amount due on May 22, 1918. The defendant Cohen is not complaining, but has answered jointly with her codefendant, Ruben, setting up the payment of this \$20 as being in full satisfaction of the entire amount due on May 22, 1918, and in this condition of the pleadings, and the manifest purpose of the defendant Cohen to have this payment operate as an extension of the optional rights of herself and her codefendant for a period of 3 months from May 22, 1918, it should be permitted to so operate.

Upon the views expressed, we are of the opinion that this case should be affirmed. It is a hard contract against the lessors, but a man has a right to enter into an onerous contract, if he wishes to do so. The plaintiff's own testimony wholly disproves his allegation of fraud being practiced upon him, and it appears that he accepted the quarterly rentals, and in this condition of the record there is no reason why the contract is not valid and binding upon him. The opinion of Judge Conner in the Hiltson-Gilman Case, supra, recognized the validity of the contract, and the reversal was based solely upon the ground that the court below erred in excluding the lessor's testimony that the recited consideration in the lease was not in fact paid. In the present case Broyles admits that he received the cash payment, and payments covering every rental installment up to and including May 22, 1918, and it further appears that the subsequent installments have been duly tendered.

The judgment is affirmed.

**CENTRAL TRANSFER & STORAGE CO. v.
WICHITA FALLS MOTOR CO. et al.
(No. 8363.)**

(Court of Civil Appeals of Texas. Dallas.
May 1, 1920. Rehearing Denied
June 19, 1920.)

1. Trial ⇨352(5)—Special issue held objectionable as being a combination of two distinct issues.

In action against mortgagee for wrongful sequestration of mortgaged automobile, the submission of special issue as to whether mortgagee's agent acted in good faith and with reasonable grounds for believing that mortgagee felt itself insecure or unsafe or that it feared that the storage company in possession of the automobile would injure the automobile during pendency of suit, with directions to answer "Yes" or "No," held error, being an erroneous combination of two separate and distinct issues which the jury should have been permitted to pass upon separately.

2. Chattel mortgages ⇨161—Stipulation for possession in case of insecurity held valid.

A stipulation in chattel mortgages giving mortgagee the right in case he feels unsafe or insecure in the collection of the deed to declare all the indebtedness due and take possession of the mortgaged property is valid and enforceable.

3. Sequestration ⇨21 — Chattel mortgage held to give no right to sequestration from fear of damage to property pending foreclosure.

While mortgagee's exercise by sequestration of a right given him by his mortgage to take possession of the mortgaged property, as the right to declare all notes due and take possession of the property upon feeling unsafe or insecure from any cause, could not make him liable as for wrongful sequestration, yet, if the mortgagee had not exercised its option to declare all the notes due because it felt unsafe and insecure, before sequestration was sued out and levied, and sued out sequestration on the ground alone of fear that the holder of the mortgaged property would injure the property during the pendency of suit, the mortgagee, if such ground in fact did not exist, could not escape liability for actual damages by showing that it had reasonable grounds to fear such consequences.

Appeal from District Court, Dallas County; Marshall Thomas, Special Judge.

Suit by the Central Transfer & Storage Company, a partnership, etc., against the Wichita Falls Motor Company and another. Judgment for defendants, and plaintiffs appeal. Reversed and remanded.

Morris & Williamson, of Dallas, for appellants.

Ralph P. Mathis, of Wichita Falls, and Davis, Johnson & Handley, of Dallas, for appellees.

TALBOT, J. The Central Transfer & Storage Company, a partnership composed of William E. Burns and Earl S. Burns, appellants, sued the appellees, Wichita Falls Motor Company, a corporation, and G. F. Spence to recover damages, actual and exemplary, for alleged wrongful and malicious issuance and levy of a writ of sequestration by them upon a "Wichita truck No. B. 160," alleged to be of the value of \$1,000. They also sued to recover "special damages," and the facts upon which they sought to recover the several characters of damages claimed were fully set out in their petition. The appellees pleaded a general demurrer, special exceptions, and specially that on July 31, 1917, the Wichita Falls Motor Company sold to O. D. Rawlins and J. B. Merritt, of Dallas, Tex., one second-hand two-ton truck; that said parties gave notes in part payment of the purchase price of said truck, said notes being for the sum of \$400, and also gave a mortgage on said truck to secure the purchase price thereof; that the mortgage was filed with county clerk of Dallas county, Tex., on August 1, 1917; that the mortgage provided in part as follows:

"The mortgagor hereby expressly agrees and covenants that on default in the payment of any one of said notes or any interest due thereon, or any sale, or any attempt to sell said goods or chattels, or any part of them, or to remove them, or any part of them from the county, or from their present location, or upon the seizure of them or any part of them, by any process of law, or if any holder of said notes shall at any time feel unsafe or insecure from any cause, then and in any of the foregoing events said mortgagees, or their assigns, agents, or representatives, are hereby authorized at their option to declare all of said notes due and to take actual possession of said property";

—that on or about September 15, 1917, and at which time the truck was in the hands of the appellees for repair, being placed there by Rawlins and Merritt, the plaintiffs came to the place of business of said defendants with Rawlins and Merritt, and said truck was sold to the appellants herein; that the appellants assumed the balance due on said truck by said Rawlins and Merritt; that at the time appellants purchased the truck there was one note due on the truck; that the notes were collected through a local bank, and inquiry was made by the local agent of the defendants if the note at the bank had been paid; that said appellants advised the appellees the note had been paid; that afterwards the appellees were advised that the note then due had not been paid on September 15, and when said appellants called for the truck on or about September 27, 1917, further inquiry was made of the appellants if said note had been paid; that the appellees refused to permit the truck to be taken out of their place of business unless said note

or notes then due were paid; that said appellants assured the appellees that the notes had not paid, and that said assurance was given before said truck was taken out of appellees' place of business; that afterwards said appellees found that said note due in September, 1917, was not paid, although the appellants had assured appellees that said note had been paid; that the October note was not paid when due; that on October 17, 1917, appellees were advised said notes due in September and October, 1917, had not been paid, and said appellees advised appellants that said notes must be paid, otherwise possession of the truck must be had by appellants; that during the month of October, 1917, said appellants were operating the truck and left said truck in Denton county on the public road and advised the defendants below, appellees here, that if they wanted said car to go after it; that in view of the fact that the notes due on said car had not been paid, although numerous promises had been made by the appellants that said notes would be paid, and in view of the fact that the truck had been left on the public highway by appellants and the security of the appellees was in danger, said appellees called on their attorneys on October 17, 1917, and were advised to sue out a writ of sequestration and levy same on the car and file suit to foreclose the mortgage lien, etc.

The case was submitted to the jury on special issues, with instructions that, if an affirmative answer was given to special issue No. 1, not to answer any other issue submitted. Special issue No. 1 is as follows:

"Did G. F. Spence, act in good faith and with reasonable grounds for believing the truth of either of the statements made, (a) that the Wichita Falls Motor Company felt itself insecure or unsafe, or (b) that it feared the Central Transfer & Storage Company would injure the property during the pendency of the suit? Answer 'Yes' or 'No.'"

To this question the jury answered "Yes," and in obedience to the instruction of the court made no other finding. On motion made judgment was entered, over the objections of the appellants, on the above finding of the jury in favor of the appellees. Appellants' motion for a new trial having been overruled, they appealed.

[1, 2] We shall not undertake to discuss seriatim the several assignments of error presented by the appellants. Our conclusion is that two propositions contended for by them are well taken and require a reversal of the case. These propositions are to the effect: (1) That special issue No. 1, quoted above and the only one determined by the jury, is an erroneous combination of two separate and distinct issues which the jury should have been permitted to pass upon

separately; (2) that it cannot be told from the jury's answer "Yes" to said special issue which of the questions therein contained they intended to or did answer and could not be made the basis of the judgment rendered thereon in appellees' favor. The first question involved in the issue is, in substance: Did G. F. Spence, the agent of appellees, in suing out the sequestration, act in good faith and with reasonable grounds for believing that the appellee Wichita Falls Motor Company felt itself insecure or unsafe with respect to its security for the payment of its debt? And the second question involved is: Did said appellee, as a basis for suing out the sequestration, fear the Central Transfer & Storage Company would injure the truck constituting the security for the payment of its debt during the pendency of the suit in which the sequestration was sued out? Under the pleadings and evidence both of these questions were questions of fact, both or either of which might have been answered in the negative. As they were submitted the jury was not given the privilege of answering one in the negative and the other in the affirmative, or vice versa. They were instructed to answer by the one word "Yes" or "No." The decisions of this state clearly affirm that a special issue of fact submitted to a jury for their determination by which the jury are instructed to answer "Yes" or "No" should submit for their consideration a single question, and should not combine two separate and distinct questions of fact, one of which might be answered in the negative and the other in the affirmative, or vice versa, by the jury. *Railway Co. v. Turner*, 199 S. W. 868; *Tel. & Tel. Co. v. Andrews*, 169 S. W. 218; *Western Indemnity Co. v. MacKechnie*, 214 S. W. 456. Here the issue as framed required the jury to find whether or not G. F. Spence, in suing out the writ of sequestration, had either reasonable grounds to believe that the Wichita Falls Motor Company felt itself insecure or unsafe with respect to the security it had for the payment of its debt, or feared the Central Transfer & Storage Company would injure such security during the pendency of the suit in which the sequestration was sued out. To this issue the jury, having been instructed to answer "Yes" or "No," answered "Yes." From the form of the issue and the answer it can only be said, at most, that the jury determined from the evidence that G. F. Spence, when he sued out the writ of sequestration, had reasonable grounds to believe either that the appellants felt themselves insecure or unsafe in the security they had, or that appellants feared the appellees would injure the truck constituting such security pending the litigation, but which of the facts they found to exist it is impossible to say. This being true, the finding of the jury furnishes no basis for the judgment ren-

dered upon it. That a stipulation in a mortgage giving the mortgagee the right, in case he feels unsafe or insecure in the collection of his debt, to declare all of his indebtedness due and take possession of the mortgaged property, is valid and enforceable, is well settled by adjudicated cases.

This court, in the case of *Warren v. Osborne*, 97 S. W. 851, cited by appellees, treating of a provision in a mortgage practically the same as the one contained in appellants' mortgage, said:

"This clause placed the power in him [the mortgagee] to declare it [the debt] due, and, the jury having found that he had reasonable grounds for feeling unsafe and insecure, and he having declared it due, judgment was properly rendered thereon."

[3] Had there been a definite finding by the jury that G. F. Spence had reasonable grounds for believing that the Wichita Falls Motor Company felt unsafe or insecure, and had declared all the notes secured by its mortgage due before the payment of the notes which became due September 15 and October 15, 1917, respectively, and before the suing out of the sequestration, then we think the court would have been authorized to declare as a matter of law arising upon such finding that appellants were not entitled to recover any damages on account of the issuance and levy of the sequestration. In such case appellee's exercise by sequestration of the right given him by his chattel mortgage to take possession of the property covered by such mortgage could not make him liable as for wrongful sequestration. *Wedig v. San Antonio Ass'n*, 25 Tex. Civ. App. 158, 60 S. W. 567; *Nichols v. Paine*, 52 Tex. Civ. App. 87, 113 S. W. 972; *Brunson v. Dawson State Bank*, 175 S. W. 438. If, in other words, the facts existed which authorized appellee to take possession of the mortgaged property under the terms of his mortgage, then he cannot be held liable for damages by taking

such property by writ of sequestration. This is firmly established by the authorities cited. But we hold that the jury's finding under the issue submitted in this case does not show the existence of such facts and does not support the judgment rendered. Whether the appellee had exercised its option to declare all the notes secured by its mortgage due because it felt unsafe or insecure before the September and October notes were paid and the sequestration sued out and levied was a question of fact under the evidence, and not one of law.

The submission of issue No. 1 in the form it was submitted indicates to us that the trial court entertained the view that, if G. F. Spence, appellee's agent, had reasonable grounds to believe that appellee felt itself unsafe or insecure, or if it feared appellants would injure the property upon which it had a mortgage during the pendency of the suit in which the sequestration was sued out, then, in either such event, appellants were not entitled to recover either actual or exemplary damages. If this was the court's view, then we do not concur in its opinion that, if the appellee's agent had reasonable grounds to fear appellants would injure the property during the pendency of the litigation, appellants were not entitled to recover actual damages. If the ground alleged for the issuance of the sequestration, which was that appellee feared that the appellants, the Central Transfer & Storage Company, would injure the property during the pendency of the suit, was in fact untrue, then appellee could not escape liability for actual damages by showing that it had reasonable grounds to fear such consequences. *Culberston v. Ca-been*, 29 Tex. 247; *Fred Mercer Dry Goods Co. v. Fikes*, 211 S. W. 830.

Because of the error in submitting issue No. 1 in the form it was submitted and the insufficiency of the finding of the jury upon that issue to authorize and support the judgment rendered, said judgment is reversed, and cause remanded.

YOUNG v. JONES et ux. (No. 1079.)

(Court of Civil Appeals of Texas. El Paso.
May 20, 1920.)1. Mines and minerals \S 73—Oil lease held privilege, and not present conveyance.

Oil and gas lease, granting described premises "for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks," etc., designating the right of the lessee as a "privilege," and providing that lessee's rights should terminate on failure to drill within one year or make payment of specified amount on or before certain date, *held* a mere right, franchise, or privilege to enter on the land, and to appropriate a portion of oil and gas discovered therein, and not a conveyance of the oil and gas as a present interest in the land, the commencement of a well, or payment of rental on or before specified date, being a condition precedent to the continuation or extension of the lessee's privileges after such date.

2. Mines and minerals \S 73—Time regarded as essence of oil and gas lease.

In oil and gas leases, time is regarded as the essence of the contract, and the rule that a lease is construed most strongly against the lessor does not apply.

3. Evidence \S 20(1)—That development is inducing consideration to lessor in oil and gas lease is common knowledge.

In oil and gas leases, it is a matter of common knowledge that the development of the oil and gas is, in most instances, the main inducing consideration to the lessor, that the privilege of paying rentals in lieu of such development is for the benefit of the lessee, and that undue delay in prospecting often produces a serious loss to the lessor.

4. Mines and minerals \S 79(6) — Forfeiture of oil lease for failure to pay rental within specified time.

Where oil and gas lease merely gave lessee the right to enter on land, and take a portion of the oil and gas therefrom, without conveying a present interest therein, and provided for the termination of lessee's right, on failure to drill or make specified payment on or before certain date, the failure to drill or pay the stipulated amount on or before such date, constituted a forfeiture against which equity will not give relief, though failure to make necessary payment was due to a mistake as to amount, and though an amount less than that specified was tendered prior to such date, and the full amount tendered subsequent thereto.

5. Mines and minerals \S 79(3)—Lessee could not extend oil lease as to only one part of land by payment of only a portion of the rental.

Where lessee assigned his interest in oil lease in different portions of the land in severalty to different persons, who in turn assigned their interests to the same person, such person,

holding the lessee's interest as to the entire land, could not extend lease as to only a portion of the land by payment of only a portion of the rental, though lease provided that, on assignment as to a part of the land, the default of assignee should not affect lease in so far as it covered other portions of the land as to which rental was duly paid; such provision being applicable only in case the rights in different portions of the land were held by different persons, the optional right to pay rental being indivisible, where rights as to all the land were vested in one person.

6. Contracts \S 170(1)—Construction by the parties to be considered.

Interpretation placed upon a contract by the parties thereto, where the meaning is uncertain, is to be considered by the court in construing the contract.

Appeal from District Court, Callahan County; Joe Burkett, Judge.

Suit by William L. Jones and wife against R. M. Young. From the judgment, defendant appeals, and plaintiff cross-assigns error. Affirmed in part, and reversed in part, and rendered for plaintiff.

R. M. Rowland, of Ft. Worth, C. M. Oakes, of Tulsa, Okl., and W. R. Ely, of Baird, for appellant.

B. L. Russell, of Baird, and Dallas Scarborough, of Abilene, for appellees.

HIGGINS, J. On December 7, 1917, Wm. L. Jones and wife, as lessors, entered into a written contract with C. L. Alvis, trustee, as lessee, the material portions whereof read:

"Witnesseth, that the said lessor, for and in consideration of seventy-six and $\frac{25}{100}$ dollars cash in hand paid, receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained, on the part of lessee to be paid, kept, and performed, has granted, demised, leased, and let, and by these presents does grant, demise, lease, and let, unto the said lessee for the sole and only purpose of mining and operating for oil and gas and of laying pipe lines, and of building tanks, power stations, and structures thereon to produce, save and take care of said products, all that certain tract of land situated in the county of Callahan, state of Texas, described as follows, to wit: Being 78 acres out of the A. T. Burnlee survey and $80\frac{1}{2}$ acres out of the Burnlee survey and 152 acres out of the U. Bass survey No. 9, abstract No. 14, being all of land owned by us in Callahan county, Texas, conveyed to us by Nattie L. Rust, as shown by record in Callahan county, Texas, Book 58, page 148, and containing 305.3 acres, more or less.

"It is agreed that this lease shall remain in full force for a term of ten (10) years from this date, and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee. In consideration of the premises the said lessee covenants and agrees:

"First. To deliver to the credit of lessor,

free of cost, in the pipe line to which he may connect his wells, the equal one-eighth part of all oil produced and saved from the leased premises.

"Second. To pay the lessor two hundred (\$200.00) dollars, each year, in advance, for the gas from each well where gas only is found, while the same is being used off the premises, and lessor to have gas free of cost from any such well for all stoves and all inside lights in the principal dwelling house on said land during the same time by making his own connections with the well at his own risk and expense.

"Third. To pay lessor for gas produced from any oil well and used off the premises at the rate of fifty (\$50.00) dollars per year, for the time during which such gas shall be used, said payments to be made each three months in advance.

"If no well be commenced on said land on or before the 7th day of December, 1918, this lease shall terminate as to both parties unless the lessee on or before that date, shall pay or tender to the lessor, or the lessor's credit in the Farmers' National Bank at Cross Plains, Texas, or its successors, which shall continue as the depository regardless of changes in the ownership of said land, the sum of seventy-six and $\frac{25}{100}$ (\$76.25) dollars which shall operate as a rental and cover the privilege of deferring the commencement of a well for 12 months from said date. In like manner and upon like payments or tenders the commencement of a well may be further deferred for like periods of the same number of months successively. And it is understood and agreed that the consideration first recited herein, the down payment, covers not only the privilege granted to the date when said first rental is payable, as aforesaid, but also the lessee's option of extending that period as aforesaid, and any and all other rights conferred.

"Should the first well drilled on the above-described land be a dry hole, then and in that event, if a second well is not commenced on said land within twelve months from the expiration of the last rental period for which rental has been paid, this lease shall terminate as to both parties, unless the lessee on or before the expiration of said twelve months shall resume the payment of rentals in the same amount and in the same manner as hereinbefore provided. And it is agreed that upon the resumption of the payment of rentals, as above provided, that the last preceding paragraph hereof, governing the payment of rentals and the effect thereof, shall continue in force just as though there had been no interruption in the rental payments. * * *

"If the estate of either party hereto is assigned—and the privilege of assigning in whole or in part is expressly allowed—the covenants hereof shall extend to their heirs, executors, administrators, successors, or assigns, but no change in the ownership of the land or assignments of rentals or royalties shall be binding on the lessee until after the lessee has been furnished with a written transfer or assignment, or a true copy thereof; and it is hereby agreed that in the event this lease shall be assigned as to a part or as to parts of the above-described lands, and the assignee or assignees of such part or parts shall fail or

make default in the payment of the proportionate part of the rents due from him or them, such default shall not operate to defeat or affect this lease in so far as it covers a part of said lands upon which the said lessee or any assignee thereof shall make due payment of said rental."

On January 16, 1918, Alvis and his cestui que trust transferred to C. W. Markley their rights under the above contract. On January 31, 1918, Markley transferred to L. W. Young, Jr., his rights in and to the land in the Burnlee survey. On February 7, 1918, Markley transferred to said Young his rights in and to the land in the Bass survey. Thereafter, and prior to November 11, 1918, L. W. Young, Jr., transferred to the appellant, R. M. Young, his rights in the land situate in the Burnlee survey, and by another assignment transferred to R. M. Young his rights in the land situate in the Bass survey.

On November 11, 1918, appellant, R. M. Young, made two deposits to the credit of appellee, Wm. L. Jones, in the Farmers' National Bank of Cross Plains, Tex., one deposit being for \$38.25, and the other for \$35.04, making a total of \$73.29. The correct amount of the rental due on or before December 7, 1918, upon all of the land, under the original contract, was \$76.25. On December 16, 1918, appellee Jones wrote appellant, Young, calling his attention to the fact that the correct amount of the rental had not been paid, and declared the contract thereby terminated. Thereupon appellant, on December 24, 1918, wrote Jones as follows:

"William L. Jones, Baird, Texas—Dear Sir: I acknowledge receipt of your favor of the 16th inst. with reference to oil and gas lease covering certain acreage in the U. Bass and Burnlee surveys, in Callahan county, Texas, and I wish to say immediately that this office has made a slight mistake with reference to the payment of rental becoming due December 7, 1918, and as a matter of explanation I have the following to say:

"Your lease covers in all 305.3 acres, and on February 5 of this year I purchased the lease, by assignment, in so far as same covers the 153 acres of the A. T. Burnlee survey, which acreage I am carrying under No. 11511; and on February 16 I purchased the remaining interest in this lease, being the acreage in the U. Bass survey, which through an oversight of my lease department was given No. 11756, when same should have been consolidated with the first purchase and carried under the one lease number, inasmuch as I was acquiring the entire lease. When the rental was paid, it therefore was paid with two separate drafts, and in figuring the amount of the rental due under each lease number the total amount was figured short \$2.96; but this, of course, was an innocent mistake, which was not discovered until your letter of the 16th inst. was received. I expect to maintain my rights under this lease, and I wish to notify you that I am to-day mail-

ing to the Farmers' National Bank of Cross Plains, Texas, a New York draft in the sum of \$2.98, being the balance of rental due you, and trust you will find it consistent to call upon them for this sum. Will you please advise me?"

In this connection the agreed facts are as follows:

"The papers concerning the acreage in question came to defendant's office in Tulsa, Oklahoma, under two separate lease numbers, one bearing the number 11511, the assignment in that case calling for 153 acres out of the Burnlee survey; the remainder of such leased acreage came through said office about two weeks later under the number of 11756, the assignment in that case calling for 150 acres out of the U. Bass survey; the combined acreage covered by both assignments amounts to 303 acres; the rental called for by this lease was \$76.25, which became due December 7, 1918, and the amount of \$73.29 was paid by defendant prior to December 7, 1918, by forwarding to the Farmers' National Bank of Cross Plains, Tex., which was the depository named in the lease, two New York drafts, one in the sum of \$38.25 to cover lease No. 11511, the other in the sum of \$35.04 to cover rental under lease No. 11756; the lessor was notified by defendant's office that these deposits had been made and some time after the rental was due said lessor notified defendant that he had made a mistake in the payment of the rental money and had failed to pay enough; thereupon the matter was immediately checked up in defendant's office, and it was discovered that the remittances made to said depository bank before December 7, 1918, lacked \$2.96 of amounting to the sum of \$76.25 called for in the lease; thereupon defendant immediately remitted said \$2.96 to said depository bank and deposited same therein to the credit of the lessors in said lease and notified lessors that such had been done and that it had always been the purpose and intention of defendant to protect the lease and comply with its terms and that the failure in the first instance to remit the required amount was due solely to error and inadvertence. If the defendant had not made a mistake, he would have paid the \$76.25 by December 7, 1918."

Jones at all times refused to accept the deposits made by appellant. On February 19, 1919, Jones and wife and S. N. Foster, to whom they had conveyed a portion of the land, brought this suit to cancel and set aside the lease contract, on account of appellant's failure to pay the correct amount of the rental due on or before December 7, 1918.

Upon trial without a jury judgment was rendered in plaintiff's favor, cancelling the lease upon the land in the Bass survey, and denied them any relief in so far as concerned the land in the Burnlee survey. From this judgment the defendant appealed.

Opinion.

The appellant's contention is that the admitted facts as above stated, show:

"That defendant at all times intended fully to comply with all terms of the lease contract, that the trivial shortage in one of the rental remittances was the result of a mere inadvertence, and that no damage resulted to the lessor from such mistake; the case plainly called for the interposition of equity to prevent a forfeiture of the lease, and the court erred in rendering judgment canceling the lease as to a part of the acreage covered by the same."

In determining whether this case calls for the application of the equitable rule for relief against forfeitures, it becomes necessary first to ascertain the nature of the contract executed by Jones and wife.

[1] The instrument does not undertake to grant the oil and gas in present, but, upon the contrary, the lands were granted and demised "for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks," etc. Elsewhere in the contract the right of the lessee is designated as "privilege." Viewing the instrument as a whole and in the light most favorable to the lessee, it cannot be regarded as a conveyance of the oil and gas as a present interest in the land itself, but it confers upon him a mere right, franchise, or privilege to enter upon the land and "devote it to a certain use, with the usufructuary right, as a part of its [his] use and enjoyment, to appropriate a portion of the oil and gas as might be discovered." *Texas Co. v. Daugherty*, 107 Tex. 226, 176 S. W. 717, L. R. A. 1917K, 989. In other words, the lessee was granted the privilege of entering upon the land, developing its oil and gas resources, and exploiting a portion of such resources for his benefit, as distinguished from a present vested interest in the land itself. This conclusion is supported by the discussion in the *Texas Co. Case*, supra, also by *Oil Co. v. Teel*, 95 Tex. 586, 68 S. W. 979, *O'Neil v. Sun Co.*, 58 Tex. Civ. App. 167, 123 S. W. 172, and *Witherspoon v. Staley*, 156 S. W. 557.

The next feature of the contract which should be noticed is its optional character. The cash paid to the lessors when the contract was made secured to the lessee the development and exploitation privilege until December 7, 1918; but, if a well upon the land was not commenced on or before that date, the lease terminated unless the lessee, on or before that date, paid or tendered to the lessor's credit the sum of \$76.25, which payment would "operate as a rental and cover the privilege of deferring the commencement of a well for 12 months from said date." It will be noted the lessee assumed no obligation to commence a well in 12 months from the date of the contract, nor did he agree to pay a rental if such a well was not commenced. It was wholly optional with him. In this connection it will be noted, also, that

by the express terms of the contract, if such well was not commenced in 12 months or the rental paid, the lease was terminated as to both parties. The features of the instrument, to which attention has been thus directed, show that if a well was not commenced in 12 months the privileges of the lessee terminated, unless he exercised his option to extend the same for the period of another year by paying \$76.25 on or before December 7, 1918. The commencement of a well or payment of rental was a condition precedent to a continuation or extension of the lessee's privileges after that date. In speaking of failure to perform conditions precedent in options to purchase, Mr. Pomeroy says:

"In pursuance of this principle, equity will not relieve against a failure to perform a condition precedent in a contract, however slight the failure. The right to specific performance has never vested for the party in default. The contract cannot be said to be of equitable cognizance until the condition is performed. The contractual liabilities are incomplete before that time. * * * It has at times been suggested that relief for slight failure, where there was substantial compliance, should be applied to options to purchase land, as where the holder of the option was a day late in exercising the option. But it is clear the rule followed generally by equity is the true one—that there can be no relief against failure to exercise an option after the day named for its expiration, for an option is no more than an offer to sell, which the offerer is bound to keep open during the time set, but which expires with that time, leaving nothing for equity to operate upon. The courts very frequently refuse to give specific performance of an option sought to be exercised after the time has expired, on the ground of time being of the essence. Strictly speaking, there is no contract if the election is not made before the expiration of the time, and equity, finding no contract to use its discretion upon, cannot be concerned with the element of time, which presupposes an existing contract." Pomeroy's Eq. Remedies, §§ 806, 807.

[2, 3] In oil and gas leases time is regarded as the essence of the contract, and the rule that a lease is construed most strongly against the lessor does not apply. In oil and gas leases it is a matter of common knowledge that the development of those products is in most instances the main inducing consideration to the lessor. The privilege of paying rentals in lieu of such development is for the benefit of the lessee. The vagrant nature of oil and gas is well known, and undue delay in prospecting therefor often produces a serious loss to the landowner.

[4] We are therefore of the opinion that the contract executed by Jones and wife did not vest in the lessee a present interest or estate in the land itself, which would render applicable the equitable rule for relief against

forfeiture of a vested interest, for breach of a condition subsequent, but that the right or privilege of the lessee terminated on December 7, 1918, unless a well was commenced on or before that date, or the stipulated rental paid; that the commencement of the well or payment of the rental were conditions precedent to an extension or continuation of the lessee's privileges and wholly optional with him; and, this being the nature of the contract equity will not relieve against the failure to exercise the option in strict accordance with its terms. *Oil Co. v. Teel, O'Neil v. Sun Co., and Witherspoon v. Staley*, all supra; *Weiss v. Claborn*, 219 S. W. 884; *Hitson v. Gilman*, 220 S. W. 140; *Jennings-Heywood Oil Syndicate v. Oil Co.*, 119 La. 793, 44 South. 504; *Pomeroy's Eq. Remedies*, §§ 806, 807. Upon this view the court below did not err in canceling the lease upon the land in the Bass survey.

The appellee cross-assigns error to the action of the court in refusing to cancel the lease upon the land in the Burnlee survey. No conclusions of law were filed by the trial court, but we presume its action in this particular was based upon the theory that the contract was divisible, and the deposit of \$38.25, which was made by appellant to cover the acreage in the Burnlee survey protected and maintained his rights and privileges as to that land. The contract provides:

"If the estate of either party hereto is assigned—and the privilege of assigning in whole as in part is expressly allowed—the covenants hereof shall extend to their heirs, executors, administrators, successors, or assigns; * * * and it is hereby agreed that in the event this lease shall be assigned as to a part or as to parts of the above-described lands, and the assignee or assignees of such part or parts shall fail or make default in the payment of the proportionate part of the rents due from him or them, such default shall not operate to defeat or affect this lease in so far as it covers a part or parts of said lands upon which the said lessee or any assignee thereof shall make due payment of said rental."

It doubtless was not contemplated that the original lessee, nor any subsequent assignee of the entire lease, should have the right to pay less than the whole rental sum of \$76.25 annually for the continuation of his privileges. The manifest purpose of the provision was to give different assignees of different portions of the land the right to protect their respective holdings. The fair and reasonable construction of this portion of the contract is that the option to pay rental upon only a portion of the land arose when the lessee had assigned to different persons different portions of the land in severalty. In such case each assignee would have the right to pay the pro rata rental upon the land as-

signed to him and protect against an extinguishment of his privileges.

[5] We are of the opinion that under the contract in question, where all of the rights and privileges granted by the instrument as to all of the lands described therein were vested in one person, the optional right to pay rental was indivisible, and that such an individual would have no right to pay rental upon a part of the land only. This was the construction placed upon the instrument by the lessor, for he at once declared the entire lease terminated for the failure to pay the whole rental. The appellant seems also to have placed this construction upon the contract, for in his letter to Jones of December 24th, he says:

"Your lease covers in all 305.3 acres, and on February 5 of this year I purchased the lease, by assignment, in so far as same covers the 153 acres of the A. T. Burnlee survey, which acreage I am carrying under No. 11511; and on February 18 I purchased the remaining interest in this lease, being the acreage in the U. Bass survey, which through an oversight of my lease department was given No. 11756, *when same should have been consolidated with the first purchase and carried under the one lease number, inasmuch as I was acquiring the entire lease.*" (Italics ours.)

[6] The interpretation placed upon a contract by the parties thereto, where the meaning is uncertain, is to be considered by the court in construing the same. We are therefore of the opinion that, since the entire interest of the lessee was vested in appellant, the option to pay the annual rental was indivisible, and the failure to pay the whole stipulated amount terminated the entire contract. For this reason appellees' cross-assignment is sustained.

Affirmed as to the land in the Bass survey. As to the land in the Burnlee survey the judgment is reversed, and here rendered in appellee's favor.

LOPEZ v. MISSOURI, K. & T. RY. CO. OF TEXAS et al. (No. 6416.)

(Court of Civil Appeals of Texas. San Antonio.
May 28, 1920. Rehearing Denied
June 16, 1920.)

1. Marriage \S 40(6) — Agreement to marry woman and cohabiting with her without legal ceremony not basis for presumption of divorce from legal wife.

The fact that a man leaves a lawful wife and lives in a state of cohabitation with another woman without a legal ceremony and with an agreement that they will be married cannot

form a basis for a presumption that he had been divorced from his legal wife.

2. Marriage \S 40(8)—Once established presumed to continue.

Where a marriage is once established, it is presumed to continue until the contrary is proved.

3. Marriage \S 40(1, 6)—Presumption of competency of parties and death or divorce of former spouse does not extend to common-law marriage.

When there has been a formal marriage according to legal requirements, the law will presume the competency of the parties to enter into marriage contracts, and will presume that any former marriage of either was dissolved by death or divorce, but such presumption does not extend to a cohabitation with an agreement that the parties would marry, since the law merely tolerates common-law marriages, and does not encourage them.

4. Death \S 31(6)—Woman unlawfully cohabiting with husband of another not entitled to sue.

The statutory cause of action to recover damages for death is "for the sole and exclusive benefit of the surviving husband, wife, children and parents" of the deceased as provided by Rev. St. 1911, art. 4698, and a woman cohabiting unlawfully with a man has no right to such damages, even though she did not know he had ever been married.

5. Marriage \S 50(5)—Evidence held insufficient to establish common-law marriage.

In an action for a man's wrongful death, evidence held insufficient to show that plaintiff was his common-law wife, even if he did not have another wife living at such time; the agreement shown being one to get married, and not a marriage contract.

6. Marriage \S 33—Binding without cohabitation if celebrated under forms of law.

A marriage celebrated under the forms of law is valid and binding, whether cohabitation takes place or not, and, although there is no cohabitation, an innocent third party otherwise eligible has no lawful right to contract a second marriage with one of the parties.

7. Marriage \S 40(7), 44—Ceremonial marriage in foreign country presumed in accordance with its laws; may be proved by witness without producing certificate.

A ceremonial marriage may be proved by the testimony of eyewitnesses without the production of the marriage certificate, or explanation of its absence, and proof of a ceremonial marriage in a foreign country carries the presumption that it was in accordance with that country's laws.

8. Marriage \S 50(1)—Evidence held to show that plaintiff's common-law husband was husband of another.

In a woman's action for a wrongful death of her alleged common-law husband evidence

held sufficient to show that deceased was the lawful husband of another, so that plaintiff was not his common-law wife.

9. Appeal and error ¶99—New trial not warranted by immaterial impeaching evidence.

Plaintiff seeking damages for the unlawful death of her alleged common-law husband is not entitled to new trial for newly discovered evidence which could be used only to impeach witness who testified that deceased was the lawful husband of another, which evidence was not material, because plaintiff failed to show a common-law marriage, even though such former marriage did not exist.

10. Pleading ¶11—Not necessary that defendant plead defensive evidence.

In an action for wrongful death of plaintiff's alleged common-law husband, it was not incumbent upon defendants to plead the evidence to show that plaintiff had never married the deceased, and they could produce evidence to prove that deceased was the lawful husband of another by a prior existing marriage.

11. New trial ¶102(1)—Not granted where movant had knowledge of facts, but did not investigate.

Where plaintiff, suing for death of her alleged common-law husband, had notice through affidavit long prior to trial that deceased was previously married in Mexico, but made no investigation whatever, a new trial for newly discovered evidence relative to marriage would not be granted.

12. Appeal and error ¶933(4)—Affidavit for continuance showing facts putting movant for new trial on notice presumed to have come to knowledge of movant at date of application.

In action by alleged common-law wife for death of husband defended on ground of prior existing marriage, appellate court will presume to uphold denial of new trial for newly discovered evidence as to marriage that affidavit for continuance showing that deceased was married in Mexico was filed as of date of application for continuance and came to knowledge of movant at that time.

Appeal from District Court, Bexar County; R. B. Minor, Judge.

Action by Tiburcia Lopez against the Missouri, Kansas & Texas Railway Company of Texas and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Davis & Long and Henry B. Cline, all of San Antonio, for appellant.

C. C. Huff, of Dallas, and F. C. Davis and Marshall Butz, both of San Antonio, for appellees.

FLY, C. J. Appellant, describing herself as Tiburcia Lopez Vda de Simon Garcia, instituted this suit for damages against the

railway company and Charles E. Schaff, its receiver, to recover damages alleged to accrue to her on account of the negligent killing of Simon Garcia, alleged to have been her husband by a common-law marriage. The marriage was denied by appellees, and other defenses presented. The cause was submitted to a jury on five special issues, the first being:

"At the time of the death of Simon Garcia, was the plaintiff, Tiburcia Lopez de Garcia, his lawful wife?"

The jury was instructed that, if Simon Garcia had a lawful living wife when it was claimed the common-law marriage was consummated, there could be no common-law marriage, and, if it was found that there was no legal marriage, no other questions need be answered. The jury found that appellant was not the legal wife of Simon Garcia, and upon that finding judgment was rendered denying a recovery to appellant.

There are 19 assignments, 12 of which involve discussions of the evidence as to the marriage of appellant to Simon Garcia, the remainder complaining of the refusal to grant a new trial, one ground of which was the discovery of new and important testimony. They are all overruled for the reasons hereinafter given.

There was testimony that showed that Simon Garcia was legally married to Demetria Hernandez in the republic of Mexico, and came to San Antonio, Tex., with her in 1912; that in 1914 or 1915 he entered into illicit relations with appellant, but did not live with her until about seven months before his death, when he abandoned his wife, and appellant followed him to Smithville and was cohabiting with him at the time of his death, which occurred on June 4, 1916. There was no evidence of any divorce from Demetria, the lawful wife, who was left with his mother and brother, and still lives with them. The jury, even though there had been no lawful wife, could have rejected the claim of a common-law marriage. Appellant stated at one time that she was 53 years old, but amended it by saying it was 43 and Simon Garcia was 39. There was no evidence, direct or circumstantial, tending to show that Simon Garcia had been divorced from his wife, Demetria. Appellant contended that they had never been married, but the jury was justified in believing they had been legally married, and that such relation existed when Simon Garcia was killed.

[1, 2] It is the contention of appellant that the presumption that Simon and Demetria Garcia had been divorced would arise because appellant swore that there had been an agreement between her and Simon Garcia to live together as man and wife. The

fact that a man leaves a lawful wife and lives in a state of cohabitation with another woman without a legal ceremony cannot form a basis for a presumption that he had been divorced from his legal wife. Of course, no authority is produced for such a proposition. On the other hand, it is a rule of evidence that, where marriage is once established, it is presumed to continue until the contrary is proved. *Odom v. Woodward*, 74 Tex. 41, 11 S. W. 925; *Summerhill v. Darrow*, 94 Tex. 71, 57 S. W. 942. The cases cited by appellant present very different facts from those found in this case, and no case has been cited where a marriage will be presumed to have been annulled by divorce to legalize adultery.

[3] When there has been a formal marriage, according to legal requirements, the law will presume the competency of the parties to enter into the marriage contract, and will presume that any former marriage of either of the parties was dissolved by death or divorce. This is based on the desire of the law to protect innocence, morality, and legitimacy rather than presume the continuance of the first marriage. When a marriage is proved according to statutory forms, it will be presumed to be legal until shown to be illegal. *Schaffer v. Richardson*, 125 Md. 88, 93 Atl. 391, and cases therein reviewed. No case has been brought to our notice where cohabitation for a few months and testimony of one of the parties to the cohabitation that there had been an agreement that they would marry would destroy the presumption of the continuation of a legal marriage theretofore consummated. The law is disposed to raise presumptions in favor of the legality of marriages entered into under legal forms, but not one consummated as appellant claims her marriage to Simon Garcia was consummated. The law merely tolerates a common-law marriage, but does not encourage or favor it.

[4] The fact that appellant, when she began cohabiting with Simon Garcia, did not know that he had ever been married would not give her the right under the statute to recover damages for his death. The statutory cause of action to recover damages for a death is "for the sole and exclusive benefit of the surviving husband, wife, children and parents of the person whose death shall have been caused." Article 4698, Rev. Stats. No mention is made in that statute of a woman living with a man unlawfully having the right to recover because she did not know he was married. The law is for the benefit of the woman who has been joined in lawful wedlock to the man who has been killed.

[5] The evidence failed to establish a common-law marriage, even though there had been no prior marriage of Simon Garcia. Appellant testified that on April 2, 1914, she had an agreement with Simon Garcia to live with

him as his wife. She stated the conversation to have been as follows:

"We said that we would live together as man and wife, and would live happily, and that we were going to get married. He talked that way to me, and when he said that I said 'Yes.'"

After that, she said, they lived together as man and wife. The only witness who corroborated appellant as to Simon Garcia calling her his wife was Mrs. M. Moke, who stated that she saw the couple at a dance in May, 1915, and Simon Garcia introduced appellant to the witness as his wife and said "that she was a very nice companion to him." Again she said: "Yes, sir; Simon Garcia said that night that this woman would be a nice friend to him; he admitted that she was a nice companion to him." She might have been all that and still not his wife. According to appellant they did not then agree to marry, but "were going to get married"—that is, at some future time.

[6] We know of no law supporting the claim of appellant that, although Simon and Demetria may have been lawfully married, if he abandoned her immediately after the celebration of the marriage, any "innocent third party, who is otherwise eligible, has the lawful right to contract a second marriage with such man." A marriage celebrated under forms of law is a valid and binding marriage, whether cohabitation takes place or not. However, the evidence is sufficient to show that Simon and Demetria, after marriage, reared a child and necessarily lived together.

[7] The marriage of Simon and Demetria Garcia could be proved by oral testimony, and the general rule is that a ceremonial marriage may be proved by the testimony of eye-witnesses, without the production of a marriage certificate and without explaining its absence. 18 R. C. L. 423. Proof of a ceremonial marriage in a foreign country carries with it the presumption that it was performed in accordance with the laws of that country. And the marriage in a foreign country may be proved by the testimony of any person who was present at the ceremony. 18 Ruling Case Law, p. 427.

[8] Demetria and Simon Garcia not only reared a brother of his, but after his death Demetria was recognized by his mother and brother as his widow, and came to live with them. Simon Garcia supported his wife, mother, and brother. They lived together in the most perfect harmony. He did not live with appellant in San Antonio, but when he went to Smithville, about seven months before his death, appellant followed him and entered into her illicit relations with him. Appellant has not even the lapse of many years, as in some of the cases cited by her, to

sanctify the cohabitation into which she entered with Simon. According to her own testimony, it could not have been more than two years, and according to that of other witnesses, found by the jury to be true, not more than seven or eight months. No children came from the illicit relations between Simon Garcia and appellant, and they cannot be considered, as is often done, to legalize certain acts and create a marriage for their protection. In the case of *Nixon v. Land Co.*, 84 Tex. 408, 19 S. W. 560, both parties to the first marriage had married again, and many years had elapsed before the validity of the second marriage was attacked. A common-law marriage did not figure in that case nor any of the others cited by appellant.

[9] In order to obtain a new trial on the ground of newly discovered evidence, it must clearly appear that it was not known before the trial; that it is material and would probably change the result; could not have been discovered before the trial by the exercise of reasonable diligence; that it is not cumulative or merely to be used for purposes of impeachment. The evidence sought was not material because, the evidence being insufficient to show a common-law marriage, appellant had no cause of action, whether a former marriage existed or not. The newly discovered testimony could have been used for no other purpose except to impeach the witnesses who swore that Simon was married to Demetria Garcia in Mexico. It is firmly settled in Texas that a new trial will rarely, if ever, be granted on the ground of newly discovered evidence, when its object is to impeach the witnesses of the successful party. *Jones v. Neal*, 44 Tex. Civ. App. 412, 98 S. W. 417; *Railway v. Murtle*, 49 Tex. Civ. App. 273, 108 S. W. 998.

[10] Appellees denied that appellant ever entered into a common-law marriage, but that she was a woman of loose and immoral character, and that her relation to Simon Garcia was meretricious and illegal. It was not incumbent upon them to plead the evidence by which they intended to show that appellant had never married Simon Garcia. They could prove a prior existing marriage to support the allegation. It is a matter of

small importance, if the marriage took place in Mexico between Demetria and Simon Garcia, whether it was in Torreon or Morales.

[11, 12] Appellant attached to a bill of exceptions an affidavit made by Demetria Hernandez de Garcia to an application made by appellees for a continuance, purporting to have been sworn to on April 18, 1918, more than a year and a half before this cause was tried, in which it was stated that Simon Garcia and Demetria Hernandez were married in Torreon, Mexico, in 1903, and yet appellant states that she had no notice that an attempt would be made to show that a marriage between Simon and Demetria had been celebrated in Mexico. Where she got the affidavit of Demetria Hernandez de Garcia or when she came into possession of it is not disclosed. It must be presumed that it was filed in support of the application for continuance on its date and came to the knowledge of appellant at that time. No claim is made that appellant was caused to investigate the records of Torreon as to a marriage, and could not know that witnesses would state that the marriage took place in Morales. No investigation of any sort was made until an adverse judgment to appellant was rendered. There was no diligence shown in procuring the testimony, and no effort made to ascertain the status of Demetria and Simon Garcia. Appellant knew for more than a year before the trial that one of the defenses of appellees to her cause of action would be that Simon Garcia was already married to Demetria Hernandez in Mexico, and yet no effort was made to obtain testimony controverting that defense. It is practically admitted that appellant knew that Demetria had sworn that she was married to Simon Garcia, because it is said in the brief:

"It looks as if the prior marriage was placed at Torreon, Mexico, to deceive appellant and her attorneys and thus prevent them from making the proper inquiry in time for the trial."

They made no inquiry, proper or otherwise, although they knew that the prior marriage was to become an issue on the trial of the cause.

The judgment is affirmed.

**SAN ANTONIO & A. P. RY. CO. v. MCGILL
et al. (No. 6187.)**

(Court of Civil Appeals of Texas, Austin.
April 28, 1920. Rehearing Denied
June 16, 1920.)

1. Railroads §376(4) — Duty as to object discovered defined.

When trainmen, discovering object on track, in the exercise of proper care, did not recognize it as a human being, it was not their duty to stop the train until they discovered that it was a man.

2. Railroads §400(8)—Negligence as to object discovered on track held for jury.

In an action for death on railroad track, whether trainmen saw deceased in a position of peril and realized that the object was a man at a distance within which they could stop the train *held* a question for the jury, notwithstanding positive testimony of trainmen in defendant's favor.

3. Railroads §398(4)—Verdict on theory of discovered peril sustained by evidence.

In action for death on a railroad track, evidence *held* sufficient to sustain a verdict in favor of plaintiff on a theory of discovered peril, notwithstanding the positive testimony of trainmen in defendant's favor.

4. Railroads §376(4)—Duty to stop on discovering person on track held correctly defined.

An instruction that the defendant railway company owed the deceased no duty, except to exercise ordinary care in the use of all means within its power, consistent with the safety of the train and the people thereon, to avoid injuring deceased after his peril was discovered, is not erroneous as requiring the trainmen to exercise more than ordinary care.

5. Trial §260(1)—Instruction already covered properly refused.

Court did not err in refusing to give a special requested instruction where the matter was covered by given instructions.

6. Death §72 — Evidence as to condition held not improper.

In an action for death, evidence that one of the children of deceased was going to school when his father was killed and afterwards went to work, and that deceased had supported his family by labor, was not improper as immaterial and calculated to arouse sympathy.

7. Appeal and error §1050(2)—Admission of immaterial evidence harmless.

In an action for death, admission of evidence that a child of decedent quit school on the death of his parent and went to work *held* not reversible, if error.

Error from District Court, Falls County:
Prentice Oltorf, Judge.

Action by Mrs. Virginia McGill, for herself and as next friend of her seven minor children, against the San Antonio & Aransas Pass Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Boyle, Ezell & Grover, of San Antonio, and Pat M. Neff and Walton D. Taylor, both of Waco, for plaintiff in error.

Nat. Llewellyn, of Marlin, for defendant in error.

BRADY, J. Mrs. Virginia McGill, for herself and as next friend of her seven minor children, brought this suit against San Antonio & Aransas Pass Railway Company for damages on account of the alleged negligent killing of their husband and father, J. D. McGill.

The case has been before this court before, the opinion on the former appeal being reported in 202 S. W. 338. The verdict and judgment on the former trial were for the plaintiffs for the sum of \$10,000, and on this trial for \$3,500, one-half to Mrs. McGill, and the remainder in equal proportions to the children.

The only issue submitted to the jury was discovered peril. The material facts are substantially the same as on the first trial, which are stated in the opinion of this court referred to above. Any additional or variant facts deemed material will be stated in the discussion of certain assignments relating to the sufficiency of the evidence.

Upon the former appeal the case was reversed and remanded, because of errors of law in the giving and refusing of certain charges. These errors seem to have been corrected on the present trial.

The first and second assignments of error raise the point that the court should have given a peremptory instruction for plaintiff in error, and that the verdict and judgment are not supported by even a scintilla of evidence showing or tending to show discovered peril. This same question was raised before, and this court held that the evidence was sufficient to raise the issue and for its submission to the jury. This conclusion is again challenged; and it is further claimed that the testimony is materially different on this trial. There is said to be a variance in the testimony of the witness Ben Springer as to the speed of the train, in that on the latter trial he stated that he would guess the train was running 12 or 15 miles an hour, but would not undertake to say that it was not running at least 18 miles an hour, and that he would not undertake to say in what distance the train could have been stopped. For the purposes of this appeal, the alleged variance in this witness' testimony will be assumed.

It is also asserted that on the former trial there was no evidence before this court as to any grass and weeds growing up against the ties at the point deceased was lying when he was struck and killed, whereas on the present trial it was shown by at least three witnesses, introduced by plaintiffs and living near the scene of the accident, that grass was growing thick at the point of the accident, some 6 inches high, right up against the end of the ties, and that between the rails the grass was flush with the top of the rails. It is further claimed that the overwhelming preponderance of the testimony shows that all along by the ends of the ties there were numerous patches of old weeds 10 and 12 inches high. From the record it seems that the testimony of these witnesses did not relate to the situation, as to grass and weeds, at the point of the accident, but rather to the conditions in the vicinity, and generally along the railroad track and right of way. However, if it be concluded that this testimony reflected the conditions at the scene of the accident, yet the testimony on this point is conflicting. The witnesses Geo. Ellison, a brother-in-law of deceased, and Ben Springer, who was an employé of plaintiff in error at the time and was on the train that struck Mr. McGill, is to the effect that at the place where McGill was killed the track was clear, slightly up grade, and that there were no grass, weeds, or anything on that side of the track, or no grass or weeds to amount to anything.

It is conceded by counsel for plaintiff in error that the liability of a railway company, under the rule of discovered peril, may be shown by circumstances as well as by direct or positive evidence, and also that positive evidence of the employés of the railway company in charge of the train may be overcome by circumstances, but in such case the circumstances must be reasonably clear and satisfactory, and no resort can be had to mere conjecture. *Railway v. Porter*, 73 Tex. 304, 11 S. W. 324; *Railway v. McMillan*, 100 Tex. 562, 102 S. W. 103.

It is true that the engineer testified that he did not see the object, which afterwards proved to be McGill's body, until the train was about 200 feet from the deceased, when he saw an object near the right-hand rail or east rail of the train, which was going north; that at the time he could not tell whether the object was living or inanimate, and had passed the object before he discovered it was a human being; that the rails were clear when he was 200 feet away from the object, and that when he saw the same he immediately sounded the whistle and rang the bell, but the object did not move; that when he had reached a point about 60 feet from the object he first realized that it was something he ought not to strike, and he then applied the emergency brake, cut off the

steam, and did everything within his power to avert striking the object; that the train was then moving at about 18 to 20 miles an hour. This witness, however, also testified that he stopped the train, after shutting off the steam and applying the emergency, in about 200 feet, which in his opinion was a good stop, and that, if he had applied the brakes when he first saw the object, the train would not have killed McGill, but would have struck him lightly. At the time of the trial, he was still in the employ of plaintiff in error.

The fireman on the train testified that the train ran four or five car lengths, or about 160 feet, after the emergency brake was applied. It thus appears from the testimony of these witnesses that, if the engineer had cut off the steam and applied the emergency as soon as he saw the object on or near the track, the train would have been stopped in time to have averted the accident, or to have avoided killing McGill.

[1] It seems to be the rule, as announced in *Railway Co. v. McMillan*, supra, that if, when the trainmen discovered the object on the track, they, in the exercise of proper care, did not recognize it as a human being, it was not their duty to stop the train until they discovered that it was a man on the track. The question then is: Was there evidence before the jury to justify the inference that, notwithstanding the positive testimony of the engineer and fireman that they did not recognize the object as a human being, or something that should not be struck, until within 60 feet of it, or in passing it, they did, in fact, recognize that it was a human being when 200 feet away, and, in the exercise of ordinary care, should then have used the means at their command to avoid the injury. We have concluded that there was such evidence, which will be briefly indicated.

A retired expert engineer testified that on an engine on a straight track, with electrical headlight, one ought to be able to see an object on the track one-half a mile, but can see a man a shorter distance; that the bulk of a man sitting on the track, or an obstruction which ought not to be hit, could be seen for a half mile, and that one could tell at a distance of 300 or 400 yards that the object was a man, if it was lying in the middle of the track, or on the outside and close to the rail. His testimony was to the effect that an engineer could see such an object and realize it was a man at a distance of 300 or 400 yards as easily on the outside and close to the rail as if the body were on the inside, since it would be in plain view of the rays of the headlight, the same as if it were on the track. His testimony as to the distance in which the train could be stopped varies from that of the fireman and engineer, he having named the greater distance.

Now, in view of the testimony of the fire-

man that the train could have been and was stopped in a distance of about 160 feet, and of the engineer in a distance of 200 feet, and the testimony of the retired expert engineer that the object should have been recognized as a human body at a distance of 300 or 400 yards, we think it clear that it was for the jury to decide whether the trainmen saw McGill in a position of peril, and realized that the object was a man at a distance of 200 feet from it, notwithstanding their denial that they realized it was a human being at that distance, and whether, in the exercise of ordinary care, it was their duty at that very time to take the steps which afterwards proved would have averted the accident.

Plaintiff in error relies especially upon the following cases: *Railway v. McMillan*, supra; *Caldwell v. Railway Co.*, 54 Tex. Civ. App. 399, 117 S. W. 490; and *Railway v. Sallee*, 56 Tex. Civ. App. 23, 120 S. W. 216—each of which is thought by us to be distinguishable on the facts.

In the *McMillan Case* it was pointed out by the Supreme Court that, after discovering the deceased, and recognizing that he was a human being, it was impossible to have stopped the train before he was struck, and also that the facts contradict any suggestion that, if the train had been checked, he would have gotten off the track. There does not appear to be any evidence whatever from which the jury might have concluded that the engineer or fireman recognized the object to be a man in time to have stopped the train, as we think appears in the instant case.

In the *Caldwell Case* it seems that the body was first discovered as an indistinguishable object on the track when the train was 300 feet from it, but was not discovered by the trainmen as the body of a human being until the train was within 75 or 80 feet from him. In that case the train ran 550 feet before it stopped after striking the deceased, and the evidence showed that the train could not have been stopped within less than 510 feet after applying the brakes and partially applying the reverse lever.

In the *Sallee Case* the issue of discovered peril was not submitted by the court; and there was no evidence tending to controvert that of the engineer and fireman to the effect that they used ordinary care in keeping a lookout to discover persons upon the track.

[2, 3] While the evidence is circumstantial, we think it was sufficient to make it an issue for the jury that the servants of plaintiff in error discovered deceased in a position of peril in time to have avoided the accident, after realizing that he was a man, and is likewise sufficient to support the verdict. Therefore the first and second assignments of error are overruled.

[4] The next assignment complains of the charge of the court "that the defendant rail-

way company owed deceased no duty except to exercise ordinary care in the use of all means within its power, consistent with the safety of the train and the people thereon, to avoid injuring J. D. McGill, after his peril was discovered," because this placed a more onerous burden upon defendant than was required by law, in that it was required only to exercise ordinary care, and not required to use all of the means at its command. We think the charge is not open to this criticism, and that it embodies a correct rule of law. *Railway v. McMillan*, 100 Tex. at page 564, 102 S. W. 103.

On the former trial this same charge was given, except that it did not prescribe the standard of ordinary care in using all the means at the command of the operatives, but the charge was corrected to conform to the ruling of this court. We do not think that this charge can fairly be construed as instructing the jury that the railway company's employes were required to use all the means at their command, but that it merely informs the jury that it was their duty to use ordinary care to use all the means that the circumstances required to avoid injuring deceased. This we understand to be the law, and the assignment is overruled.

[5] It is sufficient reply to the next assignment, complaining of the refusal of the trial court to give special instruction No. 7 requested by defendant, that the law of the case was fairly given in the main charge and in special charges asked by defendant, and specially covered in special charge No. 12 requested by defendant the defense suggested in special instruction No. 7.

[6, 7] The remaining assignments of error relate to the admission, over defendant's objection, of certain testimony by which Fred McGill, one of the children of deceased, was permitted to state that at the time his father was killed he was going to school, and afterwards he stopped and went to work; and another witness was permitted to state that Mr. McGill had supported his family by his labor.

It is claimed that this testimony was immaterial and was prejudicial, in that it was reasonably calculated to arouse the sympathy of the jury and prejudice them against the defendant. The specific claim seems to be that this testimony was a persistent effort to parade the poverty of deceased or of his family before the jury, to enlist their sympathy.

We have examined the authorities cited in support of these assignments, and do not consider any of them in point. They each either involve testimony not relating to the true issues of the case or directly showing poverty.

One of the issues of this case was the pecuniary loss of Mrs. McGill and her minor

children through the negligent killing of the husband and father. In the effort to show that McGill did not contribute much to the support of his family, because he was a drinking man, and that the children did most of the work, counsel for plaintiff in error had developed on cross-examination of Joe Haynes, a witness for plaintiff, that McGill was a tenant farmer on his place, and that at the time he was killed he had a hired hand, because his children were in school. It seems that the testimony here objected to was in line with the testimony elicited by the attorneys of the railroad company; and it is shown by the court's qualification to the bill of exception that he sustained the objection to part of this testimony, but had not time to stop the witness before the answer was made, and that no motion was made to exclude. We think the testimony was relevant and material to show that McGill was supporting and educating his family, and upon the issue of the value of his services to his family. In any event, we do not think the admission of this evidence presents reversible error.

Being of the opinion that no reversible error has been shown, the judgment is affirmed. Affirmed.

SOUTHERN TRACTION CO. v. KIRKSEY. (No. 5512.)

(Court of Civil Appeals of Texas. Austin.
May 12, 1920.)

1. Railroads ⚡301—Travelers' rights defined.

Travelers on a public highway intersected by an electric railway do not have equal rights at the crossing with the railway company.

2. Railroads ⚡351(12)—Instruction on contributory negligence held improperly refused.

In an action for the death of one struck at a highway crossing by an electric car, refusal of an instruction that if deceased saw the car, or could have seen it, and yet permitted his automobile to come in contact with the car, there could be no recovery, was improper, though the request did not submit the issue of proximate cause; for if deceased was guilty of negligence it was the proximate cause.

3. Trial ⚡240—An instruction argumentative in form is properly refused.

An instruction argumentative in form is properly refused, though it contains a correct abstract principle of law.

4. Trial ⚡248 — Abstract instructions are properly refused.

Abstract instructions are properly refused.

5. Railroads ⚡317—Violation of statute or ordinance negligence per se.

The violation of a statute or ordinance regulating the speed of electric cars is negligence per se.

6. Railroads ⚡347(10)—Rate of speed evidence of negligence.

The rate of speed at which an interurban electric car approaches a public crossing may be considered on a question of negligence, even though there is no statute regulating such speed.

7. Witnesses ⚡350—Witness not compelled to answer on cross-examination whether he has been indicted for felony.

For purposes of impeachment a witness will not be required to answer on cross-examination whether he had been indicted for felony and so the admission of such evidence is erroneous.

8. Railroads ⚡347(11)—Evidence of intoxication of motorist held admissible.

In an action for the death of a motorist struck at a crossing, evidence that he was drunk at the time is admissible as tending to show negligence.

9. Negligence ⚡132(3)—Evidence of habit of intoxication held admissible.

Where it was asserted that a motorist struck at a crossing was negligent, evidence of his reputation that he was in the habit of getting drunk and driving an automobile at dangerous and rapid speed was admissible on the issue of negligence, although evidence of isolated instances would not be.

Appeal from District Court, Hill County; Horton B. Porter, Judge.

Action by Mrs. Pearl Kirksey against the Southern Traction Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Templeton, Beall & Williams, of Dallas, and Wear & Frazier, of Hillsboro, for appellant.

Scott & Ross and Shurtleff & Cummings, all of Waco, for appellee.

JENKINS, J. This cause was decided by this court November 24, 1915, with the result that the judgment of the district court, awarding damages to appellee on account of the death of her husband, alleged to have been killed by the negligence of appellant, was reversed and judgment was rendered for appellant. That decision was based upon our finding that the evidence showed that the deceased was guilty of contributory negligence as a matter of law. 181 S. W. 545. The case was taken to the Supreme Court (217 S. W. 139), and that court has decided that we were in error in so holding, but remanded the case to this court for decision as to other issues raised by appellant's assignments of error.

The decision of the Supreme Court above referred to disposes of a dozen or more of appellant's 64 assignments of error. We will

not discuss in detail the remaining assignments of error, but, having reached the conclusion that the judgment of the trial court should be reversed, we will refer specifically to those assignments which we deem necessary to assist the trial court upon another trial hereof.

[1] Appellant assigns error upon the following paragraph of the court's charge:

"You are charged that people traveling along and over public highway, whether in automobile or otherwise, at points of intersection of such highway by lines of electric railways, have equal rights at such points of intersection in the crossing thereof with the railway company."

We sustain this assignment. Our views with reference to a similar charge were fully set forth in *Baker v. Collins*, 199 S. W. 519, and need not here be repeated. For other authorities sustaining our views in the case above cited see *Traction Co. v. Kelleher*, 48 Tex. Civ. App. 421, 107 S. W. 68; *Railway Co. v. Harrison*, 163 S. W. 332; *Railway Co. v. Garcia*, 75 Tex. 583, 13 S. W. 223.

[2] We sustain appellant's forty-first assignment of error as to the refusal of the court to give the following requested charge:

"You are instructed that if you should believe from the evidence that the deceased was, just before and at the time of the accident, causing his automobile to run along the public highway as it approached the crossing in question at a rapid rate of speed, and that he saw the defendant's car as it ran along defendant's line of railway before it reached said crossing, or if you believe from the evidence that by the exercise of reasonable care and caution he could have seen said car, and that he permitted his automobile to come in contact with defendant's car at a time and under conditions that would constitute negligence on the part of deceased, as that term is defined in the main charge, you will return a verdict in favor of the defendant, even though you may believe that the defendant was guilty of negligence." *Railway Co. v. Kauffmann*, 46 Tex. Civ. App. 72, 101 S. W. 817; *Railway Co. v. Kutac*, 72 Tex. 651, 11 S. W. 127; *Railway Co. v. Bracken*, 59 Tex. 74.

The cases above cited announce the doctrine that the failure of one about to enter upon a railroad track to look and listen is negligence as a matter of law. It may now be regarded as the settled law of this state that such failure will not of itself amount to negligence as a matter of law, but if the jury should find that such failure was negligence on the part of the person injured, and that such negligence was a proximate cause of the injury, there will be no right of recovery, and the jury should be so instructed. It is true that requested charge did not

submit the issue of proximate cause, but, under the undisputed evidence, if the deceased was guilty of negligence in driving his automobile against appellant's car, there could be no question but that such negligence was a proximate cause of his death.

[3] Appellant assigns error upon the court's giving special charge No. 1, requested by appellee. The charge is correct as a principle of law, but it should not have been given for the reason that it is argumentative in form. This observation applies to a number of charges requested by appellant and refused by the court.

[4] The first part of special charge No. 8, requested by the appellant, is an abstract statement, and should not be given; but upon another trial the court should instruct the jury substantially as set forth in the following part of said requested charge, namely:

"If, therefore, you believe from the evidence that any of those operating the defendant's car at the time of the accident saw the deceased riding in his automobile on the public highway and approaching defendant's line of railway where it crossed said public highway at a time and under the conditions when there was no obstruction between the deceased and defendant's said car, and if you further believe that those in charge of the defendant's said car, acting as a reasonably prudent man would have acted under the same circumstances, had reason to believe that the deceased saw defendant's car as it ran along said line of railway and approaching and near to said crossing, those in charge of defendant's said car would in such an event have had a right to presume that the deceased would check his car and not run the same in contact with defendant's car upon said crossing."

Of course, this would not apply after appellant had discovered the peril of deceased, if it had done so; but discovered peril was not an issue in this case.

[5, 6] Appellant complains of the charge of the court in submitting the issue as to the rate of speed at which it was operating its car in approaching the crossing where the deceased was killed; the argument being that this was error, for the reason that there is no statute regulating the rate of speed at which an interurban car may be run outside of a town or city. It is true that there is no such statute. If there was, a violation of the same would be negligence per se. But it is nevertheless true that the rate of speed with which a car approaches a public crossing is a circumstance which may be taken into consideration on the issue of negligence. The same is true also as to failure to blow a whistle, ring a bell, sound a gong, or to give other warning of approach to such crossing.

[7] Upon the trial of this cause, J. W.

Morrison testified to facts which tended to show that the deceased was drunk at the time he ran his automobile against the inter-urban car. This was material testimony, and if believed by the jury may have properly influenced them in determining the issue of contributory negligence on the part of deceased. It does not follow that because a man was drunk he was reckless or negligent in the manner in which he drove his automobile, but such fact may be considered by a jury in determining the issue of negligence.

This witness was compelled, over appellant's objection, to answer upon his cross-examination whether he had within the last five years been charged with a felony, and in answer to such question he stated that he had within that time been indicted for a felony, to wit, an assault with intent to rape. This testimony was admitted for the purpose of impeaching this witness Morrison. There is a conflict upon this point between the decisions of the Court of Criminal Appeals in this state and of our Supreme Court; the former holding that such testimony is admissible; the latter that it is not. *Railway Co. v. Creason*, 101 Tex. 337, 107 S. W. 527; *Railway Co. v. Johnson*, 83 Tex. 633, 19 S. W. 151; *Hill v. Dons*, 37 S. W. 639; *Railway Co. v. De Bond*, 21 Tex. Civ. App. 691, 53 S. W. 593; *Boon v. Weathered*, 23 Tex. 678; *Kennedy v. Upshaw*, 66 Tex. 452, 1 S. W. 412. The admission of the impeaching testimony above referred to constituted reversible error.

[8, 9] Appellant offered to prove by several witnesses that the general reputation of the deceased was that he was in the habit of getting drunk and driving an automobile at a rapid and dangerous speed, in

disregard of his own safety and the safety of others. This testimony the court refused to permit to be given to the jury, upon the ground that such testimony would not tend to establish the fact that the deceased was driving recklessly, and not in the exercise of ordinary care, at the time he was killed. It would have been permissible for appellant to prove, if it could, that the deceased was drunk at the time he drove his automobile against appellant's car, for the reason that this fact would tend to show negligence on the part of the deceased. It would tend to prove such fact, for the reason that intoxication tends to lessen and sometimes to destroy the powers of observation and the element of caution. As said by Scotland's bard:

"Inspiring bold John Barleycorn,
What dangers thou canst make us scorn!"

The fact of intoxication being relative, any fact which would legitimately tend to establish such fact was also relative. We think the fact that a person was in the habit of getting drunk, and while in such condition driving recklessly upon public highways, roads, and street crossings, would be a matter for the proper consideration of a jury as to whether or not he was intoxicated at the time of his injury, and we think that his habit in this regard could be proven by general reputation. We do not think it would be permissible to prove particular or isolated instances as to his reckless driving while drunk.

We hold that for the reasons stated this cause should be reversed and remanded for a new trial in accordance with this opinion; and it is so ordered.

Reversed and remanded.

HOYT v. ROSS et al. (No. 56.)

(Supreme Court of Arkansas. June 14, 1920.
Rehearing Denied July 5, 1920.)

1. Action \S 50(5)—Maker of note and one promising maker to pay it cannot be jointly sued.

The maker of a note and the indorser thereof without recourse, who subsequently promised the maker to pay the note, are not jointly liable on the note, and causes of action against them are inconsistent, and cannot be joined, since the holder cannot ratify the agreement for payment by the indorser without releasing the maker.

2. Venue \S 22(1)—Defendant can be served in another county only if jointly liable with resident of that county.

To obtain service on a defendant in a county other than that in which a suit is brought under Kirby's Dig. \S 6072, service must be obtained in the county where the suit is brought on a codefendant jointly liable with the nonresident defendant, and it should appear from the face of the complaint that plaintiff was entitled to recover a judgment against all of the defendants under Kirby's Dig. \S 6074.

Appeal from Circuit Court, Pulaski County; G. W. Hendricks, Judge.

Suit by W. T. Hoyt against E. B. Ross and others. From a judgment dismissing the suit against defendant Ross, plaintiff appeals. Affirmed.

Poe, Gannaway & Poe, of Little Rock, for appellant.

Carmichael & Brooks, of Little Rock, for appellees.

HUMPHREYS, J. Appellant instituted suit against appellees in the Third division of the Pulaski circuit court, to recover \$250 and interest. It was alleged in the complaint that E. B. and J. B. Ross, husband and wife, executed a series of notes, including the \$250 note sued on, to the Ollar-Overland Company, to cover the unpaid purchase price of a certain automobile; that the notes contained a provision that upon failure to pay any one of them, or the interest thereon, all should become due; that they also contained a provision retaining the title to the automobile in the Ollar-Overland Company until the notes were paid; that, before the maturity of the \$250 note aforesaid, the Ollar-Overland Company for a consideration transferred said note to appellant, without recourse; that, before the maturity of the note in question, without the consent or knowledge of appellant, the Rosses returned the automobile to the Ollar-Overland Company in payment of the balance due on the purchase price, under agreement that it would pay the

\$250 note and accrued interest, which it had theretofore assigned to appellant.

The Ollar-Overland Company was, and is, a corporation domiciled in Pulaski county. E. B. Ross and J. B. Ross were, and are, residents of Lonoke county. A judgment was sought against all of them, based upon personal service had on the Ollar-Overland Company in Pulaski county and the Rosses in Lonoke county, under section 6072 of Kirby's Digest, which provides that—

"Every other action may be brought in any county in which the defendant, or one of several defendants, resides, or is summoned."

The Rosses appeared specially, and filed a motion to quash the service upon them, for the reason that they were not jointly liable with the Ollar-Overland Company on the obligation sued upon. The court sustained the motion to quash the service, and dismissed the action against them, from which judgment of dismissal an appeal has been duly prosecuted to this court.

[1,2] Appellant insists that the court erred in holding that appellees were not jointly indebted to appellant in the sum of \$250 and interest thereon. Appellant contends that E. B. Ross and J. B. Ross are indebted to him in the sum of \$250 by virtue of a promissory note signed by them to the Ollar-Overland Company, and by it indorsed to him, without recourse, before maturity, for a valuable consideration, and that the Ollar-Overland Company is indebted to him for the same amount, because it agreed with the Rosses for a consideration to pay the note to him. Under the allegations of the complaint, two wholly inconsistent causes of action are pleaded. On the one hand, the note, signed by the Rosses and indorsed, without recourse, by the Ollar-Overland Company, is made a basis of the action. The indorsement without recourse clearly exempts the Ollar-Overland Company from joint liability with the Rosses on the note. On the other hand, the contract made by the Ollar-Overland Company with the Rosses, for a new consideration, to pay the note to appellant, is also made a basis of the action. The effect of this agreement, if ratified by appellant, was to release the Rosses as makers and accept in their stead the Ollar-Overland Company. Appellant could not ratify the contract in part and reject it in part. It was made for his benefit, and an acceptance in part amounted to a ratification in toto. There was no joint liability on either cause of action, and the causes of action, being inconsistent, were improperly joined. In order to obtain service upon a defendant, or defendants, in a county other than the county in which a suit is brought, service must be obtained on a codefendant jointly liable with him, or them, in the county where the

suit is brought. It should appear from the face of the complaint that the plaintiff was entitled to recover a judgment against all the defendants. Section 6074, Kirby's Digest; Stiewel v. Borman, 63 Ark. 30, 37 S. W. 404. No joint liability appearing on the face of the complaint in the instant case, the judgment is affirmed.

FORREST CITY BOX CO. v. LATHAM.
(No. 53.)

(Supreme Court of Arkansas. June 14, 1920.)

1. Appeal and error \S 928(2) — Instructions not abstracted presumed correct.

Where the instructions are not abstracted, it will be conclusively presumed that the jury was correctly instructed on the questions of law in the case.

2. Logs and logging \S 8(5)—As to possible profit on logging contract, testimony of one who carried out the contract that he lost money on it was admissible.

In action against a box company for breach of plaintiff's contract to cut and deliver logs, which contract the defendant gave to another at the same price per thousand, where plaintiff offered testimony tending to show profits he would have made if allowed to perform the contract, it was error to exclude testimony of the person who took the contract that he lost money in carrying it out, although himself experienced and using approved methods; such testimony being competent to show that no profit could be made out of the contract.

Appeal from Circuit Court, Union County;
C. W. Smith, Judge.

Action by C. R. Latham against the Forrest City Box Company. From judgment for plaintiff, defendant appeals. Reversed and remanded.

W. E. Patterson, of El Dorado, for appellant.

SMITH, J. Appellee recovered judgment for damages on account of an alleged breach of a contract which he claims to have had with appellant company to cut and deliver certain logs. The existence of the contract was denied, but on appellee's behalf one Reynolds testified that he had been engaged in logging for appellant for two years, when Mr. Girard, the superintendent of appellant, asked him to include in his contract the logs which form the subject-matter of this litigation. Reynolds was unable to do so, but promised Girard that he would find him a man who would take the contract. Reynolds testified that he was authorized to offer \$4 per thousand for cutting and floating out the logs, and pursuant to

this authorization he employed appellee to do the work.

On appellant's behalf it was denied that Girard made any such contract, or that he had the authority to do so, and it is contended by appellant that the logs in question were included in Reynolds' contract. Girard knew appellee was at work, but supposed he was employed by Reynolds. On appellee's behalf the testimony tends to show that Girard had the authority to make the contract, or to authorize Reynolds to do so, and that he knew the contract had been made, and that appellee was engaged in its execution.

According to appellant, Reynolds abandoned his contract, and it became necessary for appellant to employ another party to get out the logs, and that this contract was given to one Bunn Robinson at \$4 per thousand.

[1] The instructions are not abstracted, and it will therefore be conclusively presumed that the jury was correctly instructed on the questions of law in the case, including the circumstances and conditions under which Girard could bind appellant, and, without discussing the various discrepancies pointed out in the testimony, it may be said that, if the testimony offered on appellee's behalf is accepted as true, it is legally sufficient to support a finding that Girard had the authority to make the contract for the company, or, rather, that it was within the apparent scope of his authority to do so.

[2] Appellee offered testimony tending to show the profit he could and would have made under the contract if he had been allowed to perform it. Bearing upon this question of profit, Bunn Robinson testified that he took the contract to float and raft the logs in question for \$4 per thousand, and that he had experienced men working for him, that in floating the logs he used the methods ordinarily employed by himself and other experienced men, but that in rafting the logs he used chain dogs, instead of pins, as that method was less expensive, took less time and was easier done.

After stating that he had logged and rafted with his father, who was an experienced rafting and logging man, Robinson was asked this question:

"Under this contract or arrangement you had for taking out these logs at \$4 per thousand, delivered, managed in the way your father had managed and others with whom you had had experience, what was the cost in this instance of delivering the logs from the brake to the mill more than \$4?"

Objection to this question was made on the ground that "that is not the criterion." This objection was sustained, whereupon counsel for appellant offered "to show by

this witness that he took the contract from defendant to float and raft the logs in controversy from the brake to the mill at \$4 per thousand, and did in the usual way float and raft the logs to the mill, and that the cost of so doing exceeded \$4 per thousand, and that witness lost money on the operation." The court declined this testimony offered, and exceptions were saved to that ruling.

We think the offered testimony should have been admitted. It was competent to show that no profit could be made out of the contract, and that was the purport of the excluded testimony. The witness proposed to testify about the identical logs which form the subject-matter of this litigation, and that, notwithstanding the fact that he was an experienced logger, and employed approved methods, he sustained an actual loss, although he was paid the price claimed by appellee.

It is finally insisted that the verdict is excessive; but, as the judgment is to be reversed on another ground, we do not pass upon that question.

For the error indicated, the judgment is reversed, and the cause will be remanded for a new trial.

McCONNELL v. SEBASTIAN COUNTY, GREENWOOD DIST. (No. 44.)

(Supreme Court of Arkansas. June 14, 1920.)

Taxation §74—Notes held nontaxable as rent notes.

An instrument, whereby landowner leased land for specified period under agreement requiring him to execute warranty deed to lessee upon lessee's payment of stipulated rental during all of such period, held a lease, with option to lessee to purchase by continuing the payments for the full term, and not a contract for sale; the notes executed to the owner pursuant thereto being rental notes, and not purchase-money notes, and being therefore nontaxable under Kirby's Dig. § 6902.

Appeal from Circuit Court, Sebastian County; John Brizzolara, Judge.

Petition by J. A. McConnell against Sebastian County, Greenwood District. From an adverse judgment, petitioner appeals. Reversed and remanded.

A. M. Dobbs, of Hartford, for appellant.

McCULLOCH, C. J. Appellant began this proceeding in the county court by filing a petition praying for a correction of his personal assessment made by the township board of assessors. The assessment list, of which appellant complains, includes certain promis-

sory notes executed to appellant by J. S. Woods and wife, and the assessors listed the property for taxation on the theory that the notes were executed for the purchase price of the real estate. The contention of appellant is that they were immature rent notes, and not subject to taxation for the year in which the assessors listed them. Appellant owned certain lots in the town of Hartford, and he entered into a written obligation with Woods and wife, as follows:

"Know all men by these presents: This indenture, made and entered into by and between Joseph A. McConnell and Rachel S. McConnell, his wife, hereinafter called lessors, and J. S. Woods and Sarah E. Woods, husband and wife, hereinafter called lessees, all of Hartford, Arkansas, this 10th day of October, 1918, which terms, lessors and lessees shall be taken to mean heirs, executors, and administrators, wherein the context will admit, witnesseth:

"That for and in consideration of the mutual agreements, conditions and covenants, hereinafter set out, the lessors hereby leases, lets and demises to the lessees for a period of seven years, beginning on the 1st day of October, 1918, all the following described lands lying in the Greenwood district of Sebastian county, state of Arkansas, to wit: Lots seven, eight, nine, ten, eleven and twelve in block thirteen original town of Hartford. To have and to hold to the said lessees for the period of this lease together with all privileges, improvements and appurtenances thereunto belonging, except the barn now located thereon which lessor may remove.

"The said lessees covenant with the said lessors that they shall cause to be paid the lessors the sum of twenty-five dollars per month for the period of this lease, commencing payment on the first day of each month after this lease date and promptly pay the said sum when due; that the said lessees shall keep said place in repair and pay all taxes of whatsoever kind that may be assessed by state, county or city and improvement taxes of all descriptions which may become due and shall keep said premises insured against loss by fire in some reputable insurance company for the full period of the lease in such sum as may be deemed within the amount allowed by law and the value of the property, and shall further commit no waste nor sublet nor assign this lease without written consent of the lessors.

"The lessors hereby covenant with the lessees that they shall have quiet enjoyment of the said premises for the period of said lease upon prompt performance of the covenants and agreements made by them and the said lessors further agree and bind themselves as a part of the consideration of this contract that if the said lessees shall well and truly perform their covenants, agreements and promises herein contained for the full period of this lease, that at the expiration thereof the said lessors shall cause a good and sufficient warranty deed to be executed to the said lessees, clear and free from all incumbrances and warranting and defending to the said lessees the title in fee to the aforesaid premises."

The question in the case is whether or not the notes executed pursuant to the above contract were rent notes or purchase-money notes, for if of the former character they were not taxable according to the terms of the statute, which provides that a person shall not be required to list for taxation any obligation for the payment of rent, except that portion which has "accrued on the lease and shall remain due and unpaid at the time of listing." Kirby's Digest, § 6902. We are of the opinion that the proper interpretation of the contract is that it constitutes a lease with an option to purchase by continuing the payments for the full term. The parties had the right to make either a lease contract or a contract for sale and they elected to put it in the form of a lease, so that the relation of landlord and tenant should subsist until the final payment when under the contract itself that relation should be changed into that of vendor and purchaser. *Ish v. Morgan*, 48 Ark. 413, 3 S. W. 440. The lawmakers, in the enactment of the statute referred to above, undertook to classify the property which should be subject to taxation, and drew the line between immature rent notes and other obligations. Since the parties themselves in making the contract elected to create the relation of landlord and tenant, so that the notes executed pursuant thereto constituted rent notes, the state is bound by that election, and cannot exact the payment of taxes, which would amount to a change in the nature of the obligation created by the parties themselves.

The circuit court was not correct in its decision upholding the assessment, and the judgment is therefore reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

ROYAL NEIGHBORS OF AMERICA v. McCULLAR et al. (No. 52.)

(Supreme Court of Arkansas. June 14, 1920.)

1. Insurance §825(2)—Payment of premium for jury.

In action on benefit certificate, *held*, on the evidence, that whether the certificate had been invalidated by failure to pay a premium was for the jury.

2. Evidence §130—That husband sent home money for insurance dues no evidence of their payment, being *res inter alios acta*.

In action on benefit certificate, defended on the ground of forfeiture for nonpayment of a premium, it was error to admit, for the purpose of showing that the attention of the insured was "called to the importance of paying the dues, so that it could not be urged that she had forgotten to do so, and to show that she had the money with which to make the

payment," her husband's testimony that, being in the army at the time of the alleged nonpayment he sent insured \$50 and insisted on her paying her lodge dues up for the remainder of the year; the maxim "*Res inter alios acta alteri nocere non debet*" applying.

Appeal from Circuit Court, Craighead County; R. H. Dudley, Judge.

Suit by Elmo McCullar and others against the Royal Neighbors of America. From judgment for plaintiffs, defendant appeals. Reversed and remanded.

Hawthorne & Hawthorne, of Jonesboro, and Benjamin D. Smith, of Mankato, Minn., for appellant.

Lamb & Frierson, of Jonesboro, for appellees.

SMITH, J. This suit was brought to recover the sum named in the benefit certificate issued by appellant company on the life of Mrs. Nora McCullar, who died October 27, 1918. The certificate was payable to her infant children, and this suit was brought by appellee as next friend to collect the insurance. The premiums or assessments were payable monthly, and the constitution and by-laws of appellant provided that the failure to pay any one of these assessments would invalidate the certificate, and the defense interposed to the suit is that Mrs. McCullar failed to pay the premium falling due in September, 1918. There was a verdict and judgment for the face of the certificate, and this appeal is from that judgment.

[1] It is first insisted by appellant that there is no competent testimony that the premium was paid, and that a verdict should therefore have been directed in its favor. We think, however, there was sufficient testimony to take the case to the jury upon that issue, and the testimony tending to support the verdict may be summarized as follows:

John McCullar testified that he was the grandfather of the beneficiaries named in the certificate, and that his son's wife (the insured) and his nephew's wife were both named Nora, and that they both lived near Jonesboro, and that the mail of each woman was frequently delivered to the other, and that on September 7, 1918, he received a letter from his niece inclosing a receipt for dues paid appellant by his daughter-in-law, and that he gave this receipt to Orlin Turner, a son-in-law, with the request that he mail it on the following Monday morning to Mrs. Nora McCullar, the insured. His daughter, Mrs. Turner, remembered the incident and testified that the receipt was for two dollars and some odd cents, and was dated in September. J. W. Nelms, a disinterested witness, testified that he was present when the conversation between John McCullar and Turner occurred, and that he saw the receipt at the time, and remembers that it was dated

in September. Mrs. Alice Riggs testified that a lodge of the appellant company once existed at Lake City, but no meetings had been held since 1915, and that she was the recorder at Lake City, and that the assessments were payable to her. These assessments were payable from the 20th of one month to the 15th of the next. Mrs. Riggs' testimony makes it very apparent that she was not expert nor experienced in keeping accounts, and she testified that she did not always mail out the receipts the day she received the money, as she was frequently too busy to do so. The testimony also shows that at about the time in question Mrs. Riggs had a spell of sickness herself, and that a member of her family became sick and died. Payments to Mrs. Riggs were made by check, by cash, and sometimes by money order, and she kept these payments at her home until she went to town, when she remitted them to appellant. The receipts for admitted payments made to Mrs. Riggs which were produced at the trial were not signed by her.

A receipt dated September 18th was produced; but this was for August. Mrs. Riggs' testimony in regard to this receipt shows that her accounts were not accurately kept. She testified that she had advanced the money covered by that receipt, and that it was not repaid to her until after Mrs. McCullar's death, and that the last payment made by Mrs. McCullar was \$2.50, at a time when she only owed \$2.35, and that this left 15 cents in her hands, which she had forgotten about. Each assessment had a separate number, and it is insisted that the receipt about which John McCullar, Turner and his wife and Nelms testified was a receipt dated September 17th. But this cannot be true, as that receipt covered assessment No. 8, and was for only 50 cents, and was not actually issued until November or December, when Mrs. Riggs met W. H. McCullar, the husband of the insured, and told him that she had previously paid and remitted that assessment for his wife. The officers of appellant testified that no remittance had been made covering the disputed assessment.

From this testimony the jury might have found that the receipt which had been misdirected to the niece of John McCullar covered the assessment in question. Indeed, if there was such a receipt it could have covered no other assessment.

[2] We would therefore affirm the judgment as being supported by testimony legally sufficient for that purpose but for the fact

that certain incompetent testimony was admitted which may have influenced the jury in arriving at the verdict which was returned. W. H. McCullar, the husband of the insured, was permitted to testify that he was in the army from April 27, 1918, to January 12, 1919, and that he was not at home when his wife died; but that in August, 1918, he sent her \$50 and insisted on her paying her lodge dues up for the remainder of the year. An objection was overruled to the question which elicited this testimony, and in making that ruling the court stated:

"That would be no evidence, gentlemen of the jury, that the wife paid the dues, however."

But this is the inference to be drawn from that testimony, and the court's ruling is defended upon the ground that the letter was merely offered to show that the attention of Mrs. McCullar was called to the importance of paying the dues, so that it could not be urged that she had forgotten to do so, and to show that she had the money with which to make the payment. The maxim "*Res inter alios acta alteri nocere non debet*" excludes this testimony.

"Of maxims relating to the law of evidence, the above (*Res inter alios acta alteri nocere non debet*) may be considered as one of the most important and most useful; its effect is to prevent a litigant party from being concluded or even affected, by the acts, conduct, or declarations of strangers. On the principle of good faith and mutual convenience, a man's own acts are binding upon himself, and are, as well as his conduct and declarations, evidence against him; yet it would not only be highly inconvenient, but also manifestly unjust, that a man should be bound by the acts of mere unauthorized strangers; and if a party ought not to be bound by the acts of strangers, so neither ought their acts or conduct be used as evidence against him." *Brooms' Legal Maxims* (8th Ed.) 748.

This maxim was applied in the case of *Hamburg Bank v. George*, 92 Ark. 472, 123 S. W. 654, in which it was held incompetent to corroborate a witness in this manner. See, also, *Fechhelmer-Kiefer Co. v. Kempner*, 116 Ark. 482, 486, 173 S. W. 179; *Carter v. Younger*, 123 Ark. 266, 267, 272, 185 S. W. 435; *Donaghey v. Williams*, 123 Ark. 411, 425, 426, 185 S. W. 778; *Raymond v. Raymond*, 134 Ark. 484, 490, 204 S. W. 311.

For the error in admitting the incompetent testimony, the judgment will be reversed and the cause remanded for a new trial.

FLETCHER v. SIMPSON et al. (No. 50.)

(Supreme Court of Arkansas. June 14, 1920.)

1. Appeal and error ¶893(2)—Case in equity on appeal is heard de novo.

A case in equity is heard de novo by the appellate court on the record made below.

2. Appeal and error ¶522(1)—Mode of incorporating oral evidence in the record stated.

Under Arkansas practice, oral evidence introduced in chancery cases may be made a part of the record by having it taken down in writing in open court and by leave filed with the papers in the case, by bill of exceptions, or by reducing the testimony to writing and embodying it as a recital in the record of the decree.

3. Appeal and error ¶635(3)—Decree will be affirmed on appeal where transcript does not contain all the evidence.

Where decree recited that it was heard upon the pleadings and exhibits thereto and upon certain depositions and "upon the exhibits to the depositions of said witnesses filed with their testimony and upon oral explanation by the witnesses * * * to the court of certain of the exhibits," but none of the exhibits referred to in the depositions appeared in the transcript, the decree would be affirmed; for, all the evidence upon which the decree was rendered not having been brought into the record, the Supreme Court could not properly review the evidence to ascertain whether it supported the decree.

Appeal from Ashley Chancery Court; E. G. Hammock, Chancellor.

Suit by C. M. Simpson and others against R. M. Fletcher. Decree for plaintiffs, and defendant appeals. Affirmed.

Appellees brought this suit in equity against appellant to enforce the specific performance of a contract for the sale of certain land and personal property by C. M. Simpson to R. M. Fletcher. The complaint alleges that appellant is insolvent, and that the property is being neglected and deteriorating in value. The prayer of the complaint is that, if the appellant is unable to perform his contract by reason of his insolvency, the land and personal property be sold and the proceeds be applied to the payment of the purchase price, and that appellees have judgment for the residue against appellant.

Appellant filed an answer and cross-complaint, in which he alleged that he was induced to enter into the contract by reason of the false representations of C. M. Simpson; that Simpson represented the farm purchased to contain more cleared land than it had; that he represented that part of the land was across the bayou, and that it was similar in character to the main body of the land, which had been viewed by appellant; that appellant was induced thereby not to go on the land across the bayou and examine it; that the

land across the bayou comprised 140 acres, and was practically worthless; that there was a large deficiency in the amount, kind, and value of the personal property sold.

The prayer of the cross-complaint is that appellee be required to deliver to appellant all the property sold to him, and that, in the event delivery cannot be made, appellant be given credit for the value of all property not delivered.

On the 28th day of September, 1918, Claude M. Simpson and R. M. Fletcher entered into a written contract for the conveyance of 1,280 acres of land near the town of Morrell, in Ashley county, Ark., and all the personal property on said place, consisting of mules, cattle, wagons, farming tools and machinery, stock of merchandise, and all the feed and grain on hand. W. J. Simpson, brother of C. M. Simpson, was in charge of the place as his agent. Fletcher was not able to make the initial payment at the time the contract was executed, and W. J. Simpson continued in charge of the place, and gathered and sold the greater part of the crop before R. M. Fletcher entered into possession of the place. By the terms of the contract a cash payment was to be made, and the balance of the purchase money was on deferred payments. Later on in the fall R. M. Fletcher took possession of the place through his agent, A. G. Russell.

Appellees introduced testimony tending to show that R. M. Fletcher did not comply with the contract on his part in meeting the deferred payments for the purchase money; that Fletcher was insolvent, and was allowing the personal property on the place to greatly deteriorate in value.

On the other hand, Fletcher introduced testimony tending to show that there was a material deficiency in the quantity of cleared land on the farm as represented to him by Simpson to induce him to make the contract, in addition, that 140 acres of the land was situated across a bayou, and that Simpson represented to him that it was of the same kind and character of land as that shown to Fletcher and examined by him; that the 140 acres of land turned out to be situated some distance from the bayou; that it was in the edge of the hills, and was practically valueless; that Simpson gave him a list of the quantity, kind, and value of the personal property on the farm; that the list of such property so shown to Fletcher was greatly in excess of the quantity and value of the personal property on the place, and actually turned over to Fletcher. Evidence was also introduced by appellees tending to show that no false representations were made by Simpson, nor fraud perpetrated by him to induce Fletcher to make the contract.

The chancellor found the issues in favor of appellees, and a decree was entered accord-

ingly. The decree, after reciting that the cause was heard upon the pleadings and exhibits thereto, continues as follows:

"And upon the depositions of W. J. Simpson, Robert Raines, W. E. Waddell, Fred A. Snodgrass, C. M. Simpson, C. L. Willis, A. G. Russell, Walter Edwards, and R. M. Fletcher, and upon the exhibits to the depositions of said witnesses filed with their testimony and upon oral explanation by the witnesses A. G. Russell and R. M. Fletcher and C. M. Simpson to the court of certain of the exhibits filed, and upon the oral argument of counsel for the respective parties, and upon written briefs filed by counsel for the respective parties, and the court, being well and fully advised in the premises, doth find."

To reverse that decree appellant has prosecuted this appeal.

Mehaffy, Donham & Mehaffy, of Little Rock, for appellant.

Williamson & Williamson, of Monticello, for appellees.

HART, J. (after stating the facts as above). [1-3] Appellees move the court to affirm the decree for the reason that the transcript does not contain all of the evidence in the case upon which the decree of the chancery court was based.

A case in equity is heard de novo by the appellate court on the record made below. Under our practice oral evidence introduced in chancery cases may be made a part of the record by having it taken down in writing in open court and by leave filed with the papers in the case, by bill of exceptions, or by reducing the testimony to writing and embodying it as a recital in the record of the decree. *Casteel v. Casteel*, 38 Ark. 477; *Benjamin v. Birmingham*, 50 Ark. 433, 8 S. W. 183; *Jones v. Mitchell*, 83 Ark. 77, 102 S. W. 710; *Beecher v. Beecher*, 83 Ark. 424, 104 S. W. 156; *Rowe v. Allison*, 87 Ark. 206, 112 S. W. 395; *Bradley Lumber Co. v. Hamilton*, 109 Ark. 1, 159 S. W. 35; *Phillips v. Jokische*, 117 Ark. 221, 174 S. W. 520; *Weaver-Dowdy Co. v. Brewer*, 129 Ark. 193, 195 S. W. 367, and cases cited; *Alston v. Zion*, 136 Ark. 376, 206 S. W. 673.

As shown by the statement of facts, the decree recites, among other things, that it was heard upon the depositions of W. J. Simpson, Robert Raines, W. E. Waddell, Fred A. Snodgrass, C. M. Simpson, C. L. Willis, A. G. Russell, Walter Edwards, and R. M. Fletcher, and upon the exhibits to the deposition of said witnesses filed with their testimony and upon oral explanation by the witnesses A. G. Russell, R. M. Fletcher, and C. M. Simpson to the court of certain of the exhibits filed.

As will appear from the cases above cited, as well as numerous other decisions of the court, where it is shown on the record that witnesses were examined in open court, this court cannot say how much the opinion of the chancery court was influenced, and ought

to have been influenced, by their testimony. Therefore a conclusive presumption in favor of the decree must prevail if the evidence sustains the decree, so far as it is possible for a decree based on the complaint to be sustained by the evidence. In the case at bar the decree is within the issues made by the complaint and the answer and cross-complaint. It is therefore responsive to the issues.

It appears from the record that on August 20, 1919, the court ordered the stenographer to file the depositions taken at Little Rock with the exhibits thereto. None of the exhibits referred to in these depositions appear in the transcript.

W. J. Simpson, a brother of C. M. Simpson, was in charge of the place when Fletcher examined it with a view of purchasing it. He showed Fletcher all the real and personal property on the place except the cotton. He continued in charge of the place for several months after the contract of sale was executed. He had a sales book of the cotton grown on the place, which was gathered and sold by him after the contract of purchase was executed. He agreed to file as an exhibit to his deposition a statement of the sale price of all the cotton and cotton seed sold by him, together with the expense account against the same."

C. L. Willis was the real estate agent who made the sale, and he said that he would file as an exhibit to his deposition a list of all the personal property which was to be embraced in the contract of sale, together with the value thereof. Other exhibits were also to be attached to the depositions. As above stated, none of them appear in the transcript. It will be readily seen that their contents might be very important to a proper determination of the issues. The decree shows at least inferentially that these exhibits were before the chancellor. We refer to that part of the decree which recites that the case was heard upon oral explanation by the witnesses A. G. Russell, R. M. Fletcher, and C. M. Simpson to the court of certain of the exhibits filed.

The record of the decree does not recite which of these exhibits were explained by the witnesses. It will be remembered that C. M. Simpson sold the farm of R. M. Fletcher. A. G. Russell was the agent of R. M. Fletcher, and took charge of the place within a few months after the contract was executed. The record does not disclose which of these exhibits the court desired to be explained by the witnesses, nor what explanation of them was made by the witnesses. This court cannot know what effect this omitted testimony had or ought to have had upon the chancellor. What was there said by the witnesses might have had, and should have had, a material bearing upon the decision of the chancellor. These witnesses had already testified in the case. Two of them were the

principal parties to the suit, and it can be readily seen how their explanation of the exhibits might have caused the chancellor to find the issues in favor of appellees. The exhibits and the explanation of them might have had a very important bearing upon the determination of the issues of fraud and false representations alleged to have been made by C. M. Simpson to R. M. Fletcher.

Since all the evidence upon which the decree was rendered has not been brought into the record and is not now before us, we cannot properly review the evidence for the purpose of ascertaining whether or not the same supports the decree. Therefore the decree must be affirmed.

LILLY v. BARRON. (No. 43.)

(Supreme Court of Arkansas. June 14, 1920.)

1. Appeal and error ⇨347(2)—Time for appeal does not run from finding without judgment.

Where the court made a finding that plaintiff was entitled to judgment, and that one defendant, on payment thereof, should be entitled to judgment over against the other defendant, but did not render judgment thereon, limitations for an appeal from a judgment subsequently rendered run only from the judgment; such finding not constituting a judgment.

2. Bankruptcy ⇨423(2)—Claim for converting note held barred by discharge.

Where the vendor, upon the purchaser's conveyance of land to a third person, who assumed the purchaser's liability to the vendor, required third person to execute a note in lieu of purchaser's note, claimed to have been lost, as a condition to execution of deed of release, and thereafter transferred the note claimed to have been lost to an innocent purchaser, the third person's claim against the vendor was a provable debt under the Bankruptcy Act, not being a contingent claim, and the liability not having accrued by reason of fraud, and therefore was released by the bankrupt's discharge.

3. Fraud ⇨12—Actionable misrepresentations defined.

As a general rule, actionable false representations must be relative to existing facts; and if a promise is accompanied with an intention not to perform it, and is made for the purpose of deceiving the person to whom it was made, and inducing him to act, it constitutes fraud.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fraud.]

Appeal from Mississippi Chancery Court; Archer Wheatley, Chancellor.

Action by Mrs. S. B. Driver against O. B. Rodgers, and others. From a judgment for defendant J. W. Barron against defendant O. R. Lilly, Minnie E. Lilly, the latter's

administratrix appeals. Reversed and remanded, with directions.

On the 1st day of August, 1916, Mrs. S. B. Driver sued C. B. Rodgers and others to recover judgment against them for the sum of \$1,650 and to foreclose a vendor's lien on certain property which had been sold to the defendants by O. R. Lilly. She alleged that the \$1,650 was a balance of the purchase price of said property, and that the parties had given O. R. Lilly a note for \$1,650, and that Lilly had duly assigned the note to her. J. W. Barron was allowed to become a party defendant, and filed his answer to the action, and also a cross-complaint against O. R. Lilly. In his cross-complaint Barron alleged that he had paid Lilly the amount of the note sued for, and that Lilly had transferred it to the plaintiff, for the purpose of defrauding him out of the amount so paid.

The facts are as follows: J. W. Barron and O. R. Lilly originally purchased a tract of land and platted the same as the Barron and Lilly addition to the city of Blytheville, Ark. Later Lilly sold his undivided one-half interest in the addition to C. B. Rodgers, and Rodgers in turn sold it to J. W. Barron. Barron paid Rodgers \$1,000 for his half interest in the lots, and as part payment he assumed the balance of the purchase price of the lots. Before Barron purchased the lots from Rodgers, Lilly advised him that Rodgers had made payments upon the notes until there was a balance due on it of \$935. This was about March 6, 1911, and Lilly executed a deed releasing his lien upon the lots, and Barron executed to Lilly a note for \$1,600. Lilly was to surrender the old note, but was not able to find it. In a short time afterwards, Barron was in Lilly's office again, and asked him about the old note, and Lilly said that he could not find it. Barron then asked him if he had put the note up with any one as collateral, and Lilly said that he had not. Lilly never delivered the note to Barron, and it is the note here sued on. At the time Lilly told Barron that he had credited the note with the payment Rodgers had made, and that this left a balance of \$935 due on it. Barron executed the new note for \$1,600 to Lilly, in order to get Lilly to execute a deed of release to the lots. According to the testimony of O. R. Lilly, he had a settlement with J. W. Barron in 1914. Barron went to Lilly's office with a lot of notes that they jointly owned. The notes amounted approximately to \$10,000. Nearly all of them were worthless, but Barron thought that he could collect some of them, and Lilly transferred his interest to Barron to indemnify him against loss on the transaction involved in this lawsuit. O. R. Lilly was duly

adjudged a bankrupt on the 16th day of January, 1916, and was ordered to be discharged from all debts and claims which are made payable by the Bankruptcy Act against his estate. The claim of Barron involved in this suit was not proved against his estate.

The cause was heard on the 4th day of September, 1918, and a decree in favor of the plaintiff was entered of record on that day. The court found that on the 6th day of March, 1911, O. R. Lilly assigned the note for \$1,650 sued on to the plaintiff, and that no part of the principal or interest on the same has been paid, and that there is now due on said note the sum of \$2,666.72, which is declared to be a lien on the lots involved. The court further found in favor of Barron on the cross-complaint, and—

"that the said Lilly was guilty of specific fraud practiced upon the said Rodgers and Barron, and that Lilly is primarily liable to the said Rodgers and Barron, and that if the said Barron and Rodgers pay the amount due the plaintiff, as recited above, then by virtue of the said payment the said Rodgers and Barron, or either of them making said payment, shall be entitled to judgment for said amount, and the costs thereof, against the said Lilly."

It was therefore by the court decreed that, if the sum adjudged to be due plaintiff was not paid within 30 days, the vendor's lien should be foreclosed, and that the lots be sold for the payment thereof. On September 22, 1919, J. W. Barron filed his motion in the cause, alleging that he had paid the amount of the judgment, to wit, \$2,757.42, and asked that he have summary judgment against O. R. Lilly for that sum. Lilly resisted the motion, and the court rendered a decree in favor of Barron against Lilly for said amount. The case is here on appeal.

O. R. Lilly having since died, the case has been revived in the name of his administratrix.

J. T. Coston, of Osceola, for appellant.

Buck & Lasley, of Blytheville, for appellee.

HART, J. (after stating the facts as above). It is claimed that appellant is barred of relief because no appeal was taken from the decree rendered on the 4th day of September, 1918, within the time prescribed by the statute. In that decree the court found that O. R. Lilly was guilty of fraud practiced upon Barron, and was primarily liable to Barron, and that if Barron should pay the amount due the plaintiff, to wit, \$2,666.72 that the said Barron should be entitled to judgment for said amount against O. R. Lilly. No judgment for that amount, however, was rendered against Lilly in favor of Barron.

[1] The finding of the court was for the plaintiff, but there was no judgment on the

finding. This being true, there was nothing to appeal from. A finding of fact does not constitute a judgment. The judgment of the court must be pronounced in some form. The finding of the court is not final in its character, and does not terminate the litigation between the parties. It does not determine the issues in the case. The effective action of a court is by its decree or judgment, and not by its finding. *Reynolds v. Craycraft*, 26 Ark. 468; *State v. Jones*, 25 Ark. 375; *Moss v. Ashbrook*, 15 Ark. 169; *Sennett v. Walker*, 92 Ark. 607, 123 S. W. 769; *Chappell v. Chappell* (Md.) 82 Md. 647, 33 Atl. 650; *Green v. Probate Judge*, 40 Mich. 244; *Baum v. Currituck Shooting Club*, 94 N. C. 217; *Kilmer v. Bradley*, 80 N. Y. 630; *Judge v. Powers*, 156 Iowa, 251, 136 N. W. 315, Ann. Cas. 1915B, 280.

[2] The case, therefore, remained within the jurisdiction of the chancery court. Subsequently the chancellor, on motion of appellee, rendered a decree in his favor against the appellant. In apt time appellant prosecuted an appeal from that decree. One of the grounds relied upon by counsel for appellant for a reversal of the decree is that Lilly was adjudged a bankrupt and a discharge in bankruptcy granted him in January, 1916, and that appellee, Barron, failed to prove his claim against Lilly in the bankruptcy proceedings. Barron did not prove his claim in the bankruptcy proceedings. He now claims that his claim was not discharged by the bankruptcy proceedings, because it was a contingent one, and therefore not provable under the Bankruptcy Act. The claim was not a contingent one. All the facts necessary to fix liability upon Lilly in the matter had already occurred. Rodgers had executed a note to Lilly for \$1,650 for the purchase price of certain town lots, and Lilly had a vendor's lien upon the lots. Rodgers sold his interest to Barron, and Barron assumed the purchase price, which Rodgers owed to Lilly. It was agreed between Lilly and Barron that the latter should execute his note to the former for \$1,600 in lieu of the \$1,650 note. The \$1,650 note could not be found at the time the transaction occurred, but it was understood that it should be canceled and delivered to Barron. Consequently Lilly's liability to Barron existed at the time the bankruptcy proceedings were had, and the liability of Lilly to Barron was a provable debt under the Bankruptcy Law. *Remington on Bankruptcy* (2d Ed.) vol. 1, § 641. See, also, *Williams v. United States Fidelity & Guaranty Co.*, 236 U. S. 549, 35 Sup. Ct. 289, 59 L. Ed. 713.

Again, it is contended that the liability was not a provable claim in the bankruptcy proceeding, because of the fraud of Lilly, and that this was not known by Barron at

the time of the bankruptcy proceeding. The fraud contended for is that Lilly deposited the \$1,650 note as collateral security for a debt of his own, and that he had told Barron that it could not be delivered to him, because he had lost or mislaid it. It is true that Barron testified that Lilly told him that the \$1,650 note had not been deposited with any one as collateral security; but it must be remembered that this conversation occurred after the transaction had been completed. At the time of the transaction it does not appear that Lilly represented to Barron that the note had not been deposited by him as collateral security to any of his creditors. Indeed, when Lilly's whole testimony is read and considered together, it is fairly inferable from it that the note was not deposited as collateral security until some time after his transaction with Barron. His testimony in this regard is not disputed by Barron. Indeed, Barron frankly admits that he has not yet suffered any loss by reason of the transaction. In other words, the payment of the balance of the original purchase-money note of \$1,650 and the accrued interest was made by the various purchasers of the town lots.

[3] As a general rule, in order for false representations to be the basis of fraud, such representations must be relative to existing facts. An exception to the general rule is that if the promise is accompanied with an intention not to perform it, and is made for the purpose of deceiving the person to whom it was made, and inducing him to act in the premises, the same constitutes fraud. No such state of facts exists here, however, and the liability of Lilly to Barron does not accrue on account of fraud or false representations, but because Lilly converted the note to his own use at some period of time after the transaction with Barron had been completed. Therefore he should have proved his claim in the bankruptcy court. See *Crawford v. Burke*, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147.

It follows that the decree must be reversed, and the cause will be remanded for further proceedings according to the principles of equity and not inconsistent with this opinion.

JENKINS et al. v. JENKINS. (No. 47.)

(Supreme Court of Arkansas. June 14, 1920.)

1. Wills §358—Judgment admitting will to record appealable as "final order of judgment."

Under the statutes, a judgment admitting a will to record is a final order or judgment from

which an appeal lies within 12 months after the rendition thereof.

[Ed. Note.—For other definitions, see *Words and Phrases*, First and Second Series, Final Order.]

2. Wills §364—No appeal from probate of will in common form by infants more than a year after probate.

Under the statutes, infant heirs who were not notified of the probate in common form of ancestor's will will not be permitted to appeal therefrom, in view of Kirby's Dig. §§ 8041, 8043, where the year provided by the statute for appeal therefrom has expired; the statutes containing no saving clause in favor of the infants.

Appeal from Circuit Court, Jefferson County; W. B. Sorrells, Judge.

Proceeding by Edith Jenkins and another by their next friend, N. T. Jenkins, to be allowed to appeal from the probate of the will of P. G. Jenkins, deceased. Petition dismissed, and petitioners appeal. Affirmed.

This is a proceeding by Edith Jenkins and John Brunson Jenkins, Jr., minors, by their next friend, N. T. Jenkins, to be allowed to appeal from the probate of the will of P. G. Jenkins, deceased.

As grounds therefor they allege that they are children of Brunson Jenkins, deceased; that Brunson Jenkins and P. G. Jenkins were brothers; that Brunson Jenkins died before P. G. Jenkins; that the will of P. G. Jenkins was probated in common form, and that the petitioners were not notified of the probate thereof; that but for the will and probate of the same, they would have shared in the estate of P. G. Jenkins, deceased.

The will of P. G. Jenkins, deceased, was probated in common form on the 10th day of January, 1916, and the present proceeding was instituted in the probate court on June 13, 1919.

The petition of Edith Jenkins and John Brunson Jenkins, minors, to be allowed to contest the probate of the will of P. G. Jenkins, deceased, was denied by the probate court, and it was adjudged that their petition be dismissed. They prosecuted an appeal to the circuit court, and it was there adjudged that the cause be dismissed. The case is here on appeal.

Arthur D. Chavis, of Pine Bluff, and Carmichael & Brooks, of Little Rock, for appellants.

Taylor & Jones, of Pine Bluff, for appellee.

HART, J. (after stating the facts as above). The record shows that Edith Jenkins and John B. Jenkins were minors at the time P. G. Jenkins died and his will was admitted to probate in common form; that is, without notice. They seek to contest the will on the ground of undue influence in its execution,

and claim that on account of their minority they have the right to have the will probated in solemn form, or, in other words, to contest it, although more than one year has elapsed since the will was probated.

[1] Under our statute the judgment admitting a will to record is a final order or judgment from which an appeal lies within 12 months after the rendition thereof. *Hogane v. Hogane*, 57 Ark. 508, 22 S. W. 167. The appeal in that case was dismissed because it was not taken within the time limited by the statute.

In *Ouachita Baptist College v. Scott*, 64 Ark. 349, 42 S. W. 536, it was held that where a will is admitted to probate in common form in the probate court the persons interested may make themselves parties by perfecting an appeal to the circuit court within 12 months, and that this, under our practice, amounts to a contest of the will. The court said:

"If the will has been probated in the more solemn form (that is, upon notice to all interested to appear in the probate court at the probate), then, of course, this particular question does not arise. If, however, as in the present case, the probate is in the common form, and parties interested have not been summoned to appear and make objection, then we think it but a fair and reasonable construction to put on the statute that parties interested may file the affidavit provided in the statute within the 12 months allowed, and thus make themselves parties to the probate proceedings for the purpose of taking an appeal from the order of probate to the circuit court, wherein in such case the real contest of the will may be made on the grounds set forth in their petition, which of course, will necessarily show their relationship to the deceased. This ruling is one of first impression in this court, but is in harmony with the suggestions contained in all of our more recent decisions, although these decisions contain mere suggestions or intimations on the subject, and nowhere decide the particular question. *Petty v. Ducker*, supra; *Hogane v. Hogane*, 57 Ark. 508. Furthermore, since the decisions of this court have left no other remedy to the contestant, who has not been given a day in court, this ruling meets the requirements of the constitutional provision, which declares that 'every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive, in his person, property or character.' Const. Ark. art. 2, § 13. The contestants having filed their affidavit within one year from the probate of the will, as required by statute, the circuit court properly exercised jurisdiction to hear and determine the appeal, which in such matters amounts to the contest of the will."

[2] The statute under construction in that case is the one applicable here, and it contains no saving clause in favor of infants, and the court can make none. A saving from the operation of the statute for the disability of minority must be expressed or it

does not exist. Hence it has been held that where the time for contesting probated wills is limited by statute and there is no saving clause in favor of infants, none exists. 40 Cyc. pp. 1257, 1258; *Cleveland's Adm'r v. Lyne*, 5 Bush. (Ky.) 383; *Folmar's Appeal*, 68 Pa. 482; *Warfield v. Fox*, 53 Pa. 382.

With regard to other statutes by which the rights of minors and feme covert are affected, the court has held that a law general in its nature binds them, although they are not specially named, and that their disability does not relieve them from the limitation of the statute unless there is a saving clause showing that they were intended to be excepted. *Nelson v. Cowling*, 89 Ark. 334, 116 S. W. 890; *Collier v. Smith*, 132 Ark. 309, 200 S. W. 1008; *Hogg v. Nichols*, 134 Ark. 280, 204 S. W. 211.

Section 8041 of Kirby's Digest provides that when the proceeding to probate a will upon notice is taken to the circuit court all necessary parties shall be brought before the court.

Section 8043 provides that any person interested, who, at the time of the final decision in the circuit court resided out of this state, and was proceeded against by order of appearance only, and any other person interested who was not a party to the proceeding by actual appearance, or being personally served with process, may, within three years after such final decision in the circuit court, by a bill in chancery impeach the decision and have a retrial on the question of probate. The concluding part of the section provides that an infant, not a party, shall not be barred of such proceedings in chancery until 12 months after obtaining full age.

In the construction of this statute the court has held that a court of equity has no jurisdiction to review a decision of the probate court upon the probate of a will, where there was no appeal to the circuit court within the time prescribed by the statute. The court held that if the appeal to the circuit court be barred, then no final decision of the circuit court can be had on the probate or a rejection of the will, and that the section is wholly inapplicable. *Mitchell et al. v. Rogers*, 40 Ark. 91.

The Court of Appeals of Kentucky reached the same conclusion upon a precisely similar statute. *Cleveland's Adm'r v. Lyne*, 5 Bush (Ky.) 383.

It follows that the petitioners fall within the operation of the statute, and, more than one year having elapsed from the date of probating the will and the time of filing their petition to contest the will, the circuit court properly dismissed their cause of action. Any other holding would make the statute an enlarging rather than a restraining one.

Therefore the judgment will be affirmed.

CONOLLY et al. v. ROSEN et al. (No. 51.)
(Supreme Court of Arkansas. June 14, 1920.)

1. Landlord and tenant §63(3)—Where tenancy disputed title may be denied.

Where the question whether tenancy had ever existed was disputed, defendants in possession may deny plaintiffs' title and right to possession without delivering possession.

2. Deeds §139—Exception which referred to prior deed void for uncertainty.

The same certainty being required of an exception as a grant, an exception of six acres in the southeast quarter, etc., sold to C., which referred to the deed to C. for description, is void for uncertainty, where the deed referred to described land as the fractional southeast quarter, etc., containing six acres.

3. Reformation of instruments §45(5)—Denial of reformation held not against preponderance of evidence.

Where reformation of an exception in deed void for uncertainty of description was sought on the ground the six acres sought to be excepted were sufficiently identified for the court to give effect to the parties' intention, *held*, that a decree denying reformation was not clearly against the preponderance of the evidence as abstracted.

4. Quieting title §49—Decree held to sufficiently protect grantors against mortgage assumed by grantee.

Where the grantors made the mortgagee party to a suit in which they asserted an exception and he disclaimed any desire to foreclose unless necessary to protect his interests, a decree quieting the grantee's title to the land claimed to have been excepted, which made no order with reference to the mortgage executed by the grantors and assumed by the grantee, was not objectionable as failing to protect the grantors' interests.

Appeal from Garland Chancery Court; S. W. Leslie, Special Chancellor.

Suit by Berney Conolly and others against Dave Rosen and others. From a decree for defendants, plaintiffs appeal. Affirmed.

R. G. Davies, of Hot Springs, for appellants.

Geo. P. Whittington and H. P. Chappell, both of Hot Springs, for appellees.

SMITH, J. This suit was begun as an action in unlawful detainer by appellants, who were plaintiffs below, and it was alleged by them in their complaint that they had sold appellees a certain tract of land, reserving therefrom the 6 acres which forms the subject-matter of the litigation, and that appellees had unlawfully and wrongfully taken possession of said 6 acres and were forcibly and fraudulently detaining the same after demand therefor had been made in writing. There was a general denial of the allegations

and a prayer that appellees' title be quieted. By consent the cause was transferred to equity, and upon the trial there appellees' title to the land in question was quieted, and this appeal is from that decree.

[1] It is first insisted that appellees should not have been heard to deny appellants' title to the land and their right of possession thereof unless and until appellees had delivered to appellants the possession of the land. This insistence is based upon the assumption that a tenancy existed on appellees' part, and may be disposed of by saying that the existence of this tenancy is one of the disputed questions of fact in the case. According to appellees, that relationship never at any time existed.

[2] Appellants had title to an 80-acre tract of land by inheritance from their father, and by separate deeds conveyed the land to appellees, except a certain 7 acres which their father had previously conveyed to one Gibson Mills, and as there is no question in regard to this 7-acre tract it passes out of the case. In the granting clause of the deed the following exception is found:

"Excepting also 6 acres in the southeast quarter of the northeast quarter of said section 18, township 3 south, of range 19 east, sold to C. C. Cooley, for a description of which reference is had to the record of the deed for the same in the office of the recorder of Garland county, Ark."

It thus appears that the attempt to except the 6 acres, in addition to the 7 acres, was made by referring to a prior deed for a particular description of the 6 acres thus excepted. This Cooley deed was offered in evidence, and the description there employed reads as follows:

"The fractional southeast quarter of the northeast quarter in township 3, section 18, range 19, containing 6 acres, more or less, in the county of Garland and state of Arkansas."

It is quite obvious that this description is void for uncertainty, and that uncertainty is not removed by reading the two deeds together.

In the case of *Mooney v. Cooledge*, 30 Ark. 640, it was decided that—

"The same certainty of description is required in an exception out of a grant, as in the grant itself."

In that case there was an attempt to except an acre from the grant, but there was nothing in the exception, or the evidence, to locate it upon any particular part of the tract, and the court held that the exception was void for uncertainty, and that the grantee took the entire tract, including the one acre. See, also, *Scott v. Dunkle Box & Lumber Co.*, 106 Ark. 83, 152 S. W. 1025.

[3] The case as submitted in the court be-

low was, in effect, one to reform the deed, and it is insisted by appellants that the testimony shows an intent to except 6 acres, and, further, that the 6 acres are sufficiently identified for the court to give effect to the intention of the parties by reserving the 6 acres from the deed and awarding the possession thereof to appellants and quieting their title thereto.

No opinion was rendered or finding of facts made by the court below, but the decree indicates that the court found the facts against appellants' contention, as the decree rendered quieted appellees' title, and the testimony is not sufficiently abstracted for us to say that the chancellor's finding is clearly against the preponderance of the evidence.

So far as the testimony is abstracted, it appears that an irreconcilable difference of opinion exists as to the meaning and purpose of the exception set out above. It is undisputed that Patrick Conolly and his wife (father and mother of appellants) on April 3, 1880, executed a deed to one Calvin Cooley, purporting to convey the 6 acres under the description set out above; this being the deed to which reference was made in the deed from appellants to appellees. Cooley for a time occupied a part of the land under his deed, but he went away, and no account was given of his whereabouts at the time of the trial. After Cooley left appellants paid taxes on the entire tract and occupied the 6 acres as a portion of the whole.

Appellees testified most unequivocally that it was represented to them that they were getting all the land except the 7 acres owned by Mills, and that they bought under this representation and would not have purchased otherwise, and that the exception was put into the deed because appellants did not want to warrant title to land which their father had previously conveyed, but upon the delivery of the deed possession of all the land was delivered to appellees except the Mills' 7 acres, and for several months no question was raised about their being entitled to all the land except the Mills' 7 acres. The testimony on appellants' behalf sharply contradicts the testimony just recited, but the record in the case has not been sufficiently abstracted for us to say that the decree is based upon a finding of fact clearly against the preponderance of the evidence.

Much testimony was offered concerning the damages claimed; but this question passes out of the case upon the affirmance of the decree below.

[4] Complaint is also made against the decree that it does not adequately protect the interests of appellants against a certain mortgage executed by them to one Stearns, the payment of which was assumed by appellees as a part of the consideration for their deed. Stearns was made a party, and

filed an intervention in which he disclaimed any desire to have a decree entered ordering the foreclosure of his mortgage unless that action was necessary to protect his interests. The court made no order in regard to this Stearns mortgage, and we find it unnecessary to do so.

The court quieted appellees' title as against appellants to the 6 acres, but that decree did not free any portion of the land from the Stearns mortgage. Appellees have title to all the land, but they have it subject to the Stearns mortgage, and as its foreclosure is not asked, it is unnecessary to make any order in regard to it.

Decree affirmed.

WESTERN UNION TELEGRAPH CO. v.
ROAD IMPROVEMENT DIST. NO. 1
OF CLEVELAND COUNTY.
(No. 57.)

(Supreme Court of Arkansas. June 14, 1920.)

Highways §136—Telegraph company's right of way under contract with railway held permanent easement, assessable as real estate.

Under a contract reciting that a telegraph company owned a telegraph system along a railway right of way, which was shown to be a permanent construction, which contract granted an exclusive right to operate and maintain the system, the telegraph company has a permanent easement, notwithstanding clause permitting termination of contract on one year's notice after the expiration of 25 years, but not requiring removal of the lines, which clause applies only to provisions relating to maintenance, so that the telegraph system is real property, which can be assessed for road district benefits under Road Law 1919, No. 612, § 5.

Appeal from Cleveland Chancery Court; John M. Elliott, Chancellor.

Suit by the Western Union Telegraph Company against Road Improvement District No. 1 of Cleveland County. From a decree dismissing the suit for want of equity, plaintiff appeals. Affirmed.

Bridges & Wooldridge, of Pine Bluff, for appellant.

Rowell & Alexander, of Pine Bluff, and Coleman, Robinson & House, of Little Rock, for appellee.

HUMPHREYS, J. Appellant instituted suit against appellee in the Cleveland chancery court to set aside the benefits assessed and fixed against its property by the board of commissioners of appellee district, on the ground that the property owned by it in said Road Improvement District No. 1 is personal, instead of real, property. Appellee filed answer, denying that its property

in said district, against which benefits were assessed, is personal property.

The cause was submitted upon the pleadings and an agreed statement of facts, to which a contract between appellant and the St. Louis Southwestern Railway Company was attached as Exhibit A and made a part of the evidence in the case, from which the court found that the property in question was real estate, and decreed that the petition of appellant be dismissed for want of equity. From the decree of dismissal, an appeal has been duly prosecuted to this court.

The appellee, Road Improvement District No. 1 of Cleveland County, was organized under Act No. 612 of the Legislature, approved April 1, 1919. The benefits to the property in question were assessed by the board of commissioners of said district under section 5 of said act, which is as follows:

"Said commissioners shall proceed to assess the lands within the district and shall inscribe in a book each tract of land and shall assess the value of the benefits to accrue to each tract by reason of such improvement, and shall enter such assessment of benefits opposite the description together with the estimate of the probable cost to the land owner. Their assessment shall embrace not merely the lands, but all railroads, tramroads, telegraph, telephone and pipe lines, and other improvements on real estate that will be benefited by the improving of the roads; and wherever the word 'lands' is used in this act, it shall be construed to embrace all property subject to taxation herein. The commissioners shall place opposite each tract the name of the supposed owner as shown by the last county assessment list. The commissioners shall also assess all damages that will accrue to any land owner by reason of the proposed improvement, including all injury to lands taken or damaged; and where they return no such damages as to any tract of land, it shall be deemed a finding by them that no damages will be sustained."

The agreed statement of facts is as follows:

"That the above road district was created under Act No. 612 of the General Assembly of the state of Arkansas, approved April 1, 1919. That the commissioners, as provided in said act, have assessed the benefits against the lands within the district, and have filed the same in the office of the clerk of the county court of Cleveland county.

"That there are 5½ miles of telegraph line within the boundary of said district. That benefits to said telegraph line have been assessed by the assessors of said district at \$25 per mile for said 5½ miles, aggregating benefits in the sum of \$137.50.

"That the property of said telegraph company within said district consists of 165 white cedar poles, upon which are strung various wires; that these poles are guyed on curves with standard anchor rods and guy wire; that two cross-arms are attached to these poles, with through bolts and arm braces to support the wire; that these wires are on standard steel pins and insulators; that the only office

of the telegraph company in the district is at Rison, Ark., at which station the company has a standard switchboard, with three common sets of Morse instruments, etc. The wires enter the depot of the St. Louis Southwestern Railway Company through 125 feet of 10-pair rubber-covered cable.

"That the 5½ miles of the telegraph line of the complainant is located on the right of way of the St. Louis Southwestern Railway Company; the company furnishing all labor to maintain the wires; the telegraph company furnishing all material for maintenance. For furnishing the labor to maintain the telegraph lines the railway company gets free use and joint use of certain wires owned by the telegraph company.

"That the complainant, telegraph company, owns no real estate within said improvement district, unless the rights obtained under contract hereto attached constitute an easement which is taxable under the law as real estate.

"That the poles upon which the wires are strung are placed in the ground on the right of way of the St. Louis Southwestern Railway Company under a contract between the said telegraph company and the St. Louis Southwestern Railway Company, a copy of which is attached hereto, as Exhibit A, and made a part of this statement of facts, which contract is now in force between said telegraph company and railway company, and has been since its execution.

"That under said contract said telegraph company has the privilege and right of placing its telegraph poles upon which its wires are strung along and upon the right of way of said railway company, that the poles and wires of said telegraph company are so placed and maintained upon the right of way of said St. Louis Southwestern Railway Company through the county of Cleveland, Ark.

"That the telegraph line and property of the complainant in Arkansas are assessed for the purpose of taxation by the tax commission in Arkansas. That the said tax commission has assessed the telegraph line and property of the complainant for the year 1919, and for several years past, as personal property, and has not and does not assess any part of the line and property of complainant as real estate.

"That said tax commission certifies out from its office to various county clerks through which complainant's telegraph line may run, its assessment of complainant's property as personal property, and that the assessment of complainant's property in Cleveland county is so certified to the county clerk of said county, which assessment includes the mileage of complainant's telegraph line within said improvement district.

"That said tax commission directs the assessors of the various counties to place the amount of the assessment of complainant's property on the personal property tax record, and that complainant pays taxes on its property and so certified upon same as personal property."

The contract attached as an exhibit and made a part of the evidence is of such great length that it is impractical to set it out in this opinion in toto. The three clauses of the contract relating more directly than any others to the question to be determined on

this appeal are the preamble, a part of the ninth, and all of the thirteenth clause, which are as follows:

Preamble.—"That whereas, the telegraph company owns lines of telegraph along the railway company's railroad from Birds Point, Mo., opposite Cairo, Ill., to Gatesville, Tex., and along the various branches thereof, which telegraph lines are now operated under the provisions of an agreement dated the 2d day of July, 1888, made by and between the telegraph company and the St. Louis, Arkansas & Texas Railway Company in Arkansas and Missouri, whose property has been sold under foreclosure of mortgages; and it is desirable in the interest of both parties hereto, that a new agreement be entered into between them superseding and taking the place of said agreement hereinbefore mentioned, and extending to all railroads now owned, leased, or controlled, and to all railroads hereafter owned, leased, or controlled, by the railway company party hereto, and extensions or branches thereof."

Part of Ninth Clause.—"The railway company, so far as it legally may, hereby grants and agrees to assure to the telegraph company the exclusive right of way on, along, and under the line, lands, and bridges of the railway company, and any extensions and branches thereof, for the construction, maintenance, operation, and use of lines of poles and wires and underground or other lines for commercial or public telegraph and telephone uses or business, with the right to put up or construct or cause to be put up or constructed, from time to time, such additional wires and such additional lines of poles and wires and underground or other lines as the telegraph company may deem expedient, and the railway company agrees to clear and keep clear said right of way of all trees, undergrowth, and other obstructions to the construction and maintenance of the lines and wires provided for herein, and the railway company will not transport men or material for the construction, maintenance, or operation of a line of poles and wire or wires or underground or other line in competition with the lines of the telegraph company party hereto, except at and for the railway company's regular local rates, nor will it furnish for any competing line any facilities or assistance that it may lawfully withhold, nor stop its trains, nor distribute material therefor at other than regular stations."

Thirteenth Clause.—"The provisions of this agreement shall supersede said agreement hereinbefore mentioned, and shall extend to all railroads now owned, leased, controlled, or operated, and to all railroads hereafter owned, leased, controlled, or operated, by the railway company or by any company or corporation in which the railway company may own a majority of the stock, or whose action it may be able to control by the ownership of stock or otherwise, and the provisions of this agreement shall be and continue in force for and during the term of 25 years from the 13th day of July, 1901, and shall continue after the close of said term until the expiration of one year after written notice shall have been given after the close of said term by either party to the other of an intention to

terminate the same, and in case of any disagreement concerning the true intent and meaning of any of said provisions, the subject of such difference shall be referred to three arbitrators, one to be chosen by each party hereto, and the third by the two others chosen, and the decision of such arbitrators or a majority thereof shall be final and conclusive."

The other sections of the contract relate to the duties and requirements of each party in the construction and maintenance of the telegraph lines, the use of certain wires to transmit railway messages, the employment of joint employes, management of joint offices, and other reciprocal services necessary for the operation of the lines.

It is contended by appellant that the occupation of the right of way of the St. Louis Southwestern Company by appellant was only permissive, and subject to termination at the expiration of the contract, or upon one year's written notice, 25 years after the date of the contract. On the other hand, the occupancy of said right of way by appellant is characterized by appellee as an interest or permanent easement in the land. After a careful reading of the entire contract and a consideration of all its parts in the light of the situation of the parties and the facts and circumstances surrounding them at the time of its execution, we are convinced that the parties to the contract intended a permanent, and not a limited, occupancy or easement. By reference to the preamble of the contract, it will be seen that appellant owned lines of telegraph on the right of way of said railroad company from Birds Point, Mo., to Gatesville, Tex., which lines were being operated, under a contract of July 2, 1888, at the time this contract was signed. The contract of 1888 was not exhibited, nor is it disclosed how or when the telegraph company acquired the ownership of the lines, whether by prescription or conveyance. The fact of ownership of such lines by the telegraph company was regarded of sufficient importance to recite it in the contract. It is also disclosed by the preamble that the telegraph lines, so owned, constitute a telegraphic system covering parts of three states, which system was in actual operation at the time the new contract was signed.

The agreed statement of facts revealed that the construction was of a permanent character. The poles, upon which the wires were strung, are cedar, set in the ground, and guyed on curves with standard anchor rods. Two cross-arms were attached to each pole with through bolts and arm braces. The wires are on standard steel pins and insulators. The wires enter the depots through cables, and the system is equipped with standard switchboards and Morse instruments. Section 9 of the contract, in

express words, grants an exclusive easement to the appellant over the right of way for the purpose of enlarging and extending the telegraph system. No provision was incorporated in the contract for a removal of the lines or system from the right of way at the expiration of 25 years, or on one year's written notice thereafter. The contract contained no forfeiture clause. Telegraph companies are invested with the power of eminent domain in this state, and in the exercise of the power may acquire an easement along a railroad right of way. This being true, and the telegraph company being in possession, the railroad company could not eject it at the expiration of the time limit in the contract.

All these things point unerringly to the conclusion that the parties intended a permanent, and not a temporary, easement. It is almost inconceivable that a party owning a large system of telegraph over a railroad right of way, presumptively by grant, would give it in exchange for an occupancy for years, even though the time be for 26 years certain, and, after that, uncertain, dependent on a year's written notice by the railroad company. The thirteenth paragraph of the contract, containing provisions to the effect that the new agreement shall supersede the agreement made in 1888, and shall be and continue in force for and during the term of 25 years from the 13th day of July, 1901, and, after the term, until either party shall give one year's written notice of an intention to terminate same, does not necessarily conflict with a permanent easement or interest in the land. These clauses may be very reasonably attributed to the method and reciprocal duties of the parties incident to the operation of the system, and not as relating to the right of the telegraph company to remain upon the right of way and construct its lines along and under the lands and bridges of the railway company.

This is the construction placed upon a contract of like tenor and effect in the cases of *Western Union Tel. Co. v. Georgia Railroad & Banking Co.* (D. C.) 227 Fed. 276, and *Western Union Tel. Co. v. State*, 9 Baxt. (Tenn.) 509, 40 Am. Rep. 90. We regard the reasoning in those cases as accurate, and the conclusions based thereon as sound. We therefore adopt the construction of those courts placed upon contracts of similar import as the one now before us for interpretation. Under this interpretation of the contract, the property of the telegraph company is real estate, and the commissioners of the road district had a right, under section 5 of Act 612, Acts of the General Assembly of 1919, to assess benefits against it.

The decree of the chancery court is therefore affirmed.

MYERS v. LINEBARGER et al. (No. 43.)

(Supreme Court of Arkansas. June 14, 1920.)

1. Brokers \S 102—Purchaser may not recover from broker for fraudulent misrepresentations not relied on.

A purchaser is not entitled to damages against a broker for misrepresentation of a tract of land received in exchange, where purchaser relied upon her own investigation and not on the broker's representations.

2. Appeal and error \S 338(3)—Cross-appeal filed after time for original appeal not available as original appeal.

A cross-appeal filed after expiration of the statutory time for original appeals is not available as an original appeal.

3. Appeal and error \S 14(4)—Intervener not "coappellee," within statute granting right to cross-appeal.

Kirby's Dig. \S 1225, provides for "a cross-appeal against the appellant or any coappellee," and in a suit against a broker for damages for misrepresentation in which plaintiff has appealed, an intervener also seeking damages for misrepresentations as to other property is not a "coappellee," under the statute.

Appeal from Washington Chancery Court; Ben F. McMahan, Chancellor.

Suit by Ellen A. Myers against Elmer Linebarger, in which Mrs. Rosa E. Trone intervened. From the decree plaintiff appeals and defendant cross-appeals. Decree affirmed on plaintiff's appeal, and cross-appeal dismissed.

Walker & Walker, of Fayetteville, for appellant.

W. N. Ivie, of Rogers, and H. L. Pearson, of Fayetteville, for appellees.

MCCULLOCH, C. J. Appellant, Ellen Myers, formerly resided in the town of Riviera, Tex., and owned several lots there, on one of which was situated a building used as a hotel. Mrs. Rosa E. Trone owned a farm in Washington county, Ark., containing 108 acres, of which about 36 acres were in cultivation and on which there was an apple orchard containing 285 bearing trees. Each of those parties desired to sell or exchange their respective properties, and appellee, Elmer Linebarger, who lived at Fayetteville, was authorized by each of the parties to negotiate a sale, and he finally brought the parties together on terms for the exchange of their properties. He was to receive from Mrs. Myers the sum of \$100 as his commission, and was also to receive from Mrs. Trone, and did receive from her, as his commission a conveyance of one of the lots in Riviera, Tex., which Mrs. Trone had received in the trade with appellant.

This action was instituted by appellant

against appellee, Linebarger, to recover damages sustained by reason of alleged misrepresentations by the latter to appellant concerning the farm which appellant received from Mrs. Trone in the exchange. The court sustained a demurrer to the complaint, but on appeal to this court the judgment was reversed and cause remanded for further proceedings. 134 Ark. 231, 203 S. W. 580. The cause was then transferred to the chancery court, apparently without objection, and Mrs. Trone filed an intervention, in which she, too, sought to recover damages from appellee, Linebarger, on account of alleged misrepresentations to her concerning the property which she received from Mrs. Myers. The cause was heard by the court and a decree was rendered in favor of appellant against appellee, Linebarger, to the extent of the commission he was to receive, namely, the sum of \$100, which was ordered to be credited on the note executed by appellant to Mrs. Trone and assigned to appellee. In other respects appellant's complaint was dismissed for want of equity. The court also rendered a decree in favor of Mrs. Trone against Linebarger for cancellation of her conveyance to the latter of the lot in Riviera which he received as compensation for negotiating the exchange. Mrs. Myers appealed from so much of the decree as dismissed her complaint against Linebarger and the latter appealed from the decree against him in favor of Mrs. Trone. Those appeals were granted by the chancery court at the time of the rendition of the decrees, but neither of them were perfected. A few days before the expiration of the statutory time allowed for obtaining appeals to this court Mrs. Myers lodged a transcript here and was allowed an appeal by the clerk of this court. After the expiration of the statutory time for original appeals Linebarger prayed a cross-appeal, which was granted.

[1] The chancery court in its decree recited findings to the effect that Linebarger had made misrepresentations to Mrs. Myers as to the condition of the tract of land she received from Mrs. Trone with respect to the number of apple trees and the number of acres in cultivation, and as to certain fencing and other matters to some extent material, and the decree also recited a finding that Mrs. Myers did not rely wholly on the representations of Linebarger, but that she made a separate investigation of the property through one T. J. Kramer and relied on the facts thus ascertained in making the exchange.

Appellant has not abstracted the testimony, but relies for a reversal of the judgment on the contention that there should have been a decree in favor of appellant on the findings of the court. Appellee has abstracted the testimony deemed to be material to his

side of the controversy, and it appears therefrom that the representations which he made to appellant were upon information and purported to be such, and that she did not consummate the trade on the faith of those representations, but made investigation through Mr. Kramer, with whom she was acquainted, and that she relied on Kramer's judgment. In the state of the record presented to us we must presume that the evidence is sufficient to sustain the findings of the court that appellant pursued an investigation in her own way and relied upon that and not upon the representations made to her by appellee. This being true, she is not entitled to recover damages. In order to establish liability, either by way of rescission of a contract or recovery of damages, it must appear that the representations were such as the party had a right to rely on and did in fact rely on. *Brown v. Le May*, 101 Ark. 95, 141 S. W. 759. This disposes of the contention of appellant, and the decree dismissing her complaint will be affirmed.

[2, 3] Appellee, Linebarger, did not perfect his original appeal against Mrs. Trone, and the cross-appeal is not available as an original appeal, because it was asked for and allowed after the statutory time for granting appeals. A cross-appeal was not proper, because the controversy between Linebarger and Mrs. Trone was entirely separate and the record of the controversy between them cannot be brought up for review on cross-appeal obtained on the appeal of Mrs. Myers. *Shapard v. Mixon*, 122 Ark. 530, 184 S. W. 399. The statute provides for "a cross-appeal against the appellant, or any coappellee." *Kirby's Digest*, § 1225. Mrs. Trone was neither the appellant nor was she the coappellee with Linebarger on the appeal of Mrs. Myers. Linebarger's cross-appeal is therefore dismissed.

MURPHY et al. v. MURPHY. (No. 49.)

(Supreme Court of Arkansas. June 14, 1920.)

1. Wills \Rightarrow 302(6)—Holographic will held established by "unimpeachable evidence" of required number of disinterested witnesses.

In proceedings to probate holographic will, evidence of seven disinterested witnesses familiar with decedent's handwriting that will and signature thereto were in decedent's handwriting held to sustain verdict for proponent, such evidence being "unimpeachable evidence" within *Kirby's Dig.* § 8012, requiring such evidence of three disinterested witnesses to establish such a will, notwithstanding contradictory evidence; the jury by its verdict having expressed its belief in such witnesses.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Unimpeachable Evidence.]

2. Wills §324(1)—Credibility of witnesses to will held for jury.

In proceedings to probate holographic will under Kirby's Dig. § 8012, requiring unimpeachable testimony of at least three disinterested witnesses to handwriting of decedent, the credibility of the witnesses was for the jury.

3. Appeal and error §1001(1)—Verdict supported by substantial evidence not disturbed unless contrary to physical facts.

Verdict must be upheld on appeal if there is any substantial evidence to support it, but where the facts are undisputed and by applying to them the well-known laws of nature and the physical facts, it is demonstrated beyond controversy that the verdict is based upon what is untrue, appellate court will declare as a matter of law that the evidence is not legally sufficient to warrant the verdict.

4. Evidence §6, 8—Appellate court takes notice of laws of nature and physics.

Appellate courts will take notice of the unquestioned laws of nature, of mathematics, of mechanics and of physics.

5. Evidence §511—Expert witnesses may testify as to genuineness of disputed handwriting.

Expert witnesses may be introduced to prove the genuineness of disputed handwriting.

6. Wills §302(6)—Testimony as to genuineness of purported holographic will held not contrary to physical facts.

In proceedings to probate holographic will, evidence as to genuineness of will held not contrary to physical facts or opposed to any unquestioned law of nature.

7. Wills §386—Verdict for proponent, supported by substantial evidence, not disturbed.

In proceedings to probate holographic will involving issue as to genuineness of purported will, verdict for proponent will not be disturbed on appeal, where supported by substantial evidence.

Appeal from Circuit Court, Garland County; Scott Wood, Judge.

Proceedings to probate will by Mrs. Minnie Murphy, contested by M. J. Murphy and others. Judgment for proponent, and contestants appeal. Affirmed.

On June 15, 1918, P. J. Murphy, a resident of Hot Springs, Ark., died there, leaving surviving him his widow, Minnie Murphy, and some collateral heirs, but no lineal descendants. After his death a search was made for a will, but none could be found. In the latter part of January, 1919, Mrs. Minnie Murphy went to South Dakota on business. While she was there in February, 1919, Anna Feeney, her sister, had occasion to examine a trunk containing the books and papers of the deceased, and found the following:

"I wont My wife Mrs. Minnie Murphy to have all My real eal estate, Money and personal property which i own or interest in at My Death.
P. J. Murphy."

Mrs. Minnie Murphy offered this writing for probate as the last holographic will of her deceased husband. It was first presented to the clerk of the probate court in vacation, and five disinterested witnesses testified that they had examined the writing in question, and that the body of the writing, as well as the signature thereto, was in the genuine handwriting of P. J. Murphy, deceased. The collateral heirs of P. J. Murphy, deceased, made themselves parties to the proceeding, and contested the will. The probate court admitted the instrument to probate and record as the holographic will of P. J. Murphy, deceased.

Appellants appealed to the circuit court, where a trial was had before a jury. The jury returned a verdict in favor of appellee, and from the judgment rendered, appellants have duly prosecuted an appeal to this court.

R. G. Davies, A. B. Belding, and L. E. Sawyer, all of Hot Springs, for appellants.

A. J. Murphy, of Hot Springs, for appellee.

HART, J. (after stating the facts as above). Subdivision 5 of section 8012 of Kirby's Digest provides that where the entire body of the will and the signature thereto shall be written in the proper handwriting of the testator, such will may be established by the unimpeachable evidence of at least three disinterested witnesses to the handwriting and signature of such testator.

In the case at bar the proponent introduced seven disinterested witnesses, who had been closely associated with P. J. Murphy, deceased, during the last five or six years of his life, and who by correspondence and by examination of his handwriting in their social and business intercourse with him were perfectly familiar with his handwriting. They testified that the entire body of the will and the signature thereto were in the genuine handwriting of said P. J. Murphy. Five experienced bank officials, who qualified as experts in handwriting, also testified that they had made a careful comparison of the purported will with other writings of said P. J. Murphy, which were admitted to be genuine, and all of them stated that such a comparison showed the entire body of the purported will and the signature thereto to be in the genuine handwriting of said P. J. Murphy. These expert witnesses were examined and cross-examined in detail as to their reasons for the opinion that the entire body of the will and the signature thereto were in the genuine handwriting of P. J. Murphy. They observed the peculiarities and characteristics of his admittedly genuine writings, and testified that it was their opinion, from a comparison of these writings

with the purported will, that the entire body of the will and the signature thereto were in the genuine handwriting of said P. J. Murphy.

On the other hand, witnesses were introduced by the contestants who testified that they were perfectly familiar with the handwriting of P. J. Murphy, and it was their opinion that the purported will was a forgery. Expert witnesses were also introduced by the contestants, who after a comparison of the purported will with other admittedly genuine writings of said P. J. Murphy testified that it was their opinion that the purported will was a forgery. They called attention to the spelling and also the characteristics of the genuine handwriting of said P. J. Murphy which caused them to believe that the purported will was a forgery. The purported will and the admittedly genuine writings of said P. J. Murphy were also submitted to the jury for their inspection.

It is first contended by counsel for the contestants that the verdict cannot be upheld because evidence was introduced by them tending to contradict the evidence introduced by the proponent of the will, and that on this account the will was not established by the unimpeachable evidence of at least three disinterested witnesses to the handwriting and signature of the testator, as required by section 8012 of Kirby's Digest. In other words, they contend that the evidence of the proponent is not unimpeachable within the requirements of the statute where there was any evidence of a substantial character introduced which tended to contradict it, no matter whether such evidence was introduced by the proponent of the will or by the contestants.

We cannot agree with this contention. In *Arendt v. Arendt*, 80 Ark. 204, 96 S. W. 982, the court held that by "unimpeachable witness" is meant one whom the jury find to have spoken truthfully, and whose conclusion they find to be correct. See, also, *Mason v. Bowen*, 122 Ark. 411, 183 S. W. 973, Ann. Cas. 1917D, 713.

[1] In the case at bar seven disinterested witnesses testified that for five or six years prior to the death of said P. J. Murphy, by reason of social and business intercourse with him, they were perfectly familiar with his handwriting, and that the entire body of the purported will and the signature thereto were in his proper handwriting. They testified in detail as to their opportunities for knowing his handwriting, and it is plain that their opportunities for knowing his handwriting were such as to qualify them to testify with regard to the genuineness of the purported will. Their testimony was consistent in itself, and the witnesses were not impeached, either by contradictory statements made by themselves or by the testimony of other witnesses introduced for that purpose in the manner provided by the statute.

[2] It is true that the contestants introduced evidence tending to contradict their testimony. The contestants opposed the probate of the will on the ground that it was a fraud and a forgery. This presented an issue which must be determined under the rules of evidence governing all contests in courts. Under the issue presented the doors of justice are opened for the introduction of all legal evidence relative to the question. So the contestants introduced evidence tending to show that the purported will was a forgery. This was done by witnesses who testified that they knew the handwriting of said P. J. Murphy. Expert witnesses were introduced by both sides. After all, the credibility of the witnesses was a question for the jury. The jury has said by its verdict that it believed the witnesses for the proponent of the will. Therefore the jury has found that the seven witnesses who testified that the entire body of the will, as well as the signature thereto, was in the proper handwriting of said P. J. Murphy, and that their evidence is unimpeachable.

[3, 4] Again, it is contended by counsel for the contestants that the verdict of the jury is contrary to the physical facts. We cannot agree with counsel in this contention. Under the settled rules of this court we must uphold a verdict on appeal if there is any substantial evidence to support it. Of course, where the facts are undisputed, and by applying to them the well-known laws of nature and the physical facts, it is demonstrated beyond controversy that the verdict is based upon what is untrue, and cannot be true, this court will declare as a matter of law that the testimony is not legally sufficient to warrant the verdict. *St. L. S. F. R. Co. v. Stewart*, 137 Ark. 6, 207 S. W. 440. The reason for the rule is stated in *St. Louis S. W. Ry. Co. v. Ellenwood*, 123 Ark. 428, 185 S. W. 768, and need not be repeated here. The court has repeatedly held the law to be that, if after consideration of all the evidence the trial court is of the opinion that the verdict of the jury was contrary to the weight of the evidence, it is the duty of that court to set aside the verdict. Upon appeal we must uphold the verdict if there is any substantial evidence to support it. As said in that case, appellate courts will take notice of the unquestioned laws of nature, of mathematics, of mechanics, and of physics; and, where by applying such laws to the facts it is demonstrated beyond controversy that the verdict is based upon what is untrue and what cannot be true, this court will declare as a matter of law that the testimony is not legally sufficient to warrant the verdict.

[5] It is well settled that expert witnesses may be introduced to prove the genuineness of a disputed handwriting. 11 R. C. L. § 41, p. 620. The opinion of handwriting experts may be of great assistance to the jury. Their

experience and studies have so qualified them that from the comparison of the disputed writing with other writings admitted to be genuine they can detect peculiarities in the writing which might escape the observation of those less experienced.

[8, 7] The record shows that the deceased was a man of but little education, and that he was a poor speller. The purported will contains one word which was misspelled and which in the admittedly genuine writings of the deceased was never misspelled. The personal pronoun "I" is a small letter in the purported will, while in the admittedly genuine writings it is always a capital letter. Other peculiarities in the handwriting and spelling of the testator are pointed out. We need not go into details about these matters, however. While they are strong evidence that the document is not genuine, such evidence is not conclusive. It cannot be said that the testimony of the witnesses for the proponent of the will is contradicted by physical facts or is opposed to any unquestioned law of nature. The issue to be determined by the jury was the genuineness of the handwriting of P. J. Murphy. The testimony of many witnesses who were familiar with his handwriting was heard by the jury, and was in direct conflict. The testimony of the experts was also in conflict. The jury had before it the purported will and several admittedly genuine writings of P. J. Murphy as a standard of comparison. The question of the genuineness of the handwriting depended upon the truth or falsity of the testimony of the witnesses. Their testimony related to matters and conditions which might or might not be true. The testimony of none of the witnesses is contrary to any law of nature. It is beside the question that the evidence is conflicting. The jury passed upon the credibility of the witnesses, and the trial court did likewise in overruling the motion for a new trial. There was evidence of a substantial character to support the verdict, and to hold otherwise would be to substitute our judgment for that of the jury and of the trial court. This, under the settled rules of this court, we cannot do, and the judgment must be affirmed.

KANSAS CITY SOUTHERN RY. CO. v. SPARKS. (No. 9.)

(Supreme Court of Arkansas. May 24, 1920.
On Rehearing, June 25, 1920.)

1. Appeal and error \S 1005(2)—Verdict supported by substantial evidence not disturbed.

Where there is any substantial evidence to support a verdict, it will not be disturbed on appeal, the trial court having overruled a mo-

tion for new trial on the ground of insufficiency of the evidence.

2. New trial \S 72—Verdict contrary to the weight of the evidence should be set aside.

It is the duty of the trial court to set aside a verdict which in its opinion is contrary to the weight of the evidence.

3. Appeal and error \S 1005(4)—Verdict not disturbed where refusal to set aside as contrary to evidence not arbitrary.

A verdict will not be disturbed on appeal as contrary to the weight of the evidence, where the trial court refused to set the same aside on that ground, and its determination did not appear to be arbitrary or capricious.

4. Master and servant \S 279(5)—Evidence held to show negligence on part of track laborer's foreman.

In an action by track laborer, injured when an old rail which was being loosened fell on his foot, evidence of the negligence of the master's foreman held sufficient to warrant the jury in finding for plaintiff.

5. Master and servant \S 204(1)—Federal Act did not eliminate defense of assumption of risks in cases other than those enumerated.

As the federal Employers' Liability Act (U. S. Comp. St. \S 8657-8665) eliminated the defense of the assumption of risk in particular cases, such defense is still available to a railroad company in cases other than those enumerated.

6. Master and servant \S 288(12)—Track laborer's assumption of risk of old rail turning over held for jury.

While a servant assumes the risk of all dangers incident to the employment, as well as those which he must observe from the manner in which the work is done, a track laborer, helping to remove old rails, does not, as a matter of law, assume the risk of injury from the turning over of a rail when separated from the other rails.

7. Negligence \S 101—Under federal act contributory negligence merely diminishes recovery.

Under the federal Employers' Liability Act (U. S. Comp. St. \S 8657-8665), contributory negligence of the servant merely diminishes the recovery.

8. Appeal and error \S 231(9)—Where instructions involved, objection should point out particular part claimed to mislead.

Where the instructions which were lengthy were somewhat involved, an objection should point out the particular part deemed misleading, and a mere general objection will not sustain a complaint on appeal to isolated portions of the instructions claimed to mislead.

9. Trial \S 267(3)—Modification of an instruction requested by the master held proper.

Where a track laborer, injured when an old rail which was being removed turned over on his foot, asserted that the foreman struck a cleaver, used to separate the rail from the angle bar, and the defendant asserted the la-

lborer struck it, insertion, in a requested instruction to find for defendant if the laborer himself struck the cleaver, of the word "negligently" before the word "struck" was proper; the instruction being peremptory in its nature.

On Rehearing.

10. Appeal and error \S 930(1)—Evidence supporting verdict should be considered in the light most favorable to the successful party.

In reviewing the question of the sufficiency of the evidence to sustain the verdict, it is to be considered in the light most favorable to the successful party.

11. Master and servant \S 288(1)—Track laborer's assumption of risk held question of fact.

In an action founded on the federal Employers' Liability Act (Comp. St. \S 8657-8665), by a track laborer, hurt in assisting to remove an old rail, the evidence as to the occurrence of the accident, being conflicting, held insufficient to establish as a matter of law that the laborer assumed the risk.

12. Trial \S 296(11)—Instructions in an action under federal Employers' Liability Act as to damages held correct, when considered together.

In an action by a servant, based on the federal Employers' Liability Act (Comp. St. \S 8657-8665), providing that contributory negligence shall not bar recovery, but shall diminish damages, an instruction that, if the servant and master were both guilty of negligence, damages should be diminished in proportion to the amount of negligence attributable to the servant as the proximate cause of the injury held to state the correct rule, and to be sufficient when read with preceding instruction.

Appeal from Circuit Court, Polk County; Geo. R. Haynie, Judge.

Action by C. C. Sparks against the Kansas City Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

C. C. Sparks brought this suit against the Kansas City Southern Railway Company and Walker D. Hines, Director General of Railroads, under the federal Employers' Liability Act (U. S. Comp. St. \S 8657-8665), to recover for personal injuries sustained by him while engaged in the work of track repairing. At the time Sparks was injured, with other servants of the railroad company, he was engaged in taking up old rails from the track and laying new rails. During the progress of the work it became necessary to make a connection to let a train over. The rails were fastened together with fishplates, or angle bars. In order to make the connection it was necessary to disconnect the old rails and to connect the old rail with the new rail. In order to disconnect the old rails they cut the bolts out of the joints

where they were fastened with the angle bar.

According to the testimony of the plaintiff, Sparks, he had a hammer, and J. W. Ross, the foreman, had the cleaver. Ross was holding the cleaver, and the plaintiff would hit it and cut the nuts off of the bolts. The plaintiff then knocked the bolts out of the rail. He then hit the angle bar two or three times with the hammer, but it was rusty and would not come loose. Ross, who was standing on the outside of the track, then took the hammer and hit the outside angle bar a lick or two, and it then became loose. The cleaver was lying there, and the plaintiff picked it up. He put the cleaver in between the angle bar and the rail to prize the angle bar loose. He could not prize it loose. Ross then struck the cleaver with the hammer. This knocked the angle bar loose. The rail then rolled over, striking the plaintiff's left ankle and foot, and injured it severely.

According to the testimony of J. W. Ross he did not use the hammer. He was holding the cleaver, and the plaintiff was striking with the hammer. There was a certain place to stand where there was no danger of getting hurt. He had instructed plaintiff where to stand so that he would not get injured. The plaintiff did not stand in the place designated. It seemed to be wrong handed for the plaintiff, and he shifted his position. If plaintiff had stood where the witness told him to stand, the angle bar would not have hit him. Other facts will be stated or referred to in the opinion.

The jury returned a verdict for the plaintiff, and the defendant has appealed.

Jas. B. McDonough, of Ft. Smith, for appellant.

Norwood & Alley, of Mena, for appellee.

HART, J. (after stating the facts as above). [1, 2] It is earnestly insisted by counsel for the defendant that the judgment should be reversed because the verdict of the jury is contrary to the weight of the evidence. In making this contention counsel has not taken into consideration the distinction between the rules which govern trial courts and this court with respect to setting aside verdicts. It is the duty of the trial court to set aside a verdict which it is of the opinion is contrary to the weight of the evidence, but this court has repeatedly held that where the trial court has overruled a motion for a new trial based upon the insufficiency of the evidence, and where there is any substantial evidence to support it, the verdict of the trial court will be upheld on appeal. *St. L. S. W. Ry. Co. v. Ellenwood*, 123 Ark. 428, 185 S. W. 768.

[3] In the present case the trial court over-

ruled the motion for a new trial, and his ruling in that respect was tantamount to a finding that the verdict was not against the preponderance of the evidence. There is nothing to indicate that he acted arbitrarily in making such finding, and no remarks of the trial court appear in the record to bring the present case within the rule announced in *Twist v. Mullinix*, 126 Ark. 427, 90 S. W. 851, as insisted by counsel for the defendant.

[4] This brings us to a consideration of the question of whether there was any evidence legally sufficient to support the verdict. According to the testimony of the plaintiff, he was holding the cleaver between the angle bar and the rail, trying to pry them apart, when the defendant's foreman suddenly struck the cleaver with a sledge hammer, knocking the angle bar and rail apart so that the rail fell on his foot and severely injured him. The court instructed the jury that if it should find from a preponderance of the evidence that the cleaver was placed at the end of the angle bar, and that the foreman negligently struck the cleaver with the sledge hammer, thereby injuring the plaintiff, and if it should further find that the plaintiff at the time was exercising ordinary care, the verdict should be for the plaintiff. No objection is made to this instruction. The evidence, if believed by the jury, was sufficient to warrant the jury in finding for him, but it is earnestly insisted that the court should have told the jury, as a matter of law, that the plaintiff assumed the risk. This action was brought under the federal Employers' Liability Act.

[5] In the case of *Seaboard Air Line Railway v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475, the court held that, the federal Employers' Liability Act having expressly eliminated the defense of assumption of risks in certain specified cases, the intent of Congress is plain that in all other cases such assumption shall have its former effect as a bar to an action by the injured employé.

[6] According to the plaintiff's testimony, the foreman suddenly struck the cleaver with the sledge hammer, thereby causing the injury. The work was not so obviously dangerous that an ordinarily prudent person under the circumstances would not have engaged in it. The servant assumes the risks of all dangers that are incident to the employment, and he cannot recover for injuries which result to him therefrom. He also assumes the risk of injury from the manner in which he knowingly sees and observes that the work is being done. It cannot be said, however, that under the undisputed proof as declared by the record plaintiff's injury resulted from one of the risks incident to his employment, or that the danger was so obvious and imminent that no ordinarily prudent

person under the circumstances would have engaged in the work.

[7, 8] It is also insisted that the court erred in giving instruction No. 1. It is as follows:

"If you find in this case that the foreman, J. W. Ross, placed the cleaver in the crack between the angle bar and the rail, and that the plaintiff, with due care for his own safety, struck the cleaver with a hammer, and this lick caused the rail and angle bar to spring loose and injure the plaintiff, if you so find from the evidence, and you further find from the evidence in this connection that the foreman, Ross, instructed or directed the plaintiff to strike the cleaver, and at the time that he, Ross, knew where the plaintiff was standing, and by the use of ordinary care on his part might or could have known that the plaintiff was standing in a place of danger, then it was the duty of the foreman to apprise the plaintiff of the fact that he was in a dangerous place, and if you find he failed to do this, but directed the plaintiff to strike the cleaver, and the plaintiff did so, and was not negligent in obeying said instructions, and you find this act of the said foreman was a negligent act on his part, and this negligence was the cause of the injury, then, in that event, if you so find, you will not diminish the amount of plaintiff's recovery, in case he does recover, on account of the fact that he struck the cleaver and that this lick caused the rail to spring over and against the plaintiff, unless you further find that the foreman and plaintiff were both negligent, and in that event you will diminish plaintiff's recovery of damages in proportion to the amount of his negligence, in case you find damages in his favor."

According to the testimony of the plaintiff, the foreman struck the cleaver at the time the plaintiff was injured. On the other hand, according to the testimony of the foreman, he did not strike the cleaver at that time. He said that he instructed the plaintiff where to stand, and that the plaintiff was using the hammer at the time he was injured. The foreman was present and working with the plaintiff. He knew the position the plaintiff assumed in doing the work. It is true he said that he had instructed the plaintiff where to stand while using the hammer. The jury might have inferred, however, from the foreman's testimony that he knew the plaintiff was in a dangerous place, and that he again apprised him of his danger in using the hammer at the place where he was standing. This instruction, and No. 2, immediately following it, deals with the question of the reduction of damages under the federal Employers' Liability Act. Instruction No. 2 is as follows:

"You are instructed that if you find by a preponderance of the evidence that the plaintiff was injured, as alleged, while in such employ of the defendant, and that the proximate cause of his injury was the negligence of the defendant, or its employé, at the time, your ver-

dict will be for the plaintiff. On the other hand, if you find from the evidence that the plaintiff and defendant were both negligent, and that the negligence of both the plaintiff and defendant caused the injury, you will diminish the damages found in favor of the plaintiff in case you find damages in his favor, in proportion to the amount of negligence you find attributable to plaintiff as the proximate cause of the injury."

The federal statute provides that the fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by a jury in proportion to the amount of negligence attributable to such employé. The Supreme Court of the United States has held that where the causal negligence is attributable partly to the master and partly to the injured servant, the latter shall not recover full damages, but only a diminished sum bearing the same relation to the full damages that the negligence attributable to the master bears to the negligence attributable to both; the purpose being to exclude from the recovery a proportionate part of the damages corresponding to the employé's contribution to the total negligence. *Seaboard Air Line Railway v. Tilghman*, 237 U. S. 499, 35 Sup. Ct. 653, 59 L. Ed. 1069. This principle was given by the trial court, and it was the evident purpose to advise the jury as prescribed by the statute in their determination of the amount of damages. The instructions complained of are too lengthy and are somewhat involved. Counsel for the defendant only saved a general exception to the instructions. If he had any objection to a particular part of it as misleading, he should have called the court's special attention to that part, so that the court might modify or explain the words used. Not having done so, he is not now in an attitude to complain.

[9] Counsel for the defendant also asks for a reversal of the judgment because the court modified instruction No. 2 asked by it by adding the word "negligently" between the words, "himself and strike the cleaver." The instruction as asked by the defendant is as follows:

"Plaintiff alleges in the first paragraph of his complaint that he was in the employ of the Director General of Railroads on the 17th day of February, 1919, and was working in an extra gang and was at the time engaged in removing the steel rails, which steel rails were to be replaced with new steel rails. He further alleges that while engaged in this service under the instructions of the foreman in charge of the work he received great and permanent injuries because of the negligence of the foreman. He alleges that he had placed an iron cleaver at the end of an angle bar, and that J. W. Ross, foreman of the gang, struck the cleaver with a sledge hammer, and thereby caused the injury to the plaintiff. If the jury find from the evi-

dence that the plaintiff himself struck the cleaver, and that the foreman did not strike the cleaver, the jury will find for the defendant."

The court was right in inserting the word "negligently." The instruction as asked by the defendant was peremptory in its nature, and exempted the defendant from liability if the plaintiff himself struck the cleaver, regardless of whether his act in so doing was negligent or not. Other instructions asked by the defendant bear this same vice, and, if given, would have been, in effect, a peremptory instruction to find for the defendant. Therefore the court did not err in refusing to give them.

We find no prejudicial error in the record, and the judgment will be affirmed.

On Rehearing.

[10] It is earnestly insisted by counsel for appellant that the court erred in not holding as a matter of law that appellee assumed the risk, and in support of his contention states that the court has misunderstood the facts. It is well settled that, in testing the sufficiency of the evidence to support the verdict, the court must view the facts in the light most favorable to appellee.

[11] Counsel for appellant, in making his contention that the court misunderstood the facts, only takes into consideration the evidence adduced in behalf of appellant. He does not take into consideration at all the fact that appellee's own testimony flatly contradicts the testimony of the witnesses for appellant. It will be remembered that appellant's foreman testified that he did not strike the cleaver at all at the time appellee was injured. He says that he was holding the cleaver, and that appellee was striking with the hammer; that he told appellee where to stand, in order to keep from being hurt in the event the rail flew back after the angle bar was removed from it; that the appellee was hurt by reason of quickly stepping from a place of safety to a place of danger, before he could be notified not to do this by the foreman.

On the other hand, this testimony of the foreman and that of other witnesses who corroborated his testimony is flatly contradicted by the testimony of appellee himself. It will be remembered that the foreman and his crew were engaged in removing an old rail from the track at the time appellee was injured. We quote from the record of appellee's testimony the following:

"Q. Now, what were you doing to the rail? A. Disconnecting it at the joint.

"Q. Now, go ahead in your own way and explain to the jury how you did that. A. I had the hammer at the time, and Mr. Ross had the cleaver, and he was holding it, and cut the nuts off of the bolts. I just knocked the

bolts out of the rail that was holding the angle bars. I hit the angle bar two or three times with the hammer, and it wouldn't come loose. Mr. Ross says, 'Let me have the hammer.' He was standing on the outside of the track. After I struck two or three licks with the hammer myself, then I gave him the hammer, and he hit the outside angle bar a lick or two, and it came loose. The cleaver was lying there, and I picked it up, and, like the rail was there, I was standing sort of in here, and they were connected there, and this inside angle bar was still fastened. The cleaver was lying there, and I picked it up and twisted it, and I jumped back in there, and as I did that Mr. Ross raised the hammer and hit the cleaver.

"Q. What happened then? A. The rail sprung the angle bar out, and the rail caught me just a little above the ankle."

Continuing, appellee stated that the angle bar was between 28 and 36 inches long, and that there would be half of that distance projecting beyond the end of the rail; that the angle bar attached to the rail was what struck his leg, and that he did not know that the angle bar was fastened to the rail. Continuing, appellee said:

"I picked up the cleaver, and, using it myself, I struck that way in between the angle bar and flange of the rail. I twisted it, and the cleaver jumped out, and then I stuck it back in there again at the same place, and at the time I done that Mr. Ross was standing outside the rail with the hammer in his hand, and he raised the hammer and struck the cleaver on the head, and drove it in between the angle bar and flange of the rail. That sprung the angle bar out from the rail, and then the rail jumped across and caught me.

"Q. When you were working with the cleaver in the crack there yourself, was you trying to ease it loose, or get it loose, without a sudden lick that would spring it? A. That couldn't hardly be, only I stuck the cleaver in there, with the intention, after I got it in there and sprung it out, the angle bar would come out, and it would leave the rail loose.

"Q. You thought it would drop loose from both rails, did you? A. I had an idea it would. I didn't know it was fastened on the other end of the rail.

"Q. You didn't know it was fastened to the rail that did spring over? A. No, sir; I did not.

"Q. I will ask you, when the lick was struck, if it sprang over suddenly before you could get away from it? A. It did."

The witness described the cleaver as a tool with a handle in it; one end is broad like a chisel, and the other is blunt like a hammer. The cleaver proper was something like 6 or 8 inches long, and the handle was about 2 feet long. The sledge hammer that was used in striking the cleaver weighed at least 12 pounds. Again appellee stated that he was working on the inside of the rail, and the foreman on the outside, at the time he was injured. He said that he was trying to prize the angle bar loose with the cleaver at the time he was injured, and did not

know that the foreman was going to hit the cleaver; that he was beyond the reach of the rail, and the angle bar stuck out far enough to hit him when the rail flew back; that he did not know that. He expected the angle bar to drop down when he prized it loose from the rail, and did not know that the foreman was going to strike the cleaver until after he had done so. Thus it will be seen that appellee's testimony is in irreconcilable conflict with the testimony of the witnesses for appellant.

According to the testimony of appellee, he thought he could prize the angle bar loose from the rail with the cleaver or chisel, and when he had done so the angle bar would drop down to the ground. He stood in a position where he would be out of the reach of the rail itself when it sprung back. He did not know that the foreman was going to strike the cleaver with the sledge hammer. The foreman struck the cleaver suddenly with the sledge hammer, and thereby caused one end of the angle bar to become loose. The other end adhered to the rail, striking appellee on the ankle before he could get out of the reach of the angle bar. The act of the foreman in striking the cleaver suddenly with the sledge hammer, without warning to appellee, was the proximate cause of the injury. Therefore appellee's own testimony made a case for the jury, and the court did not err in submitting the question of assumption of risk to the jury. In this view of the matter it is not necessary to set out in detail the testimony of appellant; for it is readily apparent that the witnesses for appellant were contradicted by the testimony of appellee himself.

Again counsel criticizes the opinion of the court for saying in the original opinion that no objection was made to the instruction of the trial court on the question of negligence. Counsel points out that he made objections to the action of the trial court in giving it. What the court meant to say was that counsel did not argue in his brief that the instruction on the question of negligence was erroneous. We do not understand counsel to contend that the instruction given by the court on the question of negligence was erroneous. It is perfectly apparent, however, that, if there is testimony sufficient to warrant the submission of the question to the jury, there is no error in the form of the instruction. It plainly submits to the jury appellee's theory of the case, and makes the negligence of appellant depend upon the truth of appellee's testimony.

Again counsel criticizes the opinion of the court with regard to the instructions given on the measure of damages. Counsel insists that the court erred in saying that he did not make specific objections to these instructions. If it be assumed that his objections to the instructions amounted to a

specific objection to them; still we do not think that the action of the court in giving the instructions was reversible error.

[12] The federal statute is that—

"The fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé."

The two instructions on the measure of damages set out in our original opinion should be read together. In the latter part of instruction 2, the court told the jury that, if it should find from the evidence that the plaintiff and defendant were both guilty of negligence which caused the injury, the damages found in favor of the plaintiff should be diminished in proportion to the amount of negligence attributable to the plaintiff as the proximate cause of the injury. The idea meant to be conveyed was that, if the plaintiff had contributed to his own injury by his own negligence, the diminution in the damages should be in proportion to the amount of his negligence. We think the court had reference to the rule of proportion specified in the statute, and that the instructions, when read together, gave the jury the correct principle of law with reference to the exoneration of the carrier, and made it liable only for a proportionate part of the damages corresponding to the amount of the negligence attributable to the employé. *Norfolk & Western Ry. Co. v. Earnest*, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914C, 172. Therefore there was no prejudicial error in giving the instruction.

We have examined the record and find no prejudicial error in it. Therefore the motion for rehearing will be denied.

SOVEREIGN CAMP WOODMEN OF THE WORLD v. ARTHUR. (No. 405.)

(Supreme Court of Arkansas. May 17, 1920.
On Rehearing, June 21, 1920.)

1. Insurance ☞756(1)—Constitution of fraternal benefit association suspending member for engaging in hazardous occupation self-executing.

Provision of constitution of fraternal benefit association, made part of benefit certificate, that if a member engages in a hazardous occupation without notifying the clerk and paying increased dues he "shall stand suspended and his benefit certificate be null and void," is self-executing.

2. Insurance ☞755(1)—Member of fraternal association engaging in hazardous occupation held not in good standing.

A member of a fraternal benefit association, being by provision of its constitution sus-

pended and his benefit certificate null and void because of his engaging in a hazardous occupation without notice to the clerk and without payment of increased dues, was not a member in good standing at the time of his death, and his certificate had not been in force for five consecutive years immediately preceding his death, within the incontestability clause.

On Rehearing.

3. Insurance ☞748—A "mine" within association's constitution declaring hazardous occupations, held not an open working.

Within fraternal benefit association's constitution declaring engaged in hazardous occupations, requiring payment of increased assessments, structural iron workers, circus riders, trapeze performers, those engaged in the actual operation of railway trains, employes in electric current generating plants, enlisted men in the army and navy, and "those employed in mines," "mine" is used in its primary and restricted sense of an underground excavation for getting out minerals, and does not include open workings, like a bauxite mine, operation of which is like quarrying stone found just beneath the surface.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mine.]

Smith, J., dissenting.

Appeal from Circuit Court, Faulkner County; George W. Clark, Judge.

Action by Harriet A. Arthur against the Sovereign Camp Woodmen of the World. Judgment for plaintiff, and defendant appeals. Affirmed.

Harriet A. Arthur sued the Sovereign Camp Woodmen of the World to recover the sum of \$1,000, the amount of a benefit certificate issued upon the life of her son. The certificate was issued to Joe B. Arthur on the 1st day of April, 1913, and his mother, Harriet A. Arthur, was named as the beneficiary in the policy. Joe B. Arthur died from a gunshot wound inflicted by C. T. Herrick about the 1st of December, 1918. At the time Joe B. Arthur was working in the bauxite mines near Bauxite, Ark., and had been working there six or seven months.

W. A. Kinser was a foreman of the mines. According to his testimony, from about July 15, 1918, until the time of his death, Joe B. Arthur worked under him. He was asked how long Joe B. Arthur had worked in the mine and to state fully what work Arthur had been doing. His answer is as follows:

"I have no idea how long he was here, but think it must have been six or seven months. He worked in the open mines. His work caused him to be near and pass by where dynamite was being used, but when blasting was done signals were given so that everybody could get out of the way. He was working in open cut when banks were blasted down. Some one signals and all men leave. He was just simply mining and ditching is all he ever does for me. This work did not include driving and handling

of teams, placing of railroad ties and tracks, but only what we call 'ditching,' which means that we were digging ditches for the drainage of water to pass out of mine."

Continuing, we quote from the transcript the following from the deposition of W. A. Kinser:

"Q. State, if you know, in what business the said Joe B. Arthur was engaged at the time he was killed, and also state how long previous to the time he was killed, to your knowledge he had been engaged in said business. A. He was engaged in ditching up to the time of his death and had been ditching for a week or ten days. Before this time he was working in the mines."

Another witness testified that Joe B. Arthur did not work in an underground mine, but was engaged in loading cars with bauxite by using a pick and shovel, and that his work was on top of the ground.

On cross-examination he testified that they first blow the ore up with dynamite to loosen it and then load it in the cars. They dig down in the ground 10 or 15 feet in places. When a pit is dug they blast the ore out and load it in the cars. He further stated that Arthur dug up some of the ore, and that some of it he just shoveled into the cars; that the usual way was to loosen up the ore by blasting, and then to shovel it in the cars which were on the track which had been laid in the pit.

The benefit certificate provided that the constitution of the order should be a part of it. Section 42 of the constitution provides that persons engaged in certain classes of business or employment shall not be admitted to membership in the order. Section 43 provides what occupations shall be admitted hazardous, and so much thereof as is necessary to the issue raised by the appeal reads as follows:

"Sec. 43. Persons engaged in the following occupations, to wit:

"(a) Structural iron workers, circus riders and trapeze performers, conductors and brakemen on railway freight trains, locomotive engineers and firemen, switchmen, hostlers, and other similar railway or steamship employes, excepting agents, office men and those engaged in employment not more hazardous; those employed in mines not otherwise prohibited; sailors on seas, electric linemen, employes in electric current generating plants and enlisted men in the army and navy during war, may be admitted to membership if accepted by the sovereign physician, but their certificate shall not exceed two thousand dollars each, and their rate of assessment shall be three dollars and sixty cents per annum for each one thousand dollars of their beneficiary certificate in addition to the regular rate while so engaged in such hazardous occupations.

"(b) If a member engage in any of the occupations or business mentioned in this section he shall within thirty days notify the clerk of his camp of such change of occupation, and

while so engaged in such occupation shall pay on each monthly installment of assessment thirty cents for each one thousand dollars of his beneficiary certificate in addition to the regular rate. Any such member failing to notify the clerk and to make such payments as above provided shall stand suspended and his beneficiary certificate be null and void."

Section 68 is the incontestability clause, and reads as follows:

"When a beneficiary certificate has been in force for five consecutive years immediately preceding the death, while in good standing, of the member holding the same, the payment thereof shall not be contested on any ground other than that his death was intentionally caused by the beneficiary or beneficiaries, or by the hands of justice, or from the direct result of drinking intoxicating liquors, or from the use of opiates, cocaine, chloral or other narcotic or poison, or shall die while engaged in war except in defense of the United States of America or engaged in a hazardous or prohibited occupation."

It appears from the record that the insured had paid his regular dues, but that he did not pay the additional amount required by section 43 of the constitution, and did not notify the company of his change of occupation, or that he was working at a bauxite mine. The company did not have any knowledge that he was working at a bauxite mine until after his death.

The above case was tried before the court sitting as a jury, and the court found in favor of the plaintiff.

From the judgment rendered the defendant has duly prosecuted an appeal to this court.

T. E. Helm and Gardner K. Oliphint, both of Little Rock, for appellant.

R. W. Robins, of Conway, for appellee.

HART, J. (after stating the facts as above). It is first sought to uphold the judgment on the ground that the insured was not employed in a mine at the time of his death, and that his policy was not forfeited under section 43 of the constitution, which is copied in the statement of facts. We cannot agree with counsel in this contention. The foreman under whom the insured worked stated in positive terms that he was engaged in ditching for a week or ten days before he was killed, and that before this time he was working in the mines. According to his testimony, they were digging ditches for the drainage of water to pass out of the mines.

Another witness testified that the insured had been engaged in digging and loading ore in cars; that the bauxite ore was first loosened by blasting, and was then loaded into the cars by the insured and other persons. In this way a pit between 10 and 15 feet deep was dug in the ground. A track was laid down in it, and the insured and others would

load the ore into the cars on the track. The cars would then be drawn out of the pit. When the blasts were made the workmen would be notified so that they could get out of the way. It is true the mines were not under the ground but the undisputed testimony shows that the insured was engaged in working in the mines. A part of his duties was to load the ore in the cars after it had been loosened by blasting, so that it could be handled with a shovel. As they proceeded with this work they would dig down deeper and deeper into the ground, so that the pit was from ten to fifteen feet deep. Another part of the insured's duty was to help dig ditches for the purpose of draining the mines. There is no contradiction to this testimony, and it constituted working in the mine, just as much as was the work of the employé who did the blasting.

[1] It is contended that the work was not particularly dangerous, and that there was no reason to increase the dues of the insured for engaging in that kind of occupation. Be that as it may, the parties had the right to contract with each other and designate working in mines as a hazardous occupation, which required notice to the company and an increased payment of dues. The contract does not restrict the clause in question to those engaged in underground mining. The language used is, "those employed in mines, not otherwise prohibited," etc. Clause (b) of the section provides that, if the member engages in any of the occupations mentioned in clause (a) of the section, he shall within thirty days notify the clerk of his camp of his change of occupation, and shall pay on each monthly installment of assessments 30 cents of each thousand dollars of his beneficiary certificate in addition to the regular rate. It further provides that any member failing to notify the clerk and to make the payment as provided shall stand suspended and his beneficiary certificate shall be null and void. Thus it will be seen that the section of the constitution is self-executing. It provides in specific terms that if the member does not comply with the provisions of the section that he shall be suspended, and that his benefit certificate shall be null and void.

As we have already seen, the insured was engaged in working in the bauxite mine at the time he was killed by Herrick, and he had not complied with the provisions of the section of the constitution just referred to. The beneficiary certificate made the constitution a part of the contract of insurance. The Legislature of 1917 passed an act pertaining to the regulation and incorporation of fraternal beneficiary associations. Acts of Ark. 1917, vol. 2, p. 2087. Under section 8 of the act the certificate, the charter of the company, the constitution and laws of the society, and the application for membership

and medical examination signed by the applicant, constitute the agreement between the society and the members. The society in question is a fraternal benefit association. In *Acree v. Whitley*, 136 Ark. 149, 206 S. W. 137, and in *Sovereign Camp Woodmen of the World v. Newsom*, 219 S. W. 759, the court held that the insurance certificate of a fraternal society, being an Arkansas contract, is governed by the statute just referred to.

[2] Again, it is contended by counsel for the plaintiff that the judgment of the lower court should be upheld under the incontestability clause of the benefit certificate. We do not agree with counsel in this contention. The clause referred to is section 68 of the constitution. It provides that when a beneficiary certificate has been in force for five consecutive years immediately preceding the death, while in good standing, of the member holding the same, the payment thereof shall not be contested on any ground other than those stated in the section. It appears from the record that the insured had not made the payments required by section 43 of the constitution when he became employed in the bauxite mines. He did not notify his camp of his change of occupation, and did not pay the additional monthly dues required by the section. The concluding part of the section provides that any such member failing to notify the clerk and to make such payments as above provided shall stand suspended and his beneficiary certificate shall be null and void. Thus it will be seen that the provision is self-executing, and that the benefit certificate was null and void because the member had not complied with the section in the respects just mentioned. Therefore he was not a member in good standing at the time of his death, and the certificate had not been in force for five consecutive years immediately preceding his death. Hence the incontestability clause of the constitution can avail the plaintiff nothing in this case.

It follows that the court erred in finding for the plaintiff, and for that error the judgment will be reversed and the cause remanded for further proceedings according to law and not inconsistent with this opinion.

On Rehearing.

[3] Counsel for the plaintiff, in his brief on rehearing, earnestly insists that the words, "those employed in mines not otherwise prohibited," as used in the policy, do not stand alone, but are connected with the context, which plainly shows that the parties had in mind those employed in underground mining and not open workings. Upon reconsideration of the question, a majority of the court is of the opinion that counsel is correct in

his contention. Insurance policies are written on printed forms specially prepared by experts for the insurance company, and the insured has no voice whatever in their preparation, and for these reasons it is well settled that insurance contracts must be construed strictly against the insurer.

Section 42 of the constitution and by-laws of the order specifically designates certain classes of business or employment as prohibited, and provides that persons engaged in such occupations shall not be admitted to membership in the order. Section 43 deals with hazardous occupations. It uses the words "those employed in mines not otherwise prohibited." The words "not otherwise prohibited" evidently refer to the prohibited occupations named in section 42.

This brings us to a consideration of the meaning of the words "those employed in mines." As just stated, the company was dealing with hazardous occupations, and the context showed what classes of occupations were deemed hazardous by the company. Now there are two meanings to the word "mine." In its primary and restricted sense, a mine denotes an underground excavation made for the purpose of getting out minerals. The enlarged meaning of "mine" is the place where minerals are found, and under certain circumstances it includes minerals obtained by open workings. Lindley on Mines (3d Ed.) vol. 1, §§ 88, 89. Bauxite is a mineral, but it is mined by open workings. The surface of the earth is cleared off, and the bauxite is blasted, and is then removed by open workings. Bauxite is mined in precisely the same way that stone or marble is quarried. There is no distinction whatever between the operation of a bauxite mine and the quarrying of stone or marble, where the latter is found just beneath the surface of the earth as in the case of bauxite. In such a case the marble or stone is removed by open quarrying or blasting, and bauxite is removed in precisely the same way. If the insurance company had considered bauxite mining to be a hazardous occupation, doubtless it would have also mentioned quarrying. The fact it did not do so, and the further fact that the words "those employed in mines" are used in connection with structural iron workers, circus riders, trapeze performers, and those engaged in the actual operation of railway trains, employes in electric current generating plants, and enlisted men in the army and navy, show that the words were used in connection with hazardous occupations. This indicates that the company used them in their primary or popular signification, to refer to underground mining, and not to open workings.

It follows that the motion for a rehearing

should be granted, and that the judgment of the trial court should be affirmed. It is so ordered.

SMITH, J., dissents.

RURAL SPECIAL SCHOOL DIST. NO. 11 v. BAKER et al. (No. 45.)

(Supreme Court of Arkansas. June 14, 1920.)

1. Schools and school districts ~~§ 44~~—Petition for dissolution containing names of majority of electors held sufficient.

Petition by electors of a rural special school district for dissolution of the district, containing the names of a majority of the bona fide electors at the time of the filing of the petition and the posting of the notices under Kirby's Dig. §§ 7548, 7549, held sufficient notwithstanding the subsequent addition of territory to the district making the petition contain fewer than a majority of the electors of the district subsequent to annexation; the annexation of the district not affecting the merits of the petition.

2. Schools and school districts ~~§ 44~~—Compliance with statute as to petition and notice jurisdictional in proceedings for dissolution.

In proceedings to dissolve rural special school district, a compliance with Kirby's Dig. § 7548, as to the filing of the petition and giving the notice prescribed is essential to jurisdiction.

3. Schools and school districts ~~§ 44~~—Special rural district to be attached to adjoining districts on dissolution.

The court in dissolving a rural special school district should have directed that the territory comprising the district be attached in whole or in part to adjoining districts as required by the statute, and was not authorized to apportion the territory and funds among common school districts as they existed prior to the organization of the district being dissolved.

Appeal from Circuit Court, Union County; Chas. W. Smith, Judge.

Petition by W. E. Baker and others against Rural Special School District No. 11. Judgment for petitioners, and defendant appeals. Affirmed in part, and reversed in part.

W. C. Medley, of El Dorado, for appellant.

Mahony & Mahony, of El Dorado, for appellees.

WOOD, J. On May 30, 1919, a petition was filed with the county clerk of Union county, signed by 40 persons who alleged therein that they constituted a majority of the qualified electors of rural special school district No. 11 (hereafter for convenience called special district). They described the territory constituting the district, which

comprised all of common school districts No. 11 and No. 34 and part of common school districts No. 56 and No. 79. They alleged that the children living in certain portions of the district had been done a grave injustice, in that the distance of the proposed schoolhouse for the special district was so great that they would not be able to attend school, and the district was not able to furnish them transportation. They prayed for an order of the county court dissolving the district and placing the territory back in the common school districts from which the territory constituting the special district was carved when the same was organized.

On July 22, 1919, the county court took up the petition for consideration and found that notice of the intention to file the petition was not posted until May 31, and that by an order of the Union county court made on June 2, 1919, certain other territory was annexed to the special district, and that all the territory, including the territory annexed to the district on the latter date, should be considered.

The petitioners thereupon admitted that, if the annexed territory were to be construed, the petition did not contain a majority of the qualified voters within the special district. Whereupon the court entered a judgment refusing the prayer of the petition. The petitioners appealed to the circuit court.

In the circuit court the district answered, and denied that the petition for dissolution of the district was signed by a majority of the qualified voters residing therein, and alleged that there were more than 80 qualified voters in the district; that the petition contained only 39 names; that 6 of the petitioners, naming them, had not paid their poll tax, and therefore not qualified, and 3 others, naming them, who did not live within the district.

There was testimony before the circuit court to the effect that, when the petition asking for the dissolution of the district was filed May 30, 1919, it contained a majority of the qualified electors residing in the district as constituted at that time. That notices were posted, 30 days before the ensuing July term of the county court, in the district as then constituted, of the intention of the petitioners to ask for a dissolution. After the filing of the petition additional territory was annexed to the district. At the time the petition for the dissolution of the district was filed there were something like 70 qualified voters residing therein. The petition contained the names of 40 men who were qualified electors which constituted a majority of the electors residing in the territory at that time.

It was admitted by the petitioners that they did not have a majority of the qualified electors in the district if the territory annexed by the order of the county court on

June 2, 1919, were construed as a part of the district.

The circuit court, among other things, found that the petition to dissolve the district was filed with the county clerk of Union county on May 30, 1919, and that said petition contained the names of the majority of the qualified electors residing in rural special school district No. 11, as then established and formed, and that due notice of the filing and pendency of said petition was given as required by law and by the posting of four notices in said school district in public places, one of which was upon the school house door used by that district; that on June 2, 1919, while said petition to dissolve said district was pending, a petition was filed before the county court to annex certain additional territory to said district No. 11 as then organized, which petition was by the county court granted on said date enlarging said district and taking in other qualified electors after the petition to dissolve said district No. 11 had been duly filed and notice thereof posted as required by law.

The court further found that the facts alleged in the petition as to the injustice and hardship upon a majority of the qualified electors residing in the district were true. The court thereupon entered a judgment granting the prayer of the petitioners, dissolving the district, and ordered that all territory therein embraced be placed back in the common school districts from which it was taken, and that the funds on hand be apportioned to the several districts as they existed prior to the organization of district No. 11.

This appeal is duly prosecuted from that judgment. The evidence was legally sufficient to sustain the finding of the trial court on the issue as to the necessity for the dissolution of the district.

The other questions for our consideration are:

(1) Did the petition for the dissolution of the special district contain a majority of the electors residing in the district in compliance with section 1, Act 66 of the Acts of 1895, p. 82 (section 7548 of Kirby's Digest)?

(2) If the petition contained the required majority, did the court upon the dissolution of the special district err in the apportionment of the territory and funds constituting such district?

[1] First. The filing of the petition to dissolve and the posting of the notices as required by sections 7548 and 7549 of Kirby's Digest is analogous to the bringing of a suit for the dissolution of the district against any one who may oppose the dissolution. It would be wholly impracticable to ascertain who might be opposed to the dissolution; so the Legislature adopted the method of posting notices. The filing

of the petition and the posting of the notice operates as a sort of *lis pendens* upon all persons who may be interested in the affairs of the district. The filing of the petition for the dissolution and posting the notices fixes the status of the district as to the action to be had upon the petition. No territory can thereafter be annexed to the district that will affect the merits of the petition. There was therefore no error in the ruling of the court that the petition contained a majority of the qualified electors residing in the special district as required by section 7548, Kirby's Digest.

[2] A compliance with the statute as to the filing of the petition and giving the notice prescribed is essential to the jurisdiction to dissolve. *Hughes v. Robuck*, 119 Ark. 592-595, 179 S. W. 163.

[3] Second. The decision of this court in *Curtis v. Haynes Special School District H*, 128 Ark. 129, 193 S. W. 523, is to the effect that—

"Where all of the territory of a school district is taken and annexed to another district, the former goes out of existence, and is no longer a school district."

Under this decision, when the court entered the judgment dissolving special district No. 11, it should have directed that the territory comprising that district be attached in whole or in part to adjoining districts as required by the statute, following the construction thereof in *Curtis v. Haynes Special School District H*, supra.

The judgment dissolving special district No. 11 is affirmed. The judgment apportioning the territory and the funds thereof for the error indicated is reversed, and remanded for a new trial of that matter.

JOHNSON et al. v. MISSOURI PAC. R. CO. (No. 55.)

(Supreme Court of Arkansas. June 14, 1920.)

1. Attorney and client \S 182(2) — Statutory lien on recovery applies to death action by administrator for next of kin.

In an action by an administrator for damages for wrongful death under Kirby's Dig. § 6290, fashioned after Lord Campbell's Act, the recovery does not become assets of the estate, but is held by the administrator as trustee for distribution, so a contract by the administrator as to counsel fees falls within the attorney's lien statute, and the attorney has an enforceable lien.

2. Attorney and client \S 176—Contract signed by administratrix as individual as to fees in death action gives attorney a lien.

Where the administratrix of decedent employed attorneys, agreeing that they should re-

ceive one-half of the recovery, held that, though signed by the administratrix as an individual, yet, as she could maintain an action only in her representative capacity, such contract gave the attorneys a lien under attorneys' lien statute, and might be enforced against the defendant which made settlement with the administratrix independent of her attorneys.

Appeal from Circuit Court, Baxter County; J. B. Baker, Judge.

Action by Kathern King, administratrix, against the Missouri Pacific Railroad Company, in which Jo Johnson and others intervened. From the judgment dismissing the intervention after demurrer had been sustained thereto, interveners appeal. Reversed and remanded, with directions.

See, also, 214 S. W. 17, 224 S. W. —.

Allyn Smith, of Cotter, and Jo Johnson, of Ft. Smith, for appellants.

Troy Pace, of Little Rock, and Williams & Seawel, of Yellville, for appellee.

HUMPHREYS, J. Kathern King, administratrix of James E. King, deceased, by appointment of date August 4, 1917, instituted suit through her attorneys, Jo Johnson and Sizer & Gardner, against appellee on June 6, 1918, in the Baxter circuit court, to recover damages in the sum of \$50,000 for the sole benefit of herself as surviving widow, there being no children, on account of the alleged negligent killing of her husband, James E. King, in August, 1917, by appellee, while in its employ as engineer.

On August 29, 1918, the appellants filed an intervention in the suit, alleging that appellee settled with their client for \$8,500, and that, by the terms of their contract, attached to the intervention, they were entitled to a lien for one-half the amount, or \$4,250, with interest, against appellee's railroad, under Act 293, Acts of the General Assembly of 1909. The contract attached to the intervention as Exhibit A provided, in substance, for the employment of Jo Johnson and such assistants as he might deem necessary to collect Kathern King's claim, by settlement or suit, against appellee, on account of injuries received by her husband while in its employ, which resulted in his death, for one-half of the amount recovered, after deducting expenses incident to the collection. The contract was signed at Cotter, Ark., by Mrs. Kathern King. It was alleged in the intervention that, while the contract was signed by Mrs. Kathern King individually, the employment was by her in her capacity as administratrix, as shown by correspondence with her attorney Jo Johnson.

A demurrer to the intervention was filed, sustained, and the intervention dismissed, from which judgment an appeal was duly prosecuted to this court.

[1] The first question presented by this appeal is whether the attorney's lien statute (Act 293 of the Acts of the General Assembly of 1909) has application to a suit by an administrator for the benefit of the next of kin. It was ruled in *Carpenter v. Hazel*, 128 Ark. 416, 194 S. W. 225, that "this statute has no application to suits by an administrator for the benefit of an estate of the decedent, for to give it that effect would constitute an invasion of the exclusive jurisdiction vested in probate courts by the Constitution," referring to the exclusive jurisdiction of the probate courts to authorize contracts for and distribute funds of the estate. The rule there announced has no bearing in a suit by an administrator for the benefit of the next of kin, brought under section 6290 of Kirby's Digest, fashioned after Lord Campbell's Act, because the funds collected do not become assets of the estate. Such funds are in the nature of trust funds held by the personal representative in trust for the next of kin, and not subject to distribution by the probate court. In construing section 6290 of Kirby's Digest, this court said, in the case of *Little Rock & Ft. Smith Railway v. Townsend*, Admr., 41 Ark. 382, that—

"The judgment, though recovered in the name of the personal representative of the deceased, does not become assets of the estate. The relation of the administrator to the fund, when recovered, is not that of the representative of the deceased, but he is a mere trustee for the widow and next of kin."

This construction of the statute was approved in the later case of *Davis v. Railway*, 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283. It follows that the attorney's lien statute applies to suits by administrators for the benefit of the next of kin. Attorneys may, therefore, make binding contracts with administrators representing the next of kin for fees, enforceable by a lien proceeding under act 293, Acts of the General Assembly of 1909.

[2] The sole remaining question to be determined is whether appellee can be held liable under the attorney's lien statute aforesaid by Kathern King's attorneys, the appellants herein, on account of a settlement of the case brought by them for her, in her capacity as administratrix, for the benefit of the next of kin of the deceased, under a contract or agreement for fees, signed by Mrs. Kathern

King. It is contended by appellee that such a contract did not, and could not, bind Kathern King in her representative capacity; that it only bound her in her individual capacity; that appellee's settlement with her was in her representative capacity; and that her outstanding contract for fees with her attorney, in her individual capacity, could not render appellee liable on account of a settlement with her in her representative capacity. Kathern King was appointed administratrix of James E. King, deceased, on August 4, 1917. The contract in question was entered into on October 18, 1917, and the suit, which was settled, was brought by the attorneys in the name of Kathern King, as administratrix of James E. King, deceased, on June 6, 1918. The subject-matter covered in the contract was a cause of action in favor of Mrs. Kathern King against appellee for personal injuries received by her husband, James E. King, while in its employ, resulting in the loss of his life. She had no individual cause of action against the railroad. Her only cause of action was on account of her kinship to the deceased. She had been appointed administratrix of her deceased husband at the time she made the contract. The contract, therefore, could only have been made in reference to her cause of action as administratrix for her benefit as widow. Not having any right to sue except in her capacity as administratrix, the contract she made must necessarily have been made in reference to her cause of action in that capacity. If she had had a cause of action in her individual capacity as well as her representative capacity, then there would be much in the contention of appellee. Having a right to sue in one capacity only, and that being her representative capacity, her contract to bring the suit was necessarily referable to the institution thereof in her representative capacity. The suit was brought by her attorneys for her in that capacity, and appellee, in settling with her in that capacity, recognized whatever rights her attorneys had in the subject-matter of the litigation growing out of the institution of the suit.

For the error in sustaining the demurrer to the intervention and dismissing same, the judgment is reversed, and the cause remanded, with direction to overrule the demurrer to the intervention and for further proceedings not inconsistent with this opinion.

HARGER et al. v. HARGER. (No. 42.)

(Supreme Court of Arkansas. June 14, 1920.)

1. Exceptions, bill of \S 56(2)—Authentication of bill held sufficient.

Judge's certificate that "The above and foregoing is a true and perfect bill of exceptions in this cause" held proper authentication of bill, though filing certificate of clerk appeared several pages ahead of judge's certificate, and though preceding such filing certificate was a blank certificate for judge's signature; such fact being insufficient to show conclusively that bill ended at place where clerk affixed filing certificate.

2. Master and servant \S 316(1)—Mine lessee held independent contractor.

Where coal mine owner leased mine under agreement requiring lessee to operate mine, keep it in good repair, sell coal mined to owner, and keep owner protected by liability insurance, and requiring owner to completely surrender possession to lessee, reserving merely the right to send inspectors to see that the property was cared for and not injured, owner was not liable for injuries to mine employé during operation of mine by lessee; lessee being an independent contractor.

3. Master and servant \S 332(3) — Testimony as to employment of lessee by mine owner held insufficient to go to jury.

In action for injuries to miner against the mine owner and its lessee, plaintiff's testimony that he was employed by owner, without giving facts and circumstances held insufficient to require submission of the question as to whether or not the owner was operating mine through the lessee as agent; such testimony being a mere statement of a conclusion.

4. Master and servant \S 118(2) — Mining "company" in statute held to include individual operators.

Acts 1907, p. 163, \S 1, making every "company," whether incorporated or not, engaged in the mining of coal, etc., liable for injuries to employé from negligence of employer or fellow servant, held applicable to an individual operating a mine.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Company.]

5. Master and servant \S 332(4)—Instruction as to employment by independent contractor held not erroneous.

In an action for injuries to mine employé, instruction submitting issue of whether plaintiff had been employed by both owner and lessee was not erroneous as to lessee, who in fact was employer, by reason of elimination from consideration of owner, who was not operating mine and had not employed plaintiff.

6. Trial \S 253(9)—Instruction as to mine operator's duty to warn employé held defective in omitting element of discovered peril.

In action for injuries to operator of train of coal cars in mine in collision with car on track which had become detached on previous

trip, where there was evidence that foreman who had duty of warning operator of any dangerous conditions knew that the car was on the track and failed to warn operator, requested instruction that operator could not recover if it was his duty to count the cars, since in such case defendant had no duty to warn him, held defective in excluding the element of the foreman's duty to warn operator of the danger of which he had actual knowledge.

7. Trial \S 62(3)—Permitting testimony not properly rebuttal discretionary with court.

Permitting testimony not properly rebuttal testimony to be introduced during rebuttal is discretionary with the court.

Appeal from Circuit Court, Franklin County; Jas. Cochran, Judge.

Action by Herbert Harger against Wallace Harger and the Western Coal & Mining Company. Judgment for plaintiff, and defendants appeal. Reversed as to last-named defendant and affirmed as to first-named defendant.

James B. McDonough and Pryor & Miles, all of Ft. Smith, for appellants.

Evans & Evans, of Booneville, for appellee.

McCULLOCH, C. J. Appellee, Herbert Harger, instituted this action in the circuit court of Franklin county against appellants, Wallace Harger and the Western Coal & Mining Company, to recover compensation for injuries sustained while he was working in a coal mine as an employé of appellants. It is alleged in the complaint that appellee was an employé of both of the appellants, and certain acts of negligence are set forth in the complaint as having been committed by other employés of appellants and that the personal injuries received by appellee resulted from said acts of negligence. In the answer filed by appellants the Western Coal & Mining Company denied that appellee was its employé or that it was operating the mine at the time of appellee's injury. The answer of each of the defendants also contained a denial with respect to the alleged acts of negligence and pleaded contributory negligence on the part of appellee and the assumption of risk on his part. The trial of the issues resulted in a verdict in favor of appellee against both of the appellants for the recovery of the sum of \$2,167.50.

Appellee's injuries were received on April 21, 1919, while he was working in a coal mine near Denning. The mine was owned and formerly operated by the Western Coal & Mining Company, a corporation, but at the time of appellee's injuries it was being operated by appellant Wallace Harger under a written contract between him and the Western Coal & Mining Company. The character of this contract will be shown later.

Appellee was employed as the operator of an electric motor used in hauling a train of coal cars from what is called the "parting" to the foot of the shaft and then hauling the empties back from the shaft to the "parting," the distance between those two points being about 2,500 feet. The cars loaded with coal were made up into a train at the "parting," and appellee would connect the motorcar to the train and haul it to the foot of the shaft for the coal to be hoisted to the surface and then the empty cars would be made up into a train and hauled back to the "parting." This work was, of course, all underground, and the track between the two points was uneven—uphill and down. The coal cars in the train were coupled together by a crude appliance called a gooseneck, and on the occasion when appellee was injured the rear car became disconnected after the train left the "parting" en route to the foot of the shaft. This was caused by the coupling or gooseneck being too straight and the rear car loaded with coal was allowed to become disconnected from the train. The train on this occasion was composed of 17 cars, and appellee, without knowledge that the rear car had become disconnected, hauled the remainder of the cars to the foot of the shaft for the coal to be hoisted to the surface. The train arrived at the foot of the shaft just before noon, and one half of the cars were hoisted before the dinner hour and the other half after appellee had returned from his meal. The trainload of empties was made up and turned over to appellee and he proceeded on his journey, hauling the train back to the "parting," and when he had proceeded about 1,500 feet his train encountered the coal car on the track and collided with it. Appellee sustained serious personal injuries in the collision.

Five separate acts of negligence on the part of servants of appellants are alleged in the complaint as causing or contributing to appellee's injuries: First, that there was negligence in permitting the gooseneck or coupling attached to the rear car to become and remain straightened out, so that it would not hold its connection in the train; second, that Sam Young, the pit boss and mine foreman, was guilty of negligence in failing to notify appellee that one of the cars had been disconnected and was standing on the track, it being alleged that Young saw the car standing on the track and failed to notify appellee when he started on the return trip with the train of empties; third, that the brake on the motor had gotten out of repair, so that the train could not be stopped by means of the brake when danger was discovered; fourth, that the finger board on the motor had become defective and out of repair, so that the electric current could not be cut off and the train

thereby stopped when danger was discovered; and, fifth, that there were no lights along the track so as to enable the operator of the motorcar to discover obstacles on the track, it being alleged that lights had been provided, but that at the time of this occurrence the sockets were empty and had no lamps in them.

Each of these alleged acts of negligence were, as before stated, denied by appellants in their answer, and they also alleged and introduced evidence tending to prove that it was the duty of appellee himself to check the number of cars in the train when it started on the trip from the "parting" and also when he was ready to return with the empties, leaving the foot of the shaft.

[1] It is contended by learned counsel for appellee that there is no bill of exceptions in the transcript, or rather that what purports to be the bill of exceptions is so confused and disconnected and that the certificate of the trial judge appears in such a way that there is no certainty about the authentication of the bill of exceptions as the one filed with the clerk. Time was allowed for filing the bill of exceptions, and during that time it was prepared and the oral proceedings were certified by the court stenographer. There appears on one of the pages a blank certificate for the signature of the trial judge, but it is unsigned, and on the next page there appears the certificate of the stenographer and also an agreement of counsel for the respective parties to sign, certifying that the foregoing bill of exceptions was correct, but this certificate was signed only by counsel for appellant and not by counsel for appellee. On this page there also appears the filing mark of the clerk showing that the bill of exceptions was filed on December 18, 1919. On several succeeding pages of the transcript there appear the instructions of the court and certain other proceedings, and finally there is attached the certificate of the judge, properly signed and dated December 17, 1919, in which the judge certified that "The above and foregoing is a true and perfect bill of exceptions in this cause." We think that, while the bill of exceptions is in somewhat confusing shape, there is sufficient to show that everything preceding the signature of the judge was treated as a part of the bill of exceptions and that it was properly certified. The fact that the filing certificate of the clerk appears several pages ahead of the certificate of the judge is not sufficient to show conclusively that the purported bill of exceptions ended at the place where the clerk affixed his filing certificate.

[2] The first assignment of error urged here is that the evidence is not legally sufficient to sustain a verdict against the appellant Western Coal & Mining Company, in that it is not shown that appellant was

operating the mine at the time of appellee's injury. It is insisted that according to the undisputed evidence the Western Coal & Mining Company had leased the mine to its coappellant, Wallace Harger, and that appellee was employed by the latter and that the Western Coal & Mining Company had no connection whatever with his employment or service. After carefully considering the evidence we think that this contention is sound, and that the court erred in not giving a peremptory instruction in favor of the Western Coal & Mining Company, withdrawing the issue as to its liability from the jury.

The Western Coal & Mining Company owned the mine property and had been operating it for a number of years, but entered into a written contract with Wallace Harger on February 16, 1915, whereby it was agreed that the mine should be leased to Harger to be operated as a coal mine, and the testimony is clear and undisputed that the mine was being operated by Harger under said contract at the time appellee was injured. According to the express terms of this contract the mine was leased by the Western Coal & Mining Company to Wallace Harger and one Craig (Harger having subsequently succeeded to the rights of Craig), and the lessees undertook to operate the mine and to sell the coal mined therefrom to the Western Coal & Mining Company at a stipulated price on board cars at the time. Under this contract the lessees agreed:

"To operate and keep in proper repair all of the mining buildings, railway side tracks, mine workings and machinery, fans, pumps, pit cars, and all other implements, equipment, and tools as will appear on an inventory of such property attached hereto and made a part hereof, at the signing of this agreement; to remove all mine rails and ties from entries and rooms exhausted and suspended during their operations on the premises, and at the termination of this contract to leave the property in as good condition as it was when received, less the depreciation of actual use; or, upon the failure of said first parties to return any portion of such machinery, personal property, etc., said first parties agree to pay for same at a reasonable price to be agreed upon, and no buildings, machinery, fans, boilers, pumps, pit cars, or other personal property belonging to said mine shall be placed upon or taken from the premises of the second party without the consent in writing of its representative."

It was also agreed that the lessees should protect the lessor from any liability by reason of injury to persons or property, and to "provide such personal injury liability insurance as will indemnify and be satisfactory to the party of the second part."

The contract is, on its face, one for the leasing of the mine to be independently operated by Harger. There is nothing in the

contract from which there can be gathered any intention to make the lessor responsible for the conduct of the lessees in the operation of the mine. The possession of the mine was completely surrendered to the lessee, and the agreement was that the latter should keep the same in repair. The only right reserved to the lessor was the right to send inspectors to see that the property was cared for and not injured. The reservation of this right did not make the lessor liable for the failure of the lessee to keep the premises in good repair, for one of the essentials of a contract to have work done independently is that the work is to be done in the course of an independent occupation according to the methods and under the direction of the contractor himself and that he represents the will of the owner only as to the result of the work done. *Wheeler Co. v. Fitzpatrick*, 135 Ark. 117, 205 S. W. 302. In the contract the lessor was exonerated from any duty to keep the premises in repair and this duty was cast upon the lessees. In this respect the contract does not resemble the one dealt with in the case of *Collison v. Curtner*, 216 S. W. 1059. Nor does the fact that the lessor in his contract with the lessee exacted of the latter an undertaking "to provide such personal injury liability insurance as will indemnify and be satisfactory" create responsibility on the part of the lessor for the negligent acts or omissions of the lessee. Appellant coal company had the right to require indemnity against all loss under any contingency without committing itself to an obligation to become responsible for any injuries to persons or property.

Outside of the contract itself there is no substantial evidence that the relation of the parties was other than that created by the express terms of the contract itself. Each of the circumstances introduced in evidence was entirely consistent with the relations of lessor and lessee created by the contract. The lessor was to purchase the output of the mine at a stipulated price, and the proof shows that it advanced money to the lessee on the pay roll and that Harger, the lessee, put himself on the pay roll covered by such advances. This circumstance is without any probative force to establish the fact that appellant Harger was a mere employé or agent of the coal company in the operation of the mine. It had the right to make advances under its purchases without the transaction being treated as a departure from the terms of the contract and as a change of its nature. The only other circumstance relied on is that the printed matter originally used by the coal company and left at its office when the property was turned over to the lessee was used by appellant Harger in making out his pay roll. Sufficient importance cannot be attached to this circumstance to make it constitute substantive proof that

the mine was being operated by Harger as the agent of the coal company.

[3] It is contended that the testimony of appellee himself was sufficient to warrant the submission of the question as to whether or not the coal company was operating the mine and that appellant Harger was conducting the operations as the agent of the company. Appellee in his testimony made the statement that he was employed by the company, but this was a mere statement of a conclusion, as he gave no facts or circumstances to base it on. The undisputed evidence was that appellant Harger was in charge of the mine and employed the men therein. Appellee did not testify that he was employed by any one acting for the company, and his bare statement that he was employed by the company amounted to nothing more than a conclusion of his without any evidence to support it.

In holding, as we do, that no liability is established against appellant coal company, the judgment must be reversed as to that appellant. Other assignments of error relating solely to the liability of the company are thus eliminated from the discussion, and the further consideration of the court is confined to the questions regarding the liability of appellant Harger. According to the undisputed testimony Harger, as lessee of the mine, was operating it for himself and not associated with any other person or corporation.

The first question presented with respect to his liability arises upon the interpretation of the statute enacted by the General Assembly of 1907 (Acts of 1907, p. 163), which reads as follows:

"Section 1. That hereafter all railroad companies operating within this state, whether incorporated or not, and all corporations of every kind and character, and every company whether incorporated or not, engaged in the mining of coal, who may employ agents, servants or employés, such agents, servants or employés being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by any such agent, employé or servant, resulting from the careless omission of duty or negligence of such employer, or which may result from the carelessness, omission of duty or negligence of any other agent, servant or employé of the said employer, in the same manner and to the same extent as if the carelessness, omission of duty or negligence causing the injury or death was that of the employer."

[4] Does this statute apply to the operation of a coal mine by an individual? We have upheld the validity of this statute as applicable to railroad companies, and in the case of *Ozan Lumber Co. v. Biddle*, 87 Ark. 587, 113 S. W. 796, we upheld that portion of it which relates entirely to corporations "of every kind and character." The succeeding part of the statute applies to "every company, whether incorporated or not, engaged

in the mining of coal," etc. The plain purpose of the framers of the statute was to make its provisions applicable to those engaged in the mining of coal, and the only question is whether or not the use of the word "company" is broad enough to include an individual engaged in that business. It being perfectly clear from the language used that the Legislature intended to regulate the business of coal mining, we should and ought to carry out that intention and give the language used a liberal interpretation in defining the word "company," and we think that that word used in this connection was intended to include individuals and is not limited to associations of persons. The strictest interpretation of the word would confine its application to corporations alone, but it is obvious that the Legislature did not mean it in that sense, for they had already provided for the regulation of all corporations, irrespective of the kind of business conducted. If we depart from this strict construction there is no reason discoverable why individuals could not come within the term, as well as association of individuals, such as partnerships. There is authority for this interpretation, and we think it is a correct view of the matter.

In the case of *Atlantic Coast Line R. Co. v. State*, 135 Ga. 545, 69 S. E. 725, 32 L. R. A. (N. S.) 20, the court held that—

"The word 'company' does not necessarily mean a corporation, but may mean a firm, partnership or individual."

There was a like holding in *Eftand v. Southern Ry. Co.*, 146 N. C. 135, 59 S. E. 355; *Keystone Pub. Co. v. Hill Dryer Co.*, 55 Misc. Rep. 625, 105 N. Y. Supp. 894; *Singer Mfg. Co. v. Wright*, 97 Ga. 114, 25 S. E. 249, 35 L. R. A. 497.

This question has never been before us for decision until the present case was presented, and the cases referred to on the brief of appellants did not go into this question, but, on the contrary, were decisive of other phases of the statute. We are of the opinion, therefore, that the statute applies to the operation of a coal mine by an individual, and that it abolished the common-law doctrine as to liability for acts of fellow servants and made the operator of the mine responsible to an employé for the negligent acts of his fellow servants.

The instructions given by the court were, we think, according to the well-settled principles of law with respect to relations between master and servant and the duties of one to the other. Those instructions are numerous and the assignments of error in regard to them are equally numerous, and a discussion of those matters is unnecessary, as no new question is presented.

[5] It is contended that the first instruction was erroneous because it submitted to

the jury the issue of the employment of appellee by both of the appellants. This assignment raises the question of the legal sufficiency of the evidence to sustain the verdict against the coal company, and that has already been disposed of in this opinion, but the elimination of the coal company from consideration does not make the instruction erroneous as to the other appellant.

Error of the court is assigned in refusing to give the following instruction requested by appellant:

"If it was the duty of the plaintiff to count the cars when he started with a trip, or if it was his duty to ascertain how many cars he had in the trip when he started, and if it was his duty also to count or ascertain the number of cars at the completion of the trip, so as to know whether any cars were left along the haulage way, then and in that event the plaintiff did not have the right to rely upon notice from the foreman, Sem Young. If the above are the facts, the defendant did not owe to the plaintiff the duty to warn plaintiff that he had left a car on the track, and in that event the jury will find for the defendants on the alleged negligence of defendant in failing to give notice of the presence of the car on the track."

[6] This instruction was erroneous in telling the jury that appellee should be denied the right to recover because of his own failure to ascertain the fact that one of the cars had been lost on the trip, notwithstanding the actual knowledge on the part of the foreman that the car was standing on the track in a dangerous position and his failure to notify appellee of that fact.

There is abundant testimony that it was the affirmative duty of the pit boss to notify the men of any dangerous conditions existing, and the evidence shows that Young, the foreman, had actual knowledge of the presence of the car and failed to notify appellee as he started on his return trip. Even though appellee failed to discharge the duty of counting the cars before he started on the return trip, yet the negligent failure of Young to notify him of the presence of the lost car on the track which created the danger was the intervening and proximate cause of the injury. It was a case of peril actually discovered by the representative of the employer and his negligence in failing to guard against it or give warning concerning it was the proximate cause of the injury. This instruction was therefore incorrect in excluding that element from the consideration of the jury.

[7] There are other assignments of error not of sufficient importance to consider. Several of them relate to matters to which no exceptions were saved, or which do not appear in the bill of exceptions. The question of permitting the appellee to introduce in rebuttal testimony which was not properly

rebuttal testimony was a matter of discretion for the court, and we cannot say that the court abused its discretion in that respect.

The judgment is therefore reversed and the cause is dismissed as to the Western Coal & Mining Company, but as to appellant Wallace Harger the judgment is affirmed.

SECURITY LIFE INS. CO. OF AMERICA v. BATES. (No. 36.)

(Supreme Court of Arkansas. June 7, 1920.
Rehearing Denied July 5, 1920.)

1. Trial \S 177—Both parties, asking peremptory instruction, submit undisputed facts to trial court.

Where both parties ask for a peremptory instruction, and do nothing more, they assume the facts to be undisputed, and in effect submit to the trial court the determination of the inferences to be drawn from them.

2. Appeal and error \S 846(1) — Supreme Court, reviewing court case, limited to consideration of correctness of finding on law.

In reviewing action of trial court sitting as a jury, Supreme Court is limited to consideration of correctness of finding on the law, and must affirm the judgment, if there is any evidence to support finding.

3. Principal and agent \S 99—Principal bound by acts of agent within authority.

The general rule is that a principal is bound by the acts of its agent within his authority, including what is usually necessary to the performance of such duties.

4. Insurance \S 92—Evidence held to justify finding agent had authority to receive application relative to military service.

In an action on a life policy, issued to one subsequently killed in battle in France, evidence held to justify trial court in finding that agent who wrote policy was general agent of company in the particular town, and possessed at least apparent authority to receive application for permit to enlist in the army and go overseas, given him by insured's brothers, and to accept it.

5. Insurance \S 92—Evidence held to justify finding agent had authority to accept in particular form application for permit to enlist.

In action on life policy, issued to one subsequently killed in battle in France, evidence held to justify finding by trial court that insurer's general agent in town had authority to accept, in form in which it was presented to him by insured's brothers, application for permit to enlist and to go overseas, and that the brothers were justified in relying on his promise to attend to the matter of getting a permit.

6. Insurance §361—Arrangement by insured for payment of premiums through firm of which insurer's agent was credit man sufficient.

Where agent of life insurer agreed with insured and his brothers that while insured was in military service he would take care of premiums by advancing them from funds of firm for which he was credit man, and charging insured and his brothers on firm's books, both insured and his brothers were justified in believing agent would pay a premium when it fell due, together with an additional premium under a war risk clause, and, insured having been killed in battle, insurer cannot defend for nonpayment of extra premium.

**Appeal from Circuit Court, Yell County;
A. B. Priddy, Judge.**

Suit by Amos B. Bates, administrator of Alvin S. Bates, against the Security Life Insurance Company of America. From a judgment for plaintiff, defendant appeals. Affirmed.

Amos B. Bates, administrator of the estate of Alvin S. Bates, sued the Security Life Insurance Company of America to recover on a policy of life insurance for \$2,000. The company defended, on the ground that the policy had been forfeited, because the insured had not complied with the war clause contained in it.

On the 27th day of August, 1917, the Security Life Insurance Company of America issued a life insurance policy to Alvin S. Bates for \$2,000, payable to the insured's administrators, executors, or assigns. The policy contained the following clause:

"This policy shall be incontestable after one year from its date, except for nonpayment of premiums, and except for naval or military service in time of war without a permit, which are risks not assumed by the company: Provided that, in case of the death of the insured while engaged in such service without a permit, the amount payable hereunder shall be the reserve on the policy at date of death. All statements made by insured shall, in the absence of fraud, be deemed representations, and not warranties, and no such statement shall void this policy, unless it is contained in the application therefor."

Amos B. Bates lived at Sulphur Springs, in Yell county, Ark., and was drafted into the army of the United States on September 19, 1917. While in the army at Camp Pike, Ark., in November, 1917, Alvin S. Bates sent to his brothers at Sulphur Springs, Ark., a paper writing in which he asked the company to issue him a permit to engage in the military service of the United States. The insured and his brothers traded with a mercantile firm in Dardanelle, in Yell county, of which Ben Wirt, the agent of the insurance company, was the credit man. Wirt had taken the application for the insurance and had delivered

the policy to the insured. In fact, the policy was left by the insured in Wirt's possession. An arrangement was made with Wirt whereby the firm, of which he was the credit man, would pay the premiums as they fell due and charge the same to the account of the Bates Bros. While at Camp Pike, Ark., in November, 1917, the insured filled out an application to the company to secure a permit to engage in the military service of the United States and to go beyond the limits of the United States, and mailed it to his brothers at Sulphur Springs, Ark., and asked them to take it to Ben Wirt and do what was necessary to be done with regard to securing such permit. The brothers of the insured carried the application to Ben Wirt, and, handing it to him, asked Wirt for information as to what should be done in the premises. Wirt looked at the application and handed it back to the brothers of the insured, saying to them, "I will make it all right." Relying on the promises of the agent, the brothers went on home and never took any other steps in the matter. They did not pay the extra premium of \$100 on the thousand required of those drafted in the army and going beyond the limits of the United States. They had made arrangements with Mr. Wirt for the firm, of which he was the credit man, to pay the premiums and charge the same to the account of the Bates Bros. Alvin S. Bates was sent to France, and in July, 1918, was killed in battle while in the military service of the United States. When the second premium became due, on August 27, 1918, Mr. Wirt paid the same and charged it to the account of the Bates Bros. He did not, however, pay the extra premium above referred to. At the time the payments were made it was not known that the insured had been killed in battle during the latter part of the previous month. The brothers of the insured relied wholly upon the promise made by Mr. Wirt to secure the permit for the insured to go with the army to France and to pay the premiums as agreed upon, and for that reason took no further steps in the matter.

Ben Wirt was a witness for the defendant. According to his testimony he was the agent of the insurance company at Dardanelle, and secured the application of Alvin S. Bates for a policy of \$2,000 in the company. Soon after the United States became involved in the war with Germany, Wirt received instructions from the company that any policy holder who was engaged in the military service of the United States would have to have a permit from the company. Subsequently Wirt was instructed that any policy holder who had been granted this permit and went beyond the limits of the United States would have to pay an additional \$100 on the thousand. Wirt wrote to the company for blank permits

for the policy holders to fill out. The company wrote him that they had no regular forms at that time. Wirt then drew up some forms of his own and sent them to the policy holders. He mailed one of these to Alvin S. Bates at Camp Pike, Ark. He instructed Bates to sign the application for a permit, and put the number of his company and regiment on it, and forward it to the company. The form was never returned to Wirt, and he supposed, from that, that Bates had received it. Wirt wrote to the company, and asked if he would be allowed to sign his name to applications for permits, and was informed that the insured would have to sign in person. When the brothers applied to Wirt, he told them he would look after the matter for them and make it all right. He had in mind that he had already sent an application to Alvin S. Bates and thought that was sufficient.

On cross-examination Wirt was asked if the Security Life Insurance Company had a general agency at Dardanelle, Ark. He replied, "I represent them as general agent, local territory." Wirt further stated that it was only necessary for a policy holder to have a permit to engage in the military service of the United States, but that, if the policy holder went overseas in the service, an extra premium of \$100 on each thousand was required. The company at first failed to send Wirt any blank forms for permits, because it did not have any. Later it did send to him such blank forms. Wirt explained to Alvin S. Bates that he would have to pay an extra premium if he went overseas in the United States army. He told Bates to notify him with regard to the matter before he left for France, and that he would take care of the matter for him. Wirt told Bates about the extra premium a few days before Bates went to Camp Pike. Wirt understood that Bates was about to be sent overseas at the time the brothers showed him the application which the insured had signed for permission to enter the military service. Both sides requested a peremptory instruction, and asked for no other instructions.

The court directed a verdict for the plaintiff, and from the judgment rendered the defendant has appealed.

F. W. Bull, of Chicago, Ill., and T. E. Helm, of Little Rock, for appellant.

J. B. Crownover, of Dardanelle, for appellee.

HART, J. (after stating the facts as above).

[1] Where both parties ask for a peremptory instruction, and do nothing more, they assume the facts to be undisputed, and in effect submit to the trial court the determination of the inferences to be drawn from them. *St. L. & So. Ry. Co. v. Ingram*, 118 Ark. 1, 10 W. 692.

[2] In the case at bar each party asked the court for a peremptory instruction and requested no other instruction. This then amounted to a submission of the cause to the court sitting as a jury, and in reviewing the action of the trial court we are limited to a consideration of the correctness of the finding on the law, and must affirm the judgment if there is any evidence in support of the court's finding.

[3] Wirt testified that he was the general agent of the company in local territory. The general rule is that a principal is bound by the acts of its agent within the authority conferred upon him, and this includes what is usually necessary to the performance of such duties. In discussing the authority of a general agent in *Oak Leaf Mill Co. v. Cooper*, 108 Ark. 79, 146 S. W. 130, the court said:

"A principal is not only bound by the acts of the agent done under express authority, but he is also bound by all acts of a general agent which are within the apparent scope of his authority, whether they have been authorized by the principal or not, and even if they are contrary to express directions. The principal in such case is not only bound by the authority actually given to the general agent, but by the authority which the third person dealing with him has a right to believe has been given to him. *Brown v. Brown*, 96 Ark. 456. The question in all such cases relative to the acts of a general agent is, not whether the authority of such agent was limited, but whether the person dealing with such agent had knowledge or notice of such limitations of his authority."

Wirt said that he was the "general agent, local territory." The words "local territory" did not limit his powers as agent, but only restricted the territory over which he might exercise the powers of a general agent. Wirt testified that, when the brothers came to him and submitted the insured's application for a permit to go overseas, and he told them that it was all right, that he would attend to the matter, he had in mind that he had already sent a blank form to the insured at Camp Pike, to be filled out, and supposed that the insured would fill out the blank form and mail it to the company. In testing, however, the legal sufficiency of the evidence to support the finding of the court, we must consider the evidence in the light most favorable to the plaintiff. It does not appear that Wirt communicated to the brothers of the insured that he had already sent in a blank form to the insured at Camp Pike, to be there filled out by him and mailed to the company at its home office. Wirt told the brothers that it was all right and he would attend to the matter. He had already told the insured, when he passed through Dardanelle on his way to Camp Pike, to notify him in case he got orders to go overseas, so that he might attend to the matter of getting a permit for

the insured. Wirt also told the insured that he would attend to the matter of paying the premiums.

[4] Under this state of the record the court was justified in finding that Wirt was general agent of the company at Dardanelle, and possessed at least the apparent authority to receive the application for a permit to enlist in the army and to go overseas, given to him by the insured's brothers, and to accept the same.

[5] The court was further justified in finding that he had authority to accept such application in the form it was presented to him, and that the brothers of the insured were justified in relying upon his promise in the premises. Therefore the evidence was legally sufficient to justify a finding by the trial court in favor of the plaintiff.

[6] Again it is insisted that the court was not warranted in finding in behalf of the plaintiff, because no extra premium was paid as required in case of policy holders who were soldiers in the United States army and had received permits from the company to enter such service and to go overseas and fight in the war with Germany. It will be remembered that the insured was killed in battle in France in July, 1918, and that his second premium was not due until the 22d of August, 1918. In pursuance of the agreement of the insured and his brothers, Wirt charged the amount of the second premium on the books of the merchant with whom he worked to the Bates Bros., and remitted the amount to the company. It is true this was done before any of the parties knew that the insured had been killed in battle, but it was done pursuant to an agreement made by

Wirt with both the insured and his brothers. Wirt was the credit man for a mercantile firm in Dardanelle, and had authority to say when and how much money would be paid by the firm for such customer. He agreed with the insured and his brothers to take care of the premiums on his policy, and to pay them to the company and charge the Bates Bros. with them on the books of the mercantile company. Of course, in making the payment to the insurance company, he was acting as agent of the Bates Bros.; but in receiving the money he was acting as agent of the insurance company. The Bates Bros. made an arrangement in advance with the mercantile company to secure the money, and Wirt promised to apply it to the payment of the premiums as they fell due. Both the insured and his brothers were justified in believing that Wirt would pay the second premium when it fell due, and that he would pay the additional premium under the war risk clause. They had made arrangements for the money with the mercantile firm of which Wirt was the credit man, and he agreed to send the money in to the insurance company. As general agent of the company, he had the authority to receive the money and send it in. The money was there under his control all the time, and he had nothing to do but send it in to the company. Therefore the court was justified in finding that the insured had done all that was necessary for him to do with regard to paying his premium. *New York Life Insurance Co. v. Allen*, 220 S. W. 803; *Sovereign Camp, Woodmen of the World v. Newsom*, 219 S. W. 759.

It follows that the judgment must be affirmed.

STATE v. NAVE. (No. 21897.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

1. Witnesses \Leftrightarrow 384—Not impeachable by prior contradictory statements as to mere matter of opinion.

To impeach a witness by prior contradictory statements, they must be statements of fact pertinent to the issue, and not merely matters of opinion; facts which would be competent evidence independent of inconsistency with the witness' testimony; hence it was error to admit impeaching evidence that accused's father had previously stated in conversation, in accused's absence, that he thought accused had taken the mules he was accused of stealing.

2. Larceny \Leftrightarrow 68(1)—Evidence held insufficient to connect accused with stealing mules.

In trial for grand larceny, evidence as to accused's connection with the stealing of mules charged held insufficient to take the question of his guilt to the jury.

Appeal from Circuit Court, Taney County;
Fred Stewart, Judge.

Mack Nave was convicted of grand larceny, and appeals. Reversed, and defendant discharged.

G. W. Thornberry, of Galena, and D. F. McConkey, of Forsyth, for appellant.

Frank W. McAllister, Atty. Gen., and George V. Berry, Asst. Atty. Gen., for the State.

WHITE, C. The defendant was indicted in the circuit court of Taney county on a charge of grand larceny, was convicted April 24, 1919, and his punishment assessed at two years' imprisonment in the state penitentiary, and appealed.

Defendant was charged with stealing two mules that belonged to James Beck. Beck lived just within the state of Arkansas, about three miles from Protom, Mo. On the night of August 11, 1916, which was said by the witnesses to be Friday night, two bay mules belonging to Beck disappeared and he was unable to find them. About six weeks later he learned they were at the barn of Rich Kissee at Ozark, in Christian county.

He went there, identified them, and took them away. On Monday following the Friday night on which the mules were stolen they were sold to Stone & Hesterlee by one Wayne Moulder for \$160, although at the time they were worth \$235. Stone & Hesterlee immediately sold them to Kissee.

The facts relied upon by the state to connect the defendant with the theft of the mules briefly are as follows:

Mack Nave was a boy about 15 years of age, and lived with his father, Willis Nave, in

Taney county, about 20 miles from where Beck, the owner of the mules, lived. Willis Nave had a son, Perry Nave, who lived in the neighborhood of Protom, a few miles from where Beck lived. On Friday, about August 11th, Mack Nave passed Beck's house and watched the house with unusual and unnecessary intentness, according to the statement of Beck. The mules disappeared that night. On Sunday two mules with halters on, answering the general description of Beck's mules, were seen in Willis Nave's pasture. It was suggested to Mack Nave that they had better be driven out. He said, "Let the mules get out the way they got in." The witnesses who saw those mules could not tell whether they were fastened up by halters or not. The defendant, Mack Nave, was in the neighborhood of Protom at the time the mules were stolen, and, according to the testimony of his brother, he stayed all night at Perry's house on that night, and remained there until noon the next day.

Wayne Moulder, who sold the mules to Stone & Hesterlee two days after they were stolen, was a farm hand in the employ of Willis Nave. When he brought the mules to Ozark he was riding a mule which belonged to Willis Nave; Mack Nave, the defendant, told some of the witnesses that he loaned Moulder that mule to ride Sunday night.

As soon as the mules were recovered, the defendant was arrested by the sheriff of Christian county and taken to Ozark. On the way the sheriff stopped at Sparta, in Christian county, where he told his prisoner that he would have to take him before a justice of the peace. He explained to Nave that he would have to have a preliminary trial or else waive it. The defendant did not seem to understand that he would have to go through a preliminary trial, and, after further explanation, he said: "Well, I guess I just as well plead guilty." Other witnesses heard him make the statement in connection with a preliminary hearing. No objection was made to that evidence. The next morning after he was taken to Ozark his father, Willis Nave, having ridden all night to reach Ozark, appeared there and paid Hesterlee \$207, the amount the mules had cost Hesterlee with the expense. Hesterlee said he thought after that transaction the matter would be dropped. Beck then took the mules home. Wayne Moulder disappeared about the time the mules did and was not seen in the neighborhood afterwards.

On Sunday, when the mules were seen in Willis Nave's pasture, the place was in charge of one Norman Combs, who, it seems, had rented the place. He knew the mules referred to did not belong to Willis Nave. Some other facts are mentioned in the evidence tending to show the movements of Mack Nave and Wayne Moulder in the neigh-

borhood Saturday and Sunday after the mules disappeared from Beck's place.

When Willis Nave was on the stand and recalled by the defendant in rebuttal, he was asked this question:

"I will ask you if you didn't have a conversation with Norman Combs in which you said, 'Aint this a good get-off?' and he said, 'Yes, sir; it is,' and you said, 'What do you think of this?' and he refused to tell you there before the family, and out in the field the next morning you asked him again, 'What do you think about this?' and you told him that you thought Mack had taken the mules."

The witness denied making any such statement.

Norman Combs was then placed upon the stand and asked if the conversation took place—the defendant not present—in substantially the same language as in the question put to Willis Nave. He answered that Nave did make the statement. All this was duly objected to by appellant's counsel and exceptions saved.

[1] 1. The evidence offered and admitted to contradict Willis Nave was gross error. While a witness may be impeached by showing that he has made statements at other times in contradiction of what he testifies on the stand, contradictory statements, which may be shown for the purpose of impeachment, must be statements of facts pertinent to the issue, and not merely matters of opinion; facts which would be competent evidence independent of any inconsistency with the testimony of the witness. *Hamburger v. Rinkel*, 164 Mo. 398, loc. cit. 407, 64 S. W. 104; *McFadin v. Catron*, 120 Mo. 252, loc. cit. 263, 25 S. W. 506; *Schloemer v. Transit Co.*, 204 Mo. loc. cit. 118, 102 S. W. 565; *Wojtylak v. Coal Co.*, 188 Mo. loc. cit. 289, 87 S. W. 506; *Herman v. Ry., L. & P. Co.*, 144 Mo. App. loc. cit. 154, 129 S. W. 414. Here the former statement of Willis Nave, which the state was allowed to prove, merely gave his opinion. It is not a statement of any fact within the knowledge of the witness or within the knowledge of Nave. Its damaging character is sufficient to account for the verdict.

[2] II. In order to convict it was necessary by competent evidence, to connect the defendant with the commission of the crime. The statement made by the appellant when under arrest that he thought he had better plead guilty was incompetent, but was not objected to. A boy 15 years of age, in cus-

tody of an officer, a threatened prosecution for grand larceny impending, with no friend or counsel near to advise him, makes the statement which on its face does not prove he actually participated in taking the mules. It was only an expression of helplessness and despair in the heart of the boy, and, under the circumstances, ought not to be considered as evidence against him.

There is no other fact in the evidence which accomplishes more than to arouse a mere suspicion that he participated in the theft. There is no doubt of the guilt of Wayne Moulder. He took the mules away from the neighborhood of Protom to another county and sold them, got the money, and disappeared. It is not shown that the defendant assisted in any manner in taking the mules away or received any of the proceeds of the sale. He passed Beck's house on the day preceding the night on which the mules were stolen and actually looked at Beck's house with considerable interest. It is not even claimed that he looked at the mules or saw them on that occasion. He loaned Moulder the mule on which he rode the night he took the mules away. It is not shown to be anything unusual for one to loan a mule or saddle horse in that community without inquiring the purpose for which it may be used. If there had been evidence that Mack Nave knew where Moulder was going and what he borrowed the mule for, the evidence of that loan might have some probative force.

The mules seen in the pasture of Willis Nave the day after Beck's mules disappeared were not shown to be the stolen mules. That pasture at that time was not in charge of Mack Nave or of his father, Willis Nave, but was in charge of Norman Combs, a witness for the state. It was not shown that the defendant brought the mules there or took them away or had anything to do with them while they were there except to tell some one that they might get out the way they got in.

The evidence was entirely insufficient to submit to the jury the question of the defendant's guilt.

The judgment is reversed, and the defendant discharged.

RAILEY and MOZLEY, CC., concur.

PER CURIAM. The foregoing opinion by WHITE, C., is adopted as the opinion of the court.

All the Judges concur.

STATE v. JACKSON. (No. 21916.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

1. Indictment and information \S 110(38)—Indictment for carrying concealed weapons following statute held sufficient.

An information setting out the crime of carrying concealed weapons in accordance with approved precedents and closely following Rev. St. 1909, \S 4496, is sufficient.

2. Criminal law \S 875(1)—Verdict finding defendant guilty as charged held sufficient.

In a prosecution for carrying concealed weapons, a verdict, "We, the jury, find defendant guilty in the manner and form as charged in the information, and assess his punishment," etc., held sufficient in form.

3. Criminal law \S 1159(2)—Verdict of guilty supported by substantial evidence will not be disturbed.

In a prosecution for carrying concealed weapons, it was the duty of the jury to pass upon the facts under the instructions of the court, and, where there was substantial evidence to sustain a verdict of guilty, it should stand.

4. Criminal law \S 1064(1)—Assignments that verdict was against evidence, or against law declared in instructions, are too general.

Assignments in a motion for new trial that "the verdict is against the evidence" or that "the verdict is against the law as declared in the instructions given by the court" are too indefinite to require consideration, in view of Rev. St. 1909, \S 1841, requiring motions to be specific.

5. Criminal law \S 901—Demurrer to state's evidence is waived where defendant introduces evidence and rebuttal evidence follows.

Defendant in a criminal case, having put before the jury his own evidence, and rebuttal testimony having been introduced, waived his right to be heard on the overruling of his original demurrer to the evidence filed at the close of the state's evidence in chief.

6. Criminal law \S 752—Overruling of demurrer not error where verdict is supported by substantial evidence.

If defendant filed a demurrer to the evidence at the conclusion of the whole case, the court would have been justified in overruling it, since there was substantial evidence offered at the trial sustaining the verdict of guilty.

7. Weapons \S 17(5)—Intention in carrying pistol concealed held for jury.

In a prosecution for carrying a concealed weapon, it was a question for the jury as to whether defendant intentionally carried his pistol concealed.

8. Weapons \S 11(1/2)—That defendant was a postmaster and had government money and stamps did not excuse carrying concealed weapon.

In a prosecution for carrying concealed weapons, under Rev. St. 1909, \S 4496, it was

not error for the court to instruct the jury that the fact that defendant was a postmaster, and had government money and stamps upon or about his person, etc., was not a defense.

9. Criminal law \S 1129(3)—General assignment as to rulings on evidence will be overruled where record shows no error.

In a criminal prosecution, where an assignment of error alleging admission of incompetent, illegal, and irrelevant testimony offered by the state over defendant's objection does not point out the specific objectionable evidence, and where the record does not show erroneous adverse rulings in such respect, the assignment will be overruled.

10. Criminal law \S 655(2)—Remark by court that accused as postmaster had no right to carry concealed weapon to protect government funds held proper.

In a prosecution for carrying concealed weapons, where defendant was asked if he was not under bond to protect government funds, which was objected to as immaterial, the court's remark that "it don't give him any authority to carry a pistol," and further that "the law says he shall not carry it concealed except on certain conditions, and the intention don't make any difference," and a further statement that the law points out the conditions under which one may carry a concealed weapon, where defendant was attempting an excuse because he was postmaster and had government funds on his person, held proper.

11. Criminal law \S 720(2)—Assertion of prosecuting attorney held supported by evidence.

In a prosecution for carrying concealed weapons, an interruption of the prosecuting attorney when he stated that the prosecuting witness said that something fell to the ground during the scuffle between himself and defendant, objecting that there was not such testimony, is without merit, where the prosecuting witness had testified as to defendant's picking up something from the ground and not knowing where defendant got the pistol.

12. Criminal law \S 720(7) — Statement of prosecuting attorney showing his conclusion from evidence held proper.

In a prosecution for carrying concealed weapons, a remark of the prosecuting attorney that defendant tore his pocket in trying to get his pistol out held proper, as counsel's opinion, where witness testified that the pocket was torn after defendant put his hand in his pocket, it being the province of the jury to determine the facts from the evidence supporting such contention.

13. Criminal law \S 728(1)—Court need not permit interruption of prosecuting attorney's argument by trivial objections.

While it is the duty of the trial court to protect a defendant charged with crime from improper remarks, calculated to prejudice the jury against him, yet, on the other hand, trivial objections interrupting the prosecuting attorney's argument, made for the purpose of breaking the force of his remarks to the jury, should not be tolerated.

Appeal from Circuit Court, Gasconade County; R. A. Breuer, Judge.

John H. Jackson was convicted of carrying concealed weapons, and, after overruling of his motion for new trial, he appeals. Affirmed.

On July 14, 1919, the prosecuting attorney of Gasconade county, Mo., filed in the circuit court of said county a verified information charging defendant with the crime of carrying a concealed weapon. The information, without caption and jurat, is as follows:

"J. W. Hensley, prosecuting attorney within and for the county of Gasconade, in the state of Missouri, informs the court upon the sworn complaint of Fred. Bodendick that on the 29th day of May, 1919, at and in the county of Gasconade, in the state of Missouri, John H. Jackson, not being then and there a legally qualified sheriff, police officer, or other person whose bona fide duty it was to execute process, civil or criminal, make arrests or aid in conserving the public peace, and, not being then and there traveling in a continuous journey peaceably through the state of Missouri, did unlawfully and feloniously carry concealed about his person a certain deadly and dangerous weapon, to wit, a revolving pistol, against the peace and dignity of the state. J. W. Hensley, Prosecuting attorney of Gasconade county, Mo."

On September 8, 1919, defendant was properly arraigned and entered his plea of not guilty.

The evidence on the part of the state tends to show that on the evening of May 29, 1919, Fred Bodendick, prosecuting witness in this case, arriving in Bland, Gasconade county, of this state, from Hermann, also in this state, went directly to the light plant and garage to see one Coonle Miller, relative to a trip back to Hermann next day. Upon arriving at the light plant and garage, he saw the defendant, John H. Jackson, in the act of filling one of the tires of his car which he had there with air. Defendant finished, put on his coat, and walked around to the back of the car, met Bodendick, who said to him, "You have been running over the family, and probably you want to run over me," whereupon he struck defendant, and defendant ran his hand in his right outside pocket. Bodendick, seeing this action, took hold of defendant, and they scuffled until, Bodendick says, defendant said he had enough. During this altercation Bodendick did not see defendant with a pistol, nor did he know that he had one, although while they were scuffling he felt something in defendant's pocket. After the scuffle they both walked back toward the car, and at this time defendant reached down and picked something from the ground. Bodendick saw that defendant had a gun or pistol, and attempted to "grab" his hand. Defendant fired, and Bodendick turned and ran. Defend-

ant followed, discharging the pistol five times, firing each shot in Bodendick's direction. The first went through his "pants," and one of the others through his "shirt." It appears that defendant was the postmaster at Bland, and Bodendick's wife had told him that defendant had ejected his (the witness') daughter twice from the post office. One witness testified that defendant was not a sheriff, constable, police officer, or any officer authorized to execute process or make a criminal arrest, and several other witnesses who were present and saw the encounter testified that they did not at any time see a gun or pistol until after defendant had picked one up from the ground, and their testimony as to the other incidents are substantially as outlined above.

At the conclusion of respondent's evidence in chief, the defendant asked, and the court refused, the following instruction:

"The court instructs the jury that, under the law and the evidence in this case, you should find the defendant not guilty."

An exception was saved to this ruling.

The evidence on the part of the defendant tends to show that he was the postmaster at Bland, and on the evening of the 29th of May, 1919, he closed the post office about 7 o'clock, and, not having a safe in the office, he placed the money, stamps, and money orders in his pocket to take home for safe-keeping, as it was his custom to do. He also placed in his right-hand outside coat pocket his pistol, and, as he states, the lapel of the pocket of his coat was turned in, and the pistol not concealed. He had recently bought an automobile from Mr. Neese, the cashier of the Commercial Bank, and had made an appointment with him to test the car out, to ascertain whether or not it was in good running condition. The defendant was intending to make a trip to New Salem the next day. After the ride, and after Mr. Neese had left him, he went to the garage to fill one of the tires of the car with air, intending to leave immediately for his home. After filling the tire, he put on his coat, and noticed the butt of the pistol protruding from his pocket. After putting on his coat, and after he started to get into the car, he noticed the valve cap of the air stem on the ground and stooped to put it on. While doing this, he heard Bodendick, or some one else, say something, turned his head, and saw that it was Bodendick, who immediately kicked him while he was still in this position. He grabbed Bodendick by the leg, and was "slung" loose and kicked in the ribs twice more. Defendant again "grabbed" Bodendick's leg, and they both fell in a nearby ditch, and as they crawled out Bodendick, being somewhat ahead of defendant, started to pick up something, and, as defendant said, made some threatening remark, just what it

was he did not know. At this time he saw his gun on the ground, picked it up, and, as Bodendick "grabbed" him again, fired at him and continued to do so five times. Defendant says that he does not know how the gun came to be on the ground. After the shooting defendant surrendered to a deputy sheriff and was released on bond.

The instructions and such other matters as may be deemed important will be considered in the opinion.

The case was tried on September 8, 1919, before a jury, and the latter returned into court the following verdict:

"We, the jury, find the defendant guilty in manner and form as charged in the information, and assess his punishment at a fine of \$250.

"Geo. Ruediger, Foreman."

On September 10, 1919, the court pronounced judgment and sentence upon defendant in conformity with the terms of the verdict. Defendant, in due time, filed his motion for a new trial, which was overruled, and the cause appealed by him to this court.

Frank W. McAllister, Atty. Gen., and H. P. Ragland, Asst. Atty. Gen., for the State.

RAILEY, C. (after stating the facts as above). [1] 1. The information heretofore set out is sufficient in form and is in accordance with approved precedents. Section 4496, R. S. 1909; State v. Athanas, 150 Mo. App. 588, 131 S. W. 373; State v. Smith, 24 Mo. App. 413; Kelley's Crim. Law & Practice, § 588, p. 517; State v. Carter, 259 Mo. loc. cit. 360, 168 S. W. 679; State v. Barton, 209 S. W. 888, 889.

[2] 2. The jury found defendant guilty as charged in the information and assessed his punishment at a fine of \$250. The verdict was sufficient in form. State v. Richardson, 248 Mo. loc. cit. 575, 576, 154 S. W. 735, 44 L. R. A. (N. S.) 307; State v. Elvina, 101 Mo. 243, 13 S. W. 937; State v. Berning, 91 Mo. 82, 85, 3 S. W. 588.

[3, 4] 3. Defendant, in his motion for a new trial, assigns the following errors:

"(1) The verdict is against the evidence.

"(2) The verdict is against the law as declared in the instructions given by the court."

There was substantial evidence offered at the trial to sustain the verdict against defendant. It was the province of the jury to pass upon the facts under the instructions of the court. Aside from the foregoing, we have uniformly held that such general assignments are too indefinite to require at our hands further consideration of same. State v. Mann, 217 S. W. loc. cit. 69; State v. Rowe & Sanders, 271 Mo. loc. cit. 94, 196 S. W. 7; State v. Selleck, 199 S. W. loc. cit. 130, 131; State v. McBrien, 265 Mo. loc. cit. 604, 605, 178 S. W. 489; State v. Sydnor et

al., 253 Mo. loc. cit. 380, 161 S. W. 692; State v. Scott, 214 Mo. loc. cit. 261, 113 S. W. 1060; State v. Espenschied, 212 Mo. loc. cit. 222, 223, 110 S. W. 1072; section 1841, R. S. 1909.

[5] 4. Appellant, in his third assignment, contends that the trial court committed error in overruling his demurrer to the evidence at the conclusion of the state's evidence in chief. The defendant, having put before the jury his own evidence, and rebuttal testimony having been introduced, he waived his right to be heard on the original demurrer, as it became the duty of the jury to determine the issues under all the evidence in the cause. The ruling, in respect to above matter, has become elementary law in this state, as shown by the following authorities: State v. Mann, 217 S. W. 69; Lareau v. Lareau, 208 S. W. loc. cit. 243; State v. Selleck, 199 S. W. loc. cit. 130; Riley v. O'Kelly, 250 Mo. loc. cit. 660, 157 S. W. 566; State v. Cummings, 248 Mo. loc. cit. 518, 154 S. W. 725; State v. Gow, 235 Mo. loc. cit. 329, 138 S. W. 648; State v. Lackey, 230 Mo. loc. cit. 713, 132 S. W. 602; State v. Martin, 230 Mo. loc. cit. 700, 132 S. W. 595; Riggs v. Railroad, 216 Mo. loc. cit. 310, 115 S. W. 969; Hilz v. Ry. Co., 101 Mo. loc. cit. 42, 13 S. W. 946; McPherson v. Railway Co., 97 Mo. loc. cit. 255, 10 S. W. 846; Guenther v. Ry. Co., 95 Mo. loc. cit. 289, 8 S. W. 371; Bowen v. Railway Co., 95 Mo. loc. cit. 275, 276, 8 S. W. 230.

[6] (a) There is nothing in the record before us which indicates that defendant filed a demurrer to the evidence at the conclusion of the whole case, but, even if one had been filed, the trial court would have been justified in overruling same, as there was substantial evidence offered at the trial sustaining the verdict of the jury.

[7, 8] 5. Appellant's fourth assignment reads as follows:

"(4) Because the court erred in giving instruction No. 4, as asked by the state."

Said instruction 4 is couched in the following language:

"The court instructs the jury that the fact that the defendant was postmaster or had money or stamps upon or about his person is not of itself defense to this action, and does not authorize or excuse him from carrying the pistol concealed, if you find he did so intentionally carry it concealed."

This assignment is conclusively settled adversely to the contention of appellant in State v. Carter, 259 Mo. loc. cit. 360, 168 S. W. 681, where we said, in construing section 4496, R. S. 1909:

"III. The court did not err in refusing to allow the defendant to prove that he had been threatened with great bodily harm or had good reason to carry the weapon in the necessary defense of his person. The above were proper

defenses under section 1863, Revised Statutes 1899. But that section was repealed in 1909, and a new section (section 4496, R. S. 1909) was enacted in lieu thereof. Laws 1909, p. 452.

"Those defenses are not available to the defendant charged with carrying concealed weapons under the new act."

To same effect is *State v. Reagan*, 217 S. W. 84, 85.

It was a question for the jury as to whether defendant intentionally carried his pistol concealed. If he did so, then the fact that he was postmaster, or had money or stamps upon or about his person, did not excuse him for violating the plain provisions of section 4496, supra. It is evident that the law-makers of this state, in the enactment of section 4496, were attempting to put a stop to the carrying of firearms, except in respect to those cases where the persons in charge thereof were authorized by said section to carry same.

The foregoing contention of appellant is accordingly overruled.

[9] 6. The fifth assignment reads as follows:

"(5) Because the court erred in admitting incompetent, illegal, and irrelevant testimony offered by the state over the objections and exception of the defendant."

No brief has been filed by appellant, and the general objection supra does not point out to us any specific objectionable evidence alleged to have been offered by the state. We have, however, read the record carefully, in passing upon the questions involved, and do not find any adverse rulings of the court, in respect to above matters, of which the defendant can have any legal grounds of complaint.

[10] 7. In his sixth assignment of error appellant asks for a reversal of the cause:

"Because the court erred in making the following prejudicial statement in the presence and hearing of the jury."

The matters complained of under this caption occurred as follows:

"Q. By Mr. Baxter to defendant: I will ask you if you are under bond to protect the funds of the United States government in the post office?

"Mr. Hensley: I object to that; that is not material.

"The Court: It don't give him authority to carry a pistol.

"Mr. Baxter: We are offering the evidence to show the intention of the defendant as to whether or not he intended to carry this pistol concealed.

"The Court: The law says he shall not carry it concealed except on certain conditions and the intention don't make any difference.

"Mr. Baxter: If the court please, the intention is the primary feature in this case, as to whether or not this defendant intended to carry this pistol concealed.

"The Court: The law says under what condi-

tions a man may carry a pistol concealed, and when he carried it under any other conditions concealed, the intention don't cut any figure. (To which ruling of the court the defendant by his counsel then and there duly excepted and still excepts.)

"Which said error was not cured by the court later giving instruction No. D offered by defendant."

The court was clearly within the law in making the above statements. *State v. Carter*, 259 Mo. loc. cit. 360, 168 S. W. 679. The first question above quoted clearly indicated that defendant's counsel was attempting to show that his client ought to be excused for carrying a concealed weapon if he was under bond to protect the funds of the United States government. The court not only ruled correctly in respect to above matter, but at the instance of defendant gave the jury instruction D, which reads as follows:

"The court instructs the jury that to conceal a weapon means something more than carrying it or the mere fact of having it where it may not be seen. It implies an assent of the mind and a purpose to carry it so that it may not be seen; and the court instructs you that, if you find and believe from the evidence that the defendant John Jackson did not intend to carry the pistol mentioned and described in the information herein concealed, then you should find the defendant not guilty."

This assignment is without merit and is overruled.

[11] 8. In appellant's seventh assignment of error, it is claimed that counsel for the state was permitted to indulge in improper statements in his argument to the jury. The following occurred:

"Mr. Monroe (attorney for state): The prosecuting witness says that during the scuffle something fell on the ground—

"Mr. Baxter (interrupting): There is no evidence on the part of the prosecuting witness, and he did not testify, that anything fell on the ground.

"The Court: That is a mere matter of argument; go ahead."

Turning to the transcript of the evidence (pages 6 and 7), we find that defendant's counsel had the prosecuting witness testify as follows:

"Q. Now, you say the first time you saw this pistol was when Mr. Jackson had stooped and picked it up off of the ground? A. He picked something off of the ground, and the first I seen it was in his hand. * * *

"Q. You don't know where that pistol came from that Mr. Jackson picked off of the ground? A. No, sir."

In view of the foregoing, we are of the opinion that the interruption of respondent's counsel was without merit, and properly overruled.

[12] Complaint is also made as to the re-

mark of respondent's counsel to the effect that, when Jackson tried to get that pistol out, he tore his pocket. The prosecuting witness said defendant ran his hand in the pocket of his coat. He further testified:

"Q. Well, what was the condition of the pocket after he done this? A. The lining was torn wrong side out, it looked like about half-way, and his coat was tore down the side a little ways."

In view of the foregoing, counsel for respondent was simply giving it as his opinion that Jackson tore the pocket out in getting the pistol. It was the province of the jury to determine the facts, and no harm was done in overruling the above objection.

[13] Other remarks of the state's counsel were objected to, but we find there was no merit in the objections thus made. While it is the duty of the trial court to protect a defendant charged with crime from improper remarks calculated to prejudice the jury against him, yet, on the other hand, trivial interruptions of the prosecuting attorney, made for the purpose of breaking the force of his remarks to the jury, should not be tolerated.

The issue in this case was whether the defendant was carrying a concealed weapon in violation of law. The facts were put before the jury without prejudice, and there is no merit in any of the objections above referred to in the motion for a new trial.

9. The defendant had a fair and impartial trial upon proper instructions given by the court. He was convicted upon substantial evidence, and we find no grounds for disturbing the verdict of the jury.

The judgment below is accordingly affirmed.

WHITE and MOZLEY, CC., concur.

PER CURIAM. The foregoing opinion of RAILEY, C., is hereby adopted as the opinion of the court.

All concur.

STATE v. HOSTETTER. (No. 21920.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

1. Homicide §218—Evidence as to admissibility of dying declaration properly heard out of presence of jury.

In determining the admissibility of a claimed dying declaration, the trial court acts properly in hearing evidence in regard to the same out of presence and hearing of jury.

2. Homicide §203(1), 214(1) — Res gestæ declarations under sense of impending death admissible; "dying declarations."

Declarations by deceased, admissible as his dying declarations, must be a part of the res

gestæ, and voluntarily made under the realization of impending death.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dying Declarations.]

3. Homicide §207—Form of dying declarations immaterial.

It is immaterial in what form claimed dying declarations were made, or who prepared them, or when, if, when they were read over to declarant, he understood and assented to them.

4. Homicide §209—Dying declarations admissible, though not written down in exact language.

The admissibility of dying declarations is not affected because when written down they were not in the exact language of declarant if, when read over to him, he approved them.

5. Criminal law §778(2) — Instruction not erroneous as imposing excess burden on defendant.

In prosecution for murder, instruction that jury, after ascertaining true facts, should apply them to the law contained in the instructions, etc., held not erroneous through its use of the word "true," as imposing an excess burden on defendant.

6. Criminal law §822(1)—Instructions to be construed together or as a whole.

Instructions are to be construed as a series or as a whole, except under certain limitations.

7. Homicide §300(5) — Instruction defining jury's province not in conflict with one on self-defense.

In prosecution for murder, instruction defining generally the jury's province, in particular stating that it was their duty to receive the instructions as the law, and, after ascertaining the true facts from the evidence, to apply them to the law contained in the instructions, held not in conflict with instruction defining doctrine of self-defense as applicable under facts in evidence.

8. Homicide §300(2)—Charge defendant "alleges" he killed in self-defense not improper; "affirms;" "asserts;" "declares."

In prosecution for homicide, the use of the word "alleges," synonymous with "affirms," "asserts," or "declares," in an instruction on self-defense, using the expression that defendant alleged that the act with which he was charged was done in self-defense, held not improper as belittling the defense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Affirm; Allege; First Series, Declare.]

9. Criminal law §829(5)—Refusal of requested instruction on self-defense held not error, in view of instruction given.

In prosecution for murder, in view of instruction given at instance of state, refusal of defendant's requested instruction on self-defense in regard to the other phases of the case held not error.

10. Homicide §300(2)—Use of "good cause" in defining self-defense not error.

In prosecution for murder, use of phrase "good cause," instead of "reasonable cause," in defining self-defense in the instructions was not error.

11. Homicide §309(3)—Evidence of intentional killing held not to warrant instruction on manslaughter.

In prosecution for murder, evidence held not to warrant instruction on manslaughter in fourth degree under either Rev. St. 1909, § 4467, or section 4468; the killing having been intentional beyond controversy.

12. Homicide §79—In absence of sudden passion, offense not reduced to manslaughter in fourth degree.

In absence of evidence that defendant acted on sudden passion engendered by reasonable provocation, the existence of malice, a vitally constituent element of murder, is not negatived, and the offense is not reduced to manslaughter in fourth degree.

Appeal from Circuit Court, Carroll County; F. P. Divilbiss, Judge.

Enos Hostetter was convicted of murder in the second degree, and appeals. Affirmed.

James A. Shannon, of Kansas City, for appellant.

Frank W. McAllister, Atty. Gen., and Henry B. Hunt, Asst. Atty. Gen., for the State.

WALKER, J. Appellant was charged by information in the circuit court of Carroll county with murder in the first degree in having in that county, on the 31st day of August, 1918, stabbed with a knife and killed one Powhattan B. Darr. Upon a trial in January, 1920, appellant was convicted of murder in the second degree, and his punishment assessed at 10 years' imprisonment in the penitentiary. From this judgment he appeals.

Darr, the deceased, was a bachelor, living on a farm in Carroll county, which for twelve or more years prior to the difficulty resulting in his death he had managed for his sister, a Mrs. McKinney. Mrs. McKinney had died in the January preceding. During her last illness the appellant and his wife—the latter being a sister of Mrs. McKinney and of Darr—had come to the McKinney home and had remained there until Darr's death, which occurred the second day after he was stabbed by the appellant.

The morning of the difficulty Darr, who had been out attending to such chores as are necessary on a farm, came into the kitchen where Mrs. Hostetter was preparing her own and her husband's, the appellant's, breakfast. When Darr entered the room he ordered the appellant, who was sitting before the cook stove, to get out of his

way, and began to prepare his own breakfast. Appellant became angry, and started to rise, when his wife stepped between him and Darr and told appellant to go out and feed the chickens. He went, and Darr proceeded to prepare his breakfast. Mrs. Hostetter stepped into the adjacent dining room for a moment, and in the language of Darr, to whose testimony the jury gave credence, while he was leaning over the stove and breaking an egg into a skillet, appellant rushed upon him and began to stab him. He turned and attempted with his bare hands and arms to ward off the knife thrusts being inflicted by appellant. The noise occasioned by appellant's onslaught brought Mrs. Hostetter back into the room. She found Darr backed up against a window by the appellant and so hard-pressed that the window was broken out. She attempted to pull appellant away from Darr, but was unable to do so until assisted by her grown son, who came hurriedly upon the scene from a bedroom on the second floor in response to his mother's appeal. Aside from appellant's statement, there is no pretense, except such as is afforded by proof that a butcher knife was found lying on the kitchen floor, that Darr had attempted with a weapon to assault the appellant. This knife it was shown was one used in the kitchen for cutting meat when a meal was being prepared, and the reasonable conclusion is that if it was in Darr's possession when he was attacked it was for the usual purpose for which it had been employed. The jury so concluded, as evidenced by their ignoring appellant's testimony in this regard. When the appellant was pulled away from Darr, the latter was found to have received a number of knife wounds. One of these was a little to the right of the center of the chest, an inch or two above the right nipple, and penetrated the lobe of the lung. Another knife wound penetrated the liver. Other wounds were on one arm, a cut on the forehead where the knife had struck the bone and glanced, and a slashing cut penetrating one of the cheeks. When appellant's wife and son pulled him away from Darr the latter was bleeding profusely. Neighbors who had been summoned found upon their arrival Darr sitting in a chair in the kitchen. His shirt had been removed, and bandages, made from a bed sheet, had been wrapped about his body to stop the flow of blood from his wounds, which covered the kitchen floor where the difficulty had occurred. Some of the neighbors helped him to a bed, where he languished from Saturday, the day of the onslaught, until the succeeding Monday, when he died from the effect of his wounds.

Darr made dying declarations, the material facts of which are embodied in the fore-

going statement, but which are also set forth in detail hereafter.

The signed statements of the wife and grown son of the appellant, made on the day of the difficulty and their testimony at the trial, do not in their pertinent portions differ sufficiently from the facts as above set forth to require them to be more particularly stated. There was testimony on the part of the state of threats having been made a few days before the difficulty to two different persons by the appellant against Darr. To one of these, a woman, appellant said that—

"Darr had been mean from childhood, and that he would kill him if it grieved Mammy (his wife, Darr's sister) the rest of her days."

Appellant denied having made these threats. A witness for the defense testified that Darr had several months prior to the difficulty tried to hire him to kill appellant. Appellant testified that he was sitting at the corner of the kitchen range on the morning of the difficulty when Darr came in, jerked his chair, and said: "You get up and get out of here." His wife went to Darr and said: "My God, Bud, what does make you do this way?" She then asked appellant to go and feed the chickens, and he went. When he came back and was going to get the washbasin Darr struck him a terrible blow across the nose with his hand. Appellant turned, and saw Darr with a butcher knife raised as if to cut him. He warded off the blow and struck Darr; that his whole thought was to save his life; that Darr's eyes looked like those of a maniac. Appellant remembered cutting Darr at one time with all of his power; that it was the only thing that saved his life; that his wife ran in and grabbed his wrist, and when she saw the knife in his own hand it took all the life out of him, and he dropped the knife; that his wife got between him and Darr; and she and his son separated them; that at the time appellant was bleeding from the nose; that his granddaughter then said, "Daddy, come with me," and at his wife's request he left and went to a neighbor. On the way he washed off the blood in a branch, and then found the cut on his face. On cross-examination appellant said that his nose, as a result of the blow given him by Darr, was badly swollen for a week; that when Darr struck him he was standing in a small space between the stove and cabinet; that while so situated he struck at appellant with a big old knife; that not a word was spoken, and they just went at it; that appellant cut Darr as quick as he could get out his knife; that he warded the latter's blows off with his left hand and cut him with his right. He did not know at what stage of the affray Darr's knife fell from his hand; he did not see it fall; he heard something fall. He does not say

whether this was before or after he struck Darr, nor that it was the knife he heard fall. There were some eggs in a skillet and some knives and spoons on the floor after the scuffle.

Several witnesses testified that they saw appellant soon after the difficulty and for a day or two thereafter; that he had no cut on his face, and his nose was not swollen. Enough of the relevant facts have been stated to enable an intelligent disposition to be made of the errors assigned.

[1] I. The admission in evidence of the dying declarations of Darr is assigned as error. The reasons urged are that they were not voluntary statements, but were suggested by the prosecuting attorney, and that they were not in the language of the deceased, were not written by him, and are simply conclusions of the prosecuting attorney from what Darr said to him. The trial court in determining the admissibility in evidence of the declarations pursued the course we have frequently approved of hearing evidence in regard to same out of the presence and hearing of the jury. *State v. Finley*, 245 Mo. 465, 150 S. W. 1051; *State v. Colvin*, 226 Mo. loc. cit. 483, 126 S. W. 448; *State v. Crone*, 209 Mo. 316, 108 S. W. 555; *State v. Johnson*, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405. S. J. Jones, testifying at that hearing, said:

"I saw Darr the day after he was stabbed. He was lying on the bed, appeared to be suffering; his breathing was short. As I came in to the room he said: 'Jack, they've got me;' or 'He's got me; this wound here in my breast is going to kill me.'"

Jones said, "Maybe it's not so bad as that; not so bad as you think," to which Darr replied, "Yes; I am not going to get well; I am going to die." Jones then said:

"If he actually believed he was going to die, that the prosecuting attorney was there, and he had better call him in and he (Darr) make a statement." "However," continues Jones, "before that he told me how it occurred. He said he had made a statement to the prosecuting attorney the day before. To which I replied, 'Yes; but probably you didn't make that in view of impending death or a belief that you were going to die,' and I should call him in and repeat what he had to say about it. The prosecuting attorney came in, and I stated to him the purpose in calling him. He sat down at a table close by the bed and asked Mr. Darr questions, and he answered them, and the prosecuting attorney wrote them out. After it was completed the prosecuting attorney handed it to me, and we called in Mr. Calvert, and I sat down at the head of the bed, close by Mr. Darr, and read it over to him, that paper there, and his reply was, 'That was the way it occurred; that was the facts.' I read it over in his hearing. He appeared to hear and comprehend it, but he was so weak he couldn't sign it, couldn't sit up, and my recollection is the prosecuting attorney signed his name there, and we witnessed it."

Two dying declarations of Darr were read in evidence. The first was introduced by the prosecution in support of the charge in the information; and the second was introduced, also by the prosecution, upon the demand of counsel for the defense, on the ground that it was being withheld and its contents concealed from the appellant. The admission in evidence of this last declaration, not only with the approval but upon the demand of appellant, will technically suffice to dispose of this ground of error adverse to appellant's contention, as both declarations are in all of their substantial facts identical. The first introduced is as follows:

"I, Powhattan B. Darr, a resident of Carroll county, Missouri, in view of impending death from certain knife wounds inflicted upon me by Enos Hostetter, do make the following statement:

"About 7 o'clock Saturday morning, August 31, 1918, I came into my kitchen from attending to my chores to get breakfast. My sister Nannie Hostetter and her husband Enos Hostetter were in the kitchen when I came in. Enos Hostetter was in my way and I asked him to get out of my way. He seemed to resent my request and started to get out of his chair, when his wife stepped in between and told him to go out and feed the chickens. Both Enos Hostetter and his wife Nannie Hostetter then left the kitchen and I went on about the preparation of my breakfast, without paying any further attention to either of them. The next I knew of Enos Hostetter again being near me was while I was standing by the cookstove leaning over breaking an egg for my breakfast. At that time while I was in that position he came up from behind and began striking and cutting me with a knife. I didn't know he was near until he struck me from behind. His first blow with the knife caused the deep cut in my right chest. The second cut was farther down on the same side, and after I turned around and began warding off his blows he cut me again in the forehead, on my left cheek and on my left arm. All of these cuts were made by Enos Hostetter with a knife in his hands. I never had a knife or any other kind of a weapon in my hands or about me at any time and I never struck him that morning either before or after he cut me except in warding off his blows with the knife. Nannie Hostetter and her son Robert came into the kitchen and separated us after Enos had cut me, but they were not in the room at the time of the cutting."

To this is appended the mark of Darr, attested by two witnesses.

[2, 3] Ignoring appellant's waiver to the admission of these declarations, we address ourselves to his concrete objections thereto. The declarations were a part of the *res gestæ*; they were voluntarily made by the declarant under the realization of impending death. These are the two prime requisites for their admission in evidence. No question is raised as to the verity of the declarations as embodied in the statement prepared for and signed by the declarant. The ob-

jections are more superficial; they go to the manner in which the declarations were prepared, their phraseology, and that they were conclusions rather than statements of facts. Absent any intimation, much less evidence, that the declarations did not accurately express what was said by the declarant, coupled with the fact, affirmatively shown, that he understood the meaning of the words employed and adopted them, the objections must go for naught. Reason and precedent support the conclusion that it is immaterial in what form the declarations were made. *State v. Livingston*, 204 S. W. 262; *State v. Colvin*, 226 Mo. 446, 126 S. W. 448; *State v. Kelleher*, 201 Mo. 614, 100 S. W. 470; *State v. Nocton*, 121 Mo. loc. cit. 537, 550, 26 S. W. 551. In the latter case we said, in effect, that it was enough if it satisfactorily appeared in any mode that the declarations were voluntarily made under a sense of impending dissolution. This ruling has in like terms received the approval of this court in *State v. Brown*, 188 Mo. loc. cit. 460, 87 S. W. 519. Since the law looks to substance rather than form, the manner in which the declarations are made is of minor importance. It is immaterial who prepared them or when they were prepared, if they were read over to the declarant and he understood and assented to them. *Perry v. State*, 102 Ga. 365, 30 S. E. 903; *People v. Callaghan*, 4 Utah, 49, 6 Pac. 49; *People v. Brady*, 72 Cal. 490, 14 Pac. 202; *Scales v. State*, 96 Ala. 69, 11 South. 121; *State v. Kindle*, 47 Ohio St. 358, 24 N. E. 485; *State v. Cantieny*, 34 Minn. 1, 24 N. W. 458.

[4] Nor is the admissibility of the declarations affected because when committed to writing they were not in the exact language of the declarant, if when read over to him he approved them. *State v. Baldwin*, 15 Wash. 15, 45 Pac. 650; *Com. v. Haney*, 127 Mass. 455; *State v. Parham*, 48 La. Ann. 1309, 20 South. 727; 1 R. C. L. § 86, p. 542. Thus run the rulings elsewhere, and they but serve to affirm under different states of fact what we have said on the subject. In view of all of which appellant's contention is, in this regard, overruled.

II. The giving of instruction numbered 1 is assigned as error. It is as follows:

"The instructions read to you by the court constitute the law of this case, and it is your duty to receive such instructions as the law, and, after ascertaining from the evidence what are the true facts herein, you should apply them to the law contained in said instructions, and find your verdict accordingly and not otherwise. You must not consider any of the instructions as an expression or intimation of what the court thinks of the evidence, because you are the sole judges of the facts herein, and you must ascertain them yourselves from the evidence before you, under your oaths as jurors. In a criminal prosecution such as this, before a verdict, either of conviction or acquit-

tal can be returned, all the jurors must agree to it. When it has been agreed to, however, only the foreman should sign it."

The objection urged to this instruction is the employment of the word *true* which we have italicized. The reason assigned therefor is that—

"The use of the word has the effect to deprive the appellant of the benefit of all evidence except such as may be determined by the jury to be the true facts in the case, thereby placing upon the appellant the great burden of establishing his defense by true facts, whereas the law only requires that he have reasonable cause to believe, and did believe, that the deceased intended to take his life or inflict upon him some great personal injury. That this imposed upon him a greater burden than rested upon the state."

[5] It will be noted from the language employed in the instruction that the jury is required "to ascertain from the evidence what the true facts are, and apply them to the law as contained in the instructions." If this were not enough to clearly define the province of the jury, they are further instructed that they "are the sole judges of the facts, which they must ascertain for themselves from the evidence before them." Thus nothing is left unsaid necessary to enable them to intelligently perform their duty; nor is any additional burden thereby laid upon the appellant. The instruction as framed expresses nothing more than is embodied in the often employed and frequently approved phrase that the jury are the exclusive judges of the facts proved, of the credibility of the witnesses, and the weight to be given to their testimony. *State v. Maupin*, 196 Mo. 164, 93 S. W. 379; *State v. Sharpless*, 212 Mo. 176, 111 S. W. 69; *State v. Mittner*, 247 Mo. 577, 153 S. W. 1020; *State v. Jackson*, 186 S. W. 990.

Nor was this all. The court, having thus defined the general duty of the jury in their consideration of the evidence, gave, as authorized by appellant's testimony, the following instruction on self-defense:

"As a defense to this prosecution the defendant alleges that the act, with which he is charged, was done in self-defense. Upon this feature of the case you are instructed that if at the time defendant stabbed the deceased he [the defendant] had reasonable cause to apprehend a design on the part of the deceased to take his life or do him some great personal injury, and that there was reasonable cause for him to apprehend immediate danger of such design being accomplished, and that to avert such apprehended danger the defendant stabbed the deceased, and that at the time he did so he had reasonable cause to believe, and did believe, that it was necessary for him to do so in order to protect himself from such apprehended danger, then such stabbing was justifiable; and, if such are the facts in this case, you should acquit on the ground of self-defense.

"In passing upon the question whether or

not the defendant had reasonable grounds for believing there was imminent danger that the deceased was about to kill him or do him some great bodily harm, the jury should look at the transaction from the standpoint of the defendant, and under his surroundings at the time he acted. And if you believe from the evidence that the defendant had good cause to believe, and did believe, that the deceased was about to take his life or do him some great bodily harm, and that the defendant, so believing, acted in a moment of apparently impending danger, then it was not required of him to nicely gauge or measure the proper quantity of force necessary to repel the assault. The question to be determined by the jury from the evidence is, not whether some other or lesser force might not have been adequate to protect defendant from great bodily harm or death, but whether when the defendant acted he had reasonable cause to believe that such act was necessary to protect himself from immediate danger of great bodily harm or death.

"It is not necessary, in order to acquit on the ground of self-defense, that the danger should have been actual or real, or that the danger should have been impending and about to fall. All that is necessary is that defendant had cause to believe, and did believe, those facts. On the other hand, it is not enough that defendant should have so believed. He must have had reasonable cause to so believe. Whether or not he had reasonable cause is for you to determine under all the facts and circumstances given in evidence. If you believe from the evidence that defendant did not have reasonable cause for such belief, you cannot acquit him on the ground of self-defense, although you may believe that the defendant really thought that he was in danger. If upon a consideration of all the evidence in the case, including that upon the question of self-defense, you have a reasonable doubt of defendant's guilt, you should acquit him."

[6-8] Keeping in view the rule that the instructions are to be considered as a series or construed as a whole, except under limitations which do not arise in this case, there is no conflict between instruction numbered 1, defining generally the province of the jury, and instruction numbered 9, defining the doctrine of self-defense, as applicable under the facts in evidence. The latter instruction has, in the various phases it presents, been repeatedly approved by this court. The language employed in the introductory sentence of this instruction is objected to, the burden of same being that "the defendant alleges that the act with which he is charged was done in self-defense." And this was his attitude, and hence the propriety of the instruction. The use of the word "alleges," which is but synonymous with "affirms," "asserts," or "declares," or that of the more archaic "allegiare," which simply means "to define or justify by due course of law" (Jac. L. Dict.), was not improper, and in no sense belittled the appellant's defense of self-defense, upon which the jury was, as stated, correctly instructed. Other objections to the

phraseology of this instruction are made, possibly unintentionally, in disregard or in contradiction of its express terms. We regard them as trivial.

Other instructions were given at the request of the state defining the presumption of innocence, a reasonable doubt, the manner in which threats made by either the appellant or the deceased were to be considered, as to what would authorize a verdict for murder in the first or in the second degrees, explaining the doctrine of self-defense, and the meaning of the technical words necessary to be used in charging murder in the first degree. A careful review of these instructions in the light of the evidence does not disclose an error therein of such prejudicial effect to the appellant as to authorize a reversal.

At appellant's request the formal nature of the charge was defined as constituting no evidence of guilt; and the right of the appellant to be on the premises at the time when the crime was committed was declared.

[9] The refusal of appellant's instruction on self-defense and in regard to other phases of the case was not error, in view of the instructions given at the instance of the state.

[10] We have not failed to consider what may be termed appellant's minor contentions in regard to the law as declared by the court. The use of the phrase "good cause," instead of "reasonable cause," in defining self-defense is urged as error. In *State v. Parmenter*, 213 S. W. 439, we discussed at some length an attempted distinction there made by an appellant between the use of these words, and held it to be without merit. We find nothing in the instant case to justify a change in the conclusion there reached.

[11, 12] The evidence did not warrant an instruction for manslaughter in the fourth degree under either section 4467 or section 4468, R. S. 1909. That the killing was intentional there is no ground for controversy. In the absence of evidence that the appellant acted upon a sudden passion engendered by reasonable provocation, the existence of malice, a vitally constituent element of murder, is not negatived, and the offense is not reduced to manslaughter in the fourth degree. Hence the refusal of the court to so instruct was not error. *State v. Goldsby*, 215 Mo. loc. cit. 53, 114 S. W. 500; *State v. Sebastian*, 215 Mo. loc. cit. 80, 114 S. W. 522, and cases; *State v. Stewart*, 212 S. W. 853.

Fifty or more pages of this transcript are employed in a detailed account of the examination of the array of jurors and the opening statement of the prosecuting attorney. No question having been raised in regard to either, they serve no other purpose than to swell the volume of the record and unnecessarily add to the costs of transcription.

Finding no prejudicial error, the judgment of the trial court should be affirmed, and it is so ordered.

All concur.

FORGRAVE v. BUCHANAN COUNTY.

(Supreme Court of Missouri, Division No. 1.
June 2, 1920.)

1. Constitutional law \S 45—Power to nullify act of Legislature vested in courts.

The power of declaring an act of the Legislature void as infringing upon a provision of the Constitution of the state or of the United States is vested in the courts.

2. Constitutional law \S 48 — Unless plainly conflicting with Constitution, act valid.

Unless the conflict of a statute with the Constitution is so plain that it is beyond reasonable doubt, the act should be held constitutional and valid.

3. Statutes \S 125(6)—Title of act relative to justices of the peace sufficient.

Sess. Acts 1915, p. 324, entitled "An act entitled justice of the peace in townships containing seventy-five thousand inhabitants and not over one hundred and fifty thousand inhabitants," which, among other things, fixes salaries, held not violative of Const. art. 4, § 28, providing no bill shall contain more than one subject, clearly expressed in its title.

4. Statutes \S 93(8)—Act relative to justices of the peace, including townships which may come within population limits specified, not local or special.

Sess. Acts 1915, p. 324, relative to justices of the peace in townships containing 75,000 and not over 150,000 inhabitants, held not violative of Const. art. 4, § 53, as a local or special law, though there is only one township in the state of such population, as the act includes townships coming within the category in the future.

5. Statutes \S 75—Act relative to justices of peace in townships of specified population held not to enact special law by partial repeal of general law.

Sess. Acts 1915, p. 324, relative to justices of the peace in townships containing 75,000 and not over 150,000 inhabitants, held not violative of Const. art. 4, § 53, cl. 33, providing that the General Assembly shall not indirectly enact a special law by the partial repeal of a general law.

6. Justices of the peace \S 15—Act relative to justices of peace not invalid as increasing compensation during term.

Sess. Acts 1915, p. 324, relative to justices of the peace in townships containing 75,000 and not over 150,000 inhabitants, held not violative of Const. art. 14, § 8, prohibiting increase during office of compensation or fees of any state, county, or municipal officer because changing justices from a fee to a salary basis; it not appearing compensation is increased.

7. Justices of the peace §—5—Statute intended to apply to incumbents despite provision justices shall give bond.

Sess. Acts 1915, p. 324, relative to justices of the peace in townships containing 75,000 and not over 150,000 inhabitants, *held* intended to govern all justices of the peace, those in office as well as those subsequently elected or appointed, despite section 2, providing every justice before entering on his duties shall give bond.

8. Justices of the peace §—15—Justice held not entitled to clerk hire.

Justice of the peace of Washington township, Buchanan county, *held* not entitled, under Sess. Acts 1915, p. 324, to clerk hire of \$75 a month sued for in addition to his salary.

Appeal from Circuit Court, Buchanan County; L. A. Vories, Judge.

Suit by Lyman W. Forgrave against Buchanan County. From judgment for defendant, plaintiff appeals. Reversed, and cause remanded for new trial in accordance with the opinion.

Graham & Silverman and Strop & Mayer, all of St. Joseph, for appellant.

Randolph & Randolph, of St. Joseph, for respondent.

SMALL, C. I. This is a suit by appellant, a justice of the peace of Washington township, Buchanan county, to recover his salary at the rate of \$2,000 per annum from respondent, under the act of the Legislature of 1915 (Session Acts 1915, p. 324), and also to recover clerk hire at the rate of \$75 per month under said act.

Prior to the institution of this suit appellant had brought a suit in mandamus to compel the judges of the county court of said county to order a warrant issued for the services now sued for. This court held mandamus would not lie, and plaintiff's remedy, if any, was by suit against the county. *State ex rel. v. Hill et al.*, 272 Mo. 206, 198 S. W. 844. Subsequently this suit was brought.

The defense set up in the answer, besides a general denial, was that the act is unconstitutional in that it violated the Constitution of the state in the particulars to be noticed in this opinion. The lower court held with the defendant, and plaintiff appealed to this court.

The act in question, including the caption and title, is as follows:

"(H. B. 106.)

"Justices' Courts—Organization and Procedure; Justices in Townships Containing Seventy-Five Thousand and Not Over One Hundred and Fifty Thousand Inhabitants.

"An act entitled justice of the peace in townships containing seventy-five thousand inhabitants and not over one hundred and fifty thousand inhabitants.

Section

1. Salary and number of justices of the peace.
2. Justice of the peace to give bond.
3. County court may require new bond.
4. Fees to be paid into the county treasury.

Section

5. Penalty for noncompliance with provisions of this article.
6. County may sue on bond of justice of peace.
7. County to provide office—appointment of clerk and payment of salary.

"Be it enacted by the General Assembly of the state of Missouri, as follows:

"Section 1. Salary and Number of Justices of the Peace.—In all townships which now contain or may hereafter contain seventy-five thousand inhabitants and not over one hundred and fifty thousand inhabitants according to the last decennial census there shall be four justices of the peace and each shall receive a salary of two thousand dollars per annum, payable monthly out of the treasury of the county in which he is elected.

"Sec. 2. Justice of the Peace to Give Bond.—Each justice of the peace shall, before entering upon the duties of his office, give bond to the state of Missouri, with two good and sufficient sureties, residents of the county, in the penal sum of two thousand dollars, conditional that he will account for and pay to the proper officer all the money received by him by virtue of his office; said bond to be approved by the county court, or the clerk in vacation, and if taken by the clerk in vacation it shall be approved or rejected by the court at the next term.

"Sec. 3. County Court may Require New Bond.—Whenever any surety shall die, remove from the county or become insolvent, or when from any other cause the county court shall have reason to believe that the sureties to a justice's bond are likely to become or have become insufficient, the court shall require the justice, at a time to be fixed, to show why a new bond shall not be required and unless cause to the contrary be shown, the justice of the peace shall be required within a given time to give a new bond; and in default thereof the office shall be vacant, which shall be filled as now provided by law for filling vacancies in office of the justice of the peace.

"Sec. 4. Fees to be Paid Into the County Treasury.—Each justice of the peace shall pay over all fees collected for his services to the treasurer of the county in which he is elected every thirty days, accompanied by a statement thereof sworn to by him, and all other costs collected by said justice of the peace shall be paid by him every thirty days, accompanied by like sworn statement, to the constable of his district, who shall be responsible for the same and pay over the same to the parties entitled thereto, as is now required by law in cases of costs collected by or paid to said constable.

"Sec. 5. Penalty for Noncompliance with Provisions of This Article.—Upon failure or neglect of any justice of the peace to comply with the provisions of this article, within five days from the time provided for paying over said costs and filing said statement, he shall be guilty of a misdemeanor, and shall forfeit his salary for and during such time that he fails to make such statement, as provided in section

four of this article; and should he further fail and neglect to pay over said costs and file said statement for a period of thirty days from the time required for filing the same, he shall forfeit all his right and claim to said office of justice of the peace, and the same shall be filled as now provided by law for filling vacancies in the office of justice of the peace.

"Sec. 6. *County may Sue on Bond of Justice of Peace.*—Any such county shall sue for and recover all sums of money payable into the treasury thereof by any justice of the peace, and the sureties on his official bond shall be liable therefor.

"Sec. 7. *County to Provide Office—Appointment of Clerk and Payment of Salary.*—Said county shall provide proper offices for said justice courts and for the proper care of the same, and shall provide light, heat, proper books of accounts, dockets, and printed forms of writs, and stationery, and whatever else may be deemed necessary by the county court of said county, for the proper conduct and the business of such court, including a clerk thereof, to be designated by the justice, at a salary of seventy-five dollars per month, payable at the end of each month out of the treasury of such county. Approved March 23, 1915."

[1,2] II. It is true the power to declare an act of the Legislature null and void because it infringes upon provisions of the Constitution of the state or of the United States is, by reason of our system of government, vested in the courts. But great care and caution has always been used in the exercise of this high prerogative. We have accordingly laid it down, as a rule, that unless the conflict with the Constitution is so plain that it is beyond reasonable doubt, the act would be held constitutional and valid. *Greene County v. Lydy*, 263 Mo. loc. cit. 87, 172 S. W. 376, Ann. Cas. 1917C, 274, and cases cited. With this rule in mind, therefore, let us compare the provisions of the Constitution with the provisions of the law in question, and see whether they conflict with each other beyond such reasonable doubt.

III. First, as to the title to the act: An examination of the original bill, as it was passed by the Legislature and approved by the Governor, shows that the headnotes and index to the sections, above copied, were not part of the bill, but were placed there afterwards when the bill was printed in the session acts. Therefore we can only consider the title proper, which is as follows:

"An act entitled justice of the peace in townships containing seventy-five thousand inhabitants and not over one hundred and fifty thousand inhabitants."

The constitutional provision as to the title and subject-matter of legislative acts is as follows:

Section 28 of article 4:

"No bill * * * shall contain more than one subject, which shall be clearly expressed in its title."

The objection that acts of the Legislature conflict with this constitutional provision has frequently been passed upon by this court, but the titles and acts involved are so variant that little aid can be had by referring to the adjudicated cases. But the guiding principle has been firmly established. As to singleness of the subject, the rule has been stated as follows:

"The test is that, when all the provisions of the statute fairly relate to the same subject, have a natural connection with it, * * * are the means of accomplishing it, then the subject is single." *Elting v. Hickman*, 172 Mo. 252, 72 S. W. 704.

As to the expression of the subject-matter in the title, the rule has been stated as follows:

"The constitutional mandate in regard to the title of a statute does not require a table of contents as a caption to a law. It is sufficient if the title does not mislead as to the chief topic of the act, and that the minor features of it have a reasonable and natural connection with the subject named in the title. [Citing authorities.] Mere generality in the title will not vitiate an act of the General Assembly, unless the title is of such a nature as to compel the conviction that it was designed to mislead as to the subject dealt with." *State ex rel. v. County Court*, 128 Mo. loc. cit. 441, 30 S. W. 105.

[3] Under the liberal rules thus announced, we think the title to the act before us sufficiently shows that the act will provide generally for justices of the peace, which would include provisions generally for justice courts, their organization and procedure in townships containing 75,000 and not over 150,000 inhabitants, and that all the provisions in the act relate to that one subject. The provisions for four justices of the peace in such townships, that they should have a salary, that it should be paid by the county, that their fees should be turned over to the county, that they should give bond for so doing, that there should be a clerk of the justice's court, to be approved by the justice and paid by the county, etc., are all matters relating to justices of the peace and incident to the maintenance and operation of their courts. So with the furnishing the justice with an office and supplies. In *State ex rel. v. Williams*, 232 Mo. loc. cit. 75, 133 S. W. 8, this court said:

"The act in question not only amends the statute which prescribes what fees should be paid to the various prosecuting attorneys throughout the state, and fixes fees of those in the counties to which the act applies, but also creates the office of assistant prosecuting attorney in those same counties, provides for the manner of their appointment and fixes the amount of their salaries. While the question of creating an office and prescribing the manner of appointing the officer thereto is different from the question of prescribing the fees to be paid such officer; however, the one is germane to the other and so closely connected therewith that we

are unable to say they constitute two separate and distinct subjects within the meaning of said constitutional provision"—citing many cases.

We not only think the act before us contains but one subject, but that there are no provisions in it not germane and naturally connected with that subject, as expressed in the title, and that therefore the subject is clearly expressed in the title, within the meaning of the Constitution in that regard.

IV. It is contended that the act is contrary to section 53, art. 4, of the Constitution, prohibiting the passage of a local or special law for any of the following purposes: Clause 18:

"Regulating the fees or extending the powers and duties of aldermen, justices of the peace, magistrates or constables."

And clause 32:

"Legalizing the unauthorized or invalid acts of any officer or agent of the state, or of any county or municipality thereof. In all other cases where a general law can be made applicable, no local or special law shall be enacted; and whether a general law could have been made applicable in any case is hereby declared a judicial question, and as such shall be judicially determined, without regard to any legislative assertion on that subject."

[4] The contention of learned counsel is that the act only applies to one township in the state, to wit, Washington township, Buchanan county, because that was the only township in the state which had 75,000 or less than 150,000 inhabitants when the act was passed and took effect. But the language of the act does not limit its operation to townships that have that population at the time of its passage, but includes all townships "which now contain or may hereafter contain seventy-five thousand and not over one hundred and fifty thousand inhabitants." It is well settled that this language takes the law out of the category of a special or local law and makes it a general law, so as not to conflict with the constitutional provisions against special and local laws pointed out by the respondent.

In *State ex inf. v. Aetna Ins. Co.*, 150 Mo. loc. cit. 135, 136, 51 S. W. 420, the court says:

"The proviso relates to fire insurance in cities of a class, that is, cities in this state which now have or which may hereafter acquire a population of 100,000 inhabitants or more, and while there are but two of such cities in this state at this time, St. Louis and Kansas City, it has been repeatedly held by this court that such a law is general, and not special. *Ewing v. Hoblitzelle*, 85 Mo. 64; *Rutherford v. Heddens*, 82 Mo. 388; *State ex rel. v. Herrman*, 75 Mo. 340; *Kelly v. Meeks*, 87 Mo. 396; *Rutherford v. Hamilton*, 97 Mo. 543; *Lynch v. Murphy*, 119 Mo. 163."

Same ruling in the recent case of *State ex inf. v. Southern*, 265 Mo. loc. cit. 286, 287, 177 S. W. 640.

But learned counsel say that the real intent of the Legislature was to limit the act to the one township in Buchanan county, and cite especially *Henderson v. Koenig*, 168 Mo. 356, 68 S. W. 72, 57 L. R. A. 659, and *State v. Messerly*, 198 Mo. 351, 95 S. W. 913, as so holding. An examination of those cases will show that the language in the act before us, "or hereafter having 75,000 inhabitants and less than 150,000 inhabitants," or equivalent language, making the law general in its application, was absent from the acts construed in those cases. Indeed, in those cases there were special features and provisions in the act itself which showed clearly an affirmative intent to limit the operation of the law to a certain territory, which is not the case here. We must rule this point, too, against respondent.

[5] V. Nor does the act violate clause 33, art. 4, of section 53 of the Constitution, which provides:

"Nor shall the General Assembly indirectly enact such special or local law by the partial repeal of a general law."

Here there is no partial repeal of a general law so as to create a special law. It is true the old general law relating to justices of the peace no longer governs in townships now or hereafter having the specified population, but the act in question leaves the old general law in force in all other townships in the state, except in the townships provided for by this act, which, we hold, is a general law governing such townships.

[6] VI. It is also contended that the act violates section 8 of article 14 of the Constitution, which provides:

"The compensation or fees of no state, county or municipal officer shall be increased during his term of office."

The change of an officer's compensation during his term of office from a fee basis to a salary is not necessarily an increase of his compensation. It may be a decrease, and frequently is.

The evidence introduced in this case showed that the fees earned by the plaintiff as justice during the time sued for somewhat exceeded the salary prescribed by the act for that period, but that the fees actually collected did not quite equal such salary. But in the view we take that question is not material. The fees were not fixed sums to be paid by the public, like unto a salary, which he was sure to receive, but were to be paid by the litigants, and the compensation received by him depended upon the amount of the fees collected, which was necessarily more or less uncertain. In such cases it has been held that a law changing from a fee basis to a salary, by requiring the fees to be turned over to the county, and the county to pay a fixed salary, does not necessarily increase the officer's compensation, contrary

to such constitutional provision, and will not be so held unless it appears, as a matter of law, on the face of the act itself, that the officer's compensation is thereby increased. If not, it will be conclusively presumed that the Legislature investigated the facts and ascertained that by the change from the fee basis to the salary prescribed no increase would be made in the compensation of the officer. *Galeener v. Honeycutt*, 173 Cal. loc. cit. 103 et seq., 159 Pac. 595; *State ex rel. v. Erickson*, 120 Wis. loc. cit. 442, 98 N. W. 253; *State v. Grimes*, 7 Wash. 445, 35 Pac. 361.

While this court has never before passed upon the question, we deem the above ruling to be sound, and it meets with our approval.

[7] VII. It is next argued that the act does not apply to justices in office at the time the act took effect, because it provides that (section 2) "each justice of the peace shall, before entering upon the duties of his office, give bond to the state," etc., that he will pay over all moneys received by him. The whole act shows that it is to govern all justices of the peace, those in office, as well as those subsequently to be elected or appointed. The language quoted means that before entering upon his duties as justice, under the act, each justice shall give bond, etc. He could not enter upon his duties, under the act, until it took effect, and it was intended he should then and thereafter turn over his fees, give bond to secure his obligation so to do, and receive a salary. We must rule this contention also against respondent.

[8] VIII. We sustain the respondent's contention that plaintiff is not entitled to the clerk hire sued for. The statute does not require the justice to pay the clerk, if there is one, nor require the salary of the clerk to be paid to the justice.

The judgment is therefore reversed, and the cause remanded for a new trial in accordance with the views herein expressed.

BROWN and RAGLAND, CC., concur.

PER CURIAM. The foregoing opinion by SMALL, C., is adopted as the opinion of the court.

All concur, except WOODSON, J., absent.

SULLIVAN v. CHAUVENET. (No. 21154.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1920.)

1. Municipal corporations ⇨706(5)—Evidence held to show that defendant's automobile was running at excessive speed.

In an action for personal injuries sustained by a 13 year old boy struck by an automobile while crossing the street, evidence held to show

that defendant's automobile was running at an unlawful and dangerous speed.

2. Municipal corporations ⇨705(3)—Failure of automobile driver to sound warning at street intersection held negligence.

In an action for personal injuries sustained by a 13 year old boy struck by defendant's automobile while crossing the street, failure of defendant's chauffeur to sound a warning upon approaching the crossing, which was a commonly used one, held negligence.

3. Municipal corporations ⇨705(5)—Street running into but not crossing another street held not an "intersecting highway," within statute.

Laws 1911, p. 327, § 8, par. 2, requiring an automobile upon approaching an intersecting highway, or curve or corner in a highway where the operator's view is obstructed, to slow down and give timely signal, does not require the driver of an automobile to slow down when approaching a point where a side street debouches into another street; such street not being an "intersecting highway," within the statute.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Intersecting Way.]

4. Municipal corporations ⇨705(5)—Ordinance held not to require motor vehicles to slow down at street crossing when not exceeding speed prescribed.

A city ordinance limiting the speed of vehicles to six miles per hour when turning the corner of intersecting streets, avenues, boulevards, or public places, or when traversing a curve or turn in the street where the view is obstructed, does not require the driver of an automobile going at a rate not exceeding six miles an hour to slow down, and an instruction authorizing a recovery for such omission is erroneous.

5. Appeal and error ⇨856(1)—Case reversed for error, though another ground of recovery established.

On appeal by defendant in an action for personal injuries sustained in an automobile collision, where error has been committed in allowing recovery, merely for not slowing down at the street crossing, the judgment must be reversed, notwithstanding defendant's failure to signal was established.

6. Municipal corporations ⇨706(7)—Contributory negligence in automobile accident held for jury.

In an action for personal injuries to a 13 year old boy struck by defendant's automobile while crossing the street, evidence held to make the question of his contributory negligence one for the jury.

Appeal from St. Louis Circuit Court; Karl Kimmel, Judge.

Action by James J. Sullivan against Anna L. A. Chauvenet, wherein, upon plaintiff's death, Patrick Sullivan was substituted as administrator. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

H. W. Allen and Blodgett & Rector, all of St. Louis, for appellant.

Walter B. Douglas and Roebke & Clay, all of St. Louis, for respondent.

GOODE, J. Between 7:30 and 8 o'clock in the evening of October 2, 1912, James J. Sullivan, then a boy 13 years old, was collided with and seriously hurt by an automobile owned by defendant and driven by a chauffeur employed by her. The injured boy began this action, but, as he has died since it was tried, Patrick Sullivan, the administrator of his estate, has been substituted as the plaintiff. For convenience we will speak of the boy as still the plaintiff. As related by the boy and corroborated in important particulars by other testimony, the facts are these:

The plaintiff had been playing a game with some boys at Garfield and Union avenues, two intersecting streets in St. Louis; the former running east and west and the latter north and south. Boys of another group were teasing the proprietor of a hardware store near by and finally the proprietor chased them. Plaintiff was afraid he might be caught and charged with the mischievous acts done in front of the hardware store, though he said he had nothing to do with them, so he ran too, and southwardly along the east side of Union avenue toward another east and west street which intersected it, that is, Cote Brillante avenue. Cote Brillante does not run across Union in a straight course, but has a jog in it at Union, which it enters at the east side about 40 feet south of where it enters at the west. Plaintiff ran along the east sidewalk of Union avenue until he reached a point opposite the mouth of Cote Brillante on the west side of Union, which was a common crossing place, and there he started across Union, still running, to join a boy friend on the southwest corner of Union and Cote Brillante. He was looking south but saw no automobile coming. Double street car tracks run along the center of Union avenue, with roadways on either side, and when plaintiff was within 3 feet of the east street car track and 17 feet from the east curb of Union he was run into by defendant's automobile, knocked down but got up, walked to the sidewalk, fell there, was taken up, and conveyed in the automobile that hurt him to a hospital. The machine was stopped about 35 feet north of the point where it knocked plaintiff down. No warning of its approach had been given by horn or other noise and he had not observed it, but its headlights were burning and he could see several blocks to the southward. The chauffeur went to the plaintiff while plaintiff was lying on the ground, and was asked why he did not sound a horn, and the chauffeur replied he did not have time. The automobile was a heavy one and the fenders on it were heavy. The left front fender was the part that struck plaintiff and it was bent

slightly by the blow. A witness testified he noticed the automobile just before it hit the boy; that it was running "at full speed"—15 or 20 miles an hour. An expert said it could have been stopped, considering the condition of the street and the speed, in 15 or 20 feet. Traffic ordinances of the city of St. Louis regulating the driving of automobiles are in proof.

The driver of the automobile testified as follows: He had stopped just south of East Cote Brillante avenue to adjust his rear light, and after starting again was running about 6 miles an hour; plaintiff ran into the automobile, having started southwest across the driveway of Union avenue, when the automobile was within 3 feet of him; he was looking back in the direction of the proprietor of the hardware store, who was chasing some boys; when he saw plaintiff the clutch was thrown out and the brake applied, which were the acts to do to stop the car; also the car was turned toward the east curb of Union avenue and hit plaintiff only a foot from the curb; ran 3 feet after the collision; did not blow his horn because he had not time to do so after he saw plaintiff. The injured boy was given attention by a physician at the hospital, where he complained of pain in the region of his left kidney; showed no bruise or swelling, but was pale and weak; was taken home that evening; suffered much through the night and the next day, or the day after, commenced to bleed from the left kidney, and the hemorrhage continued until he came near dying; was taken again to the hospital and an operation performed. The left kidney had been torn in two; the upper third was torn off. The kidney was removed and after several weeks the plaintiff was able to leave the hospital, and in two months he returned to school, but remained weak for a long time.

The specifications of negligence counted on in the petition are these: First, that by the exercise of ordinary care the driver could have seen plaintiff crossing the street in time to avoid injuring him; second, in violation of the duty imposed by law and ordinance on persons operating automobiles on a public street, the driver of the car ran it at a high and dangerous speed and in excess of 10 miles an hour; third, the driver sounded no warning; fourth, did not reduce speed as he approached the intersection of Cote Brillante and Union avenues. The answer was a general denial and an averment that plaintiff caused or contributed to his injury by running backward into the street from the curb on Union avenue at a point not customarily used by pedestrians as a crossing, without looking to see whether a vehicle was approaching, and in so doing ran into and collided with the automobile, when by using reasonable care to look for approaching vehicles he could have avoided the collision. The jury returned a verdict against defendant for \$12,-

500, and, judgment having been entered on the verdict, the defendant appealed.

The court instructed for a verdict for the plaintiff, James Joseph Sullivan, if the jury found defendant's chauffeur negligently ran the automobile against plaintiff at a high and dangerous speed, or without sounding a warning or giving any signal of its approach, or without slowing down as the automobile approached the intersection of Cote Brillante and Union avenues, provided the plaintiff was found to have been exercising ordinary care for his own safety. The instruction omitted to submit the question of whether the driver of the car could have seen the boy, had ordinary care been used, in time to avoid running against him, though an allegation to that effect was made in the petition. The defendant asked a separate instruction concerning each of the three acts of negligence submitted to the jury, and charging that plaintiff was not entitled to a verdict for the particular act of negligence mentioned in the instruction; the total effect of these three instructions being that the plaintiff was not entitled to a verdict at all. We learn from the opinion of the St. Louis Court of Appeals that at the first trial the only issue of negligence left to the jury related to the omission of the chauffeur to sound a warning. We presume additional evidence was introduced at the second trial, as a different view of the case was then taken by the court in instructing the jury, and rightly.

[1] The limit of speed allowed by municipal ordinance in the district of St. Louis where the accident occurred was 10 miles an hour. There was testimony that the speed defendant's automobile was under when it hit the boy was from 15 to 20 miles an hour. This evidence, if believed, inclines to prove the speed was not only excessive, but dangerous. The car ran 35 or 40 feet past the boy after colliding with him; the fender that struck him, a heavy one, was bent upward by the blow; he was knocked 3 feet away; his kidney was torn in two. We rule there was substantial evidence that the car was running at an unlawful and dangerous speed.

[2] An ordinance of the city required drivers of motor vehicles to sound their horns so as to warn pedestrians when they approached the crossing of a public street. The plaintiff was struck at a point on Union avenue which was commonly used as a crossing, according to the testimony, and no signal was given as defendant's car drew near that crossing. The chauffeur acknowledged he did not blow his horn when he started again after having stopped on the south side of the intersection of East Cote Brillante avenue with Union, a point some 70 feet south of the place where the boy was struck. He said, too, he did not signal at any time after resuming his journey and before the boy was hit; in fact, did not remember blowing the horn after he passed

Delmar avenue, an intersecting street many blocks south of Cote Brillante. Possibly the fact that West Cote Brillante opened into the west side of Union further north was the cause of his omitting to signal as he approached the crossing; but, as a commonly used crossing was there, the evidence tends to support a finding that it was an omission to comply with the ordinance, and cause for a finding that the chauffeur was negligent.

The court instructed it was ground for a verdict for plaintiff if the automobile approached the intersection of the streets without slowing down. For convenience in considering the propriety of that direction, we transcribe the instruction wherein it was given:

"The court instructs you that if you find and believe from the evidence that on or about the 2d day of October, 1912, the defendant or her agent and servant was operating an automobile on Union avenue at the intersection of said avenue with Cote Brillante avenue, and that both of said avenues are public streets of the city of St. Louis, and that the defendant or her agent and servant negligently ran said automobile at a high and dangerous rate of speed, or without sounding any warning or giving any signal of its approach, or without slowing down as said automobile approached the intersection of said streets, upon and against plaintiff, striking and injuring him, and if you find and believe from the evidence that plaintiff's injury was proximately caused by defendant's negligence in one or more of said particulars above mentioned, and that the plaintiff at the time was exercising ordinary care for his own safety, then your verdict should be for the plaintiff."

We remark that the three careless acts, either of which, if proved to have happened, would warrant, according to the instruction, a verdict for plaintiff, are stated separately and divided by the word "or." We remark, too, that the right of recovery, if the car approached the intersection of the streets without slowing down, is not based on neglect to slow down upon the driver's apprehending, or having reason to apprehend, the plaintiff was in danger of being run against if the speed was not lowered, but on the bare fact that the speed was not lowered as the intersection was approached. Omitting to reduce speed was not in itself (and independently of reason to anticipate striking some person if the rate of speed was kept up) negligent conduct unless the law of the state or a municipal ordinance required a reduction when approaching the place of the accident.

This is the statute that bears on the question:

"Upon approaching a pedestrian, who is upon the traveled part of any highway and not upon a sidewalk, and upon approaching an intersecting highway or a curve or a corner in a highway, where the operator's view is obstructed, every person operating a motor vehicle shall slow down and give a timely signal with his

bell, horn or other device for signalling." Laws 1911, p. 327, § 8, par. 2.

[3] The question submitted was not whether the driver of the automobile neglected to slow down upon approaching the plaintiff when the plaintiff was a pedestrian in the highway, but when the car approached an intersecting highway. Can it be said the statute required the driver to slow down because he, while driving in the east driveway of Union, was drawing near to the line of the intersection of Cote Brillante avenue with the west side of Union, a street 55 feet wide and with double street car tracks in the middle and roadways on either side of the tracks? Was Cote Brillante an intersecting highway in the statutory sense? We think not. The object of the law is to prevent collisions between motor vehicles and other vehicles and persons at the intersection of streets and highways where collisions are apt to happen—at a point where one street opens into another and vehicles usually run past the mouth of the intersecting street. Where two separate roadways run along a street and a cross street debouches into the roadway an automobile is not running on, the statute does not apply. It is to be borne in mind the statute does not refer to a crossing of a street or highway; that is, the point where pedestrians cross.

We next ask: Was there a city ordinance which required the chauffeur to diminish speed when approaching the crossing? The only ordinance which can be argued to have that effect, after prescribing maximum speeds for vehicles, lays this duty on drivers:

"And when turning the corner of intersecting streets, avenues, boulevards, or public places, or when traversing a curve or turn in a street, avenue, boulevard, or public place where the view is obstructed, the rate of speed shall not be greater than six miles per hour."

[4, 5] The driver of the car in question testified he was not exceeding 6 miles an hour. Other testimony goes to prove he was. But the act of negligence the instruction for plaintiff submitted to the jury was, not that the car was running more than 6 miles an hour "when turning the corner of intersecting streets," etc., or when the view was obstructed, but that the defendant's driver approached the intersection of Cote Brillante and Union avenues "without slowing down."

That was a precaution the ordinance did not prescribe. It follows the instruction was erroneous in authorizing a recovery for the omission of the driver to do something not exacted of him by the law. Should the judgment be reversed for this error when another failure of duty, namely, not signaling, was established? We think it must, for the reason that it cannot be known which neglect was found by the jury to have been the proximate cause of the accident—omitting to signal or omitting to slow down. If they thought the latter neglect was the sole proximate cause of the accident, then it was not the breach of a duty to the boy by defendant's driver, and the verdict should have been for defendant.

[6] It is earnestly insisted the plaintiff was shown conclusively to have caused his injury by his own carelessness in darting suddenly off the sidewalk of Union avenue in close proximity to the car; that he knew moving motorcars were frequent at the point, must have realized the need to look for them, and could have seen the five headlights of the defendant's car had he looked southward before leaving the sidewalk. He said he looked and did not see the car—an improbable occurrence, we may say an impossible one, if he looked carefully, and with his mind alert to ascertain whether he could cross in safety. Therefore the question is, should the plaintiff be held negligent in law for leaving the sidewalk when he did? If the car was only 3 feet away at the moment, and he was struck within a foot of the east curb, as the driver said, then he was negligent. If he was struck as he said, and as other evidence tends to show, 17 feet from the east curb, and only 3 feet from the east rail of the car track, the conclusion of contributory negligence on his part is not compelled; for this would make an issue for the jury as to whether the car was far enough away from him when he started to cross the street to lead a reasonably prudent boy of 14 years to attempt to cross in the belief that he could get over before the car reached him. The issue of his negligence as a cause or factor in causing the accident was left to the jury under a sound instruction and rightly, we think.

The judgment is reversed, and the cause remanded.

All concur, except WOODSON, J. absent.

STATE v. DALE. (No. 21970.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

1. Criminal law §956(4)—Evidence held to show that when defendant entered plea of guilty he was misled.

In a prosecution for robbery where defendant entered plea of guilty, and on being sentenced to five years in the penitentiary moved for new trial on the ground that he had been led to believe that he would be paroled by court, evidence held to establish defendant's contention he had pleaded guilty under a misapprehension; hence denial of the motion was erroneous.

2. Criminal law §913(1)—Courts in accepting plea of guilty must see that defendant has not been misled.

Courts have always been accustomed to exercise a great degree of care in receiving pleas of guilty in prosecutions for felonies to see that the defendant has not made his plea by being misled, and where it appears that defendant probably was misled he should be allowed to withdraw his plea and be granted new trial, notwithstanding entry of judgment of conviction.

Appeal from Circuit Court, St. Charles County; Edgar B. Woolfolk, Judge.

Virgil Dale was convicted of robbery on plea of guilty, and after the overruling of his motion for new trial he appeals. Reversed and remanded.

Defendant pleaded guilty in the circuit court of St. Charles county to an information charging him with robbery in the first degree, in that defendant feloniously took \$7 from the person of one Frank J. Bull, by force and violence to his person. Thereupon the court sentenced defendant to five years' imprisonment in the state penitentiary. At the time the plea of guilty was entered defendant was not represented by counsel, but afterwards, and within four days, defendant appeared by counsel and filed a motion for a new trial, setting up as a ground that he had entered a plea of guilty upon a promise that he would be paroled by the court. Testimony was heard by the court upon this motion and the motion was overruled. Defendant thereafter duly perfected an appeal to this court.

The evidence heard upon the motion for a new trial was as follows:

"Synopsis of Testimony of Virgil Dale.

"My name is Virgil Dale, age 23. I reside at 8453 Lowell, St. Louis, Mo. I was employed at the Baden car shops. I was arrested with Alvin Meyer, charged with robbing Frank Bull, on the night of the 21st of February, in a saloon in St. Charles, by Sheriff John Grothe. After arresting me Mr. Grothe took me into a back room adjoining the saloon and searched me, then took me outside of the saloon onto

the street and had me turn my coat collar up, then had Frank Bull come and see if he could identify me as one of the men who had held him up and robbed him. Bull looked at me and said that he could not say that I was one of them. Then Mr. Grothe took me over and put me in jail. After I was in jail about one-half or three-quarters of an hour, Mr. Hensler, the prosecuting attorney there, came over to the jail and the sheriff came and got me and took me into a room in the jail and the sheriff and Mr. Hensler began asking me questions about the robbery. I told them I did not know anything about it, but they kept on questioning me about the robbery and I kept telling them that I did not know anything about it.

"Then they put me back in the cell and took Alvin Meyer out. After awhile they came and got me and took me back to the room again and told me I might as well tell them about the robbery as Meyer had made a statement that we had robbed Mr. Bull. Mr. Hensler said to me that if I would make a confession and say that I held up Mr. Bull and took money from him that it would be easier for me. He said that he was my friend, and that if I would say that I had committed the robbery and sign a statement and plead guilty that the court would parole me. After talking the matter over with him and the sheriff for quite awhile, I believed what each of them said to me, and signed the statement, and when I was brought into court I pleaded guilty, believing that I would be paroled by the court, as Mr. Hensler told me the night I was arrested I would be; but instead of paroling me they gave me five years in the penitentiary."

"Question by the Court: 'Weren't you represented by an attorney at the time that you entered a plea of guilty?'"

"Answer by Virgil Dale: 'I did not have an attorney. They told me I did not need one. Mr. Hensler also told me there in jail that night that Mr. Bull did not want his name in court, and that if I would plead guilty he would see to it that I was paroled.'"

"Synopsis of Testimony of John Dale.

"My name is John Dale. I am the father of Virgil Dale. After Virgil was arrested and in jail waiting for trial, I went to see Mr. Hensler, prosecuting attorney, to see what Virgil was charged with. Mr. Hensler told me that it was highway robbery; that he had held up Frank Bull of St. Charles and robbed him of \$7. I talked with Mr. Hensler about the case, and said that I would get a lawyer for Virgil, but Mr. Hensler said it was not necessary; 'the boy has pleaded guilty and you need not do it.' He said he would go with me to the judge and see what could be done about it, and that we would have a talk with the judge about paroling Virgil."

"On the morning of the 18th of March (this was the day that Virgil's trial came up) I had a talk with Mr. Hensler, and he said the judge would be in on the 10:48 train, he supposed, and that we could see him; but Mr. Hensler said that he would see the judge and that everything would be all right, and I just relied on what Hensler said and did not get a lawyer for Virgil."

"Synopsis of Testimony of Mrs. Allie Jacobsen.

"My name is Mrs. Allie Jacobsen. I went to see Mr. Hensler at his house and had a conversation with him about the trouble that Virgil was in. This was after Virgil was arrested and before they sentenced him to the pen. Mr. Hensler told me that we did not need a lawyer for Virgil; that he had already made a confession to him about the robbery, but that he knew that Virgil was not a bad boy and that he would help him out of his trouble; that he would do all in his power for him; that it was all in his hands and that he would go to the judge. I am an aunt of Virgil Dale.

"I later had a conversation with Mr. Hensler at his office and he repeated about the same thing to me at his office that he had said to me at his house, and assured me that he would help Virgil out of the trouble at the same time I talked with him at his office. I asked him again if we would need a lawyer for Virgil and Mr. Hensler said, "No," it was not necessary; it was all in his hands. This is the statement that he made to me, and I thought he was telling me the truth about it."

"Synopsis of Testimony of John Grothe.

"My name is John Grothe. I am sheriff of St. Charles county. On the night of February 21st I arrested Virgil Dale in a saloon and searched him, and then took him outside and had Frank Bull come and see if he could identify him. Mr. Bull said, "It looks like the two boys;" but he was not sure; then I took him over and locked him up in jail. After a short time Mr. Hensler came over to the jail and we took Dale out into a room and began to question him and he denied the charge of robbery. We then brought out Alvin Meyer and questioned him and he made a statement, and we then again brought out Virgil Dale, and told him that Meyer had told us all about holding up Bull and that he might as well tell the truth about it. Then Dale said to me, "If I tell you about it can I go home to-night, or can I get out on bond, and if I tell you will I be paroled?" I told him I could not parole him; that was for the court to say; that it was too late for him to get out on bond that night. I told Dale I was his friend, but I did not tell him that if he would confess he would be paroled. I told him that I was his friend and was still his friend and would help him if I could."

"Synopsis of Testimony of Osmund Hensler.

"My name is Osmund Hensler. I am prosecuting attorney for St. Charles county. On the night of the 21st of February, 1919, I came from St. Louis and went over to the jail and had a conversation with Virgil Dale and questioned him regarding having robbed Frank Bull on that night of \$7. Dale denied the robbery and said that he did not know anything about it. After talking with him for some time Grothe, the sheriff here, brought out Alvin Meyer and questioned him and he made a statement to us that they had robbed Frank Bull. We again brought Dale out and told him that he might as well tell what he knew about the robbery as Meyer had told us all about it and had made a confession. Then Dale put his head on the table and asked me, "Will I get out?" Grothe told him it was too late to get out that night. I did not say to Dale that if he would make a confession that he would

be paroled by the court. I told him that I was his friend and that I would help him. I do not remember just all that was said there that night.

"I had a talk with John Dale, Virgil's father, in my office on the morning of the 18th of March. I told him that I would see the judge and see what could be done about the case, but I did not tell Virgil that if he would sign a confession that he would be paroled. I don't remember all that was said there that night in the jail when we talked to Virgil. I did say to him that I was his friend.

"I had a conversation with Allie Jacobsen, at my house, a few days before Virgil's case came up and told her that I would do all that I could for the boy. I did tell her that I knew that he was a good boy, and had never been in any trouble before that I had ever heard of, but I did not tell her that I would have him paroled.

"I talked with John Dale, the boy's father, three or four times about the case, and I did tell him that I was in sympathy with him and I told the boy's father that I would do all I could for Virgil."

W. Neustadt, of St. Louis, for appellant.

Frank W. McAllister, Atty. Gen., and C. P. Le Mire, Asst. Atty. Gen., for the State.

WILLIAMS, P. J. (after stating the facts as above). [1] After carefully reviewing the foregoing testimony offered upon the hearing of the motion for a new trial, we are of the opinion that defendant at the time of entering a plea of guilty was laboring under misapprehension as to his rights and that he had been misled by the conversations which he had had with the prosecuting attorney. We do not mean by this that the evidence shows that the prosecuting attorney willfully misled the defendant, but what we do mean to say is that we think the evidence tends strongly to show that the defendant was in fact misled by what occurred.

It is immaterial whether the misleading was intentionally or unintentionally done. The material inquiry is: Was the defendant misled, or under a misapprehension, at the time he entered his plea of guilty? While it may be true, as stated by the prosecuting attorney, that he did not in so many words tell defendant that if he would make a confession that he would be paroled, yet we think the statements made by the prosecutor to the defendant were such as did cause him to believe that he would be paroled if he entered a plea of guilty.

[2] Under such circumstances the judgment should not be permitted to stand. The rule to be here applied is fully discussed in the early case of *State v. Stephens*, 71 Mo. 535. In that case the court, in reversing and remanding a judgment of the trial court in refusing to grant a new trial on the ground that the defendant had been misled into entering a plea of guilty, said:

"Viewing the matter, then, in either light, we feel constrained to say that it would better

have comported with the proper exercise of a sound judicial discretion, had the special judge permitted the withdrawal of the plea of guilty and the entry, in its stead, of the usual plea. The law is not composed of a series of snares and pitfalls for the unwary, neither does it favor what Judge Bliss terms 'snap judgments.' * * * Courts have always been accustomed to exercise a great degree of care in receiving pleas of guilty, in prosecutions for felonies, to see that the prisoner had not made his plea by being misled, or under misapprehension or the like."

The judgment is reversed and the cause is remanded.

All concur.

STATE v. MEYER. (No. 21969.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

Criminal law §956(4) — Evidence held to show that when defendant entered plea of guilty he was misled.

In a prosecution for robbery where defendant entered a plea of guilty, and on being sentenced to five years in the penitentiary moved for a new trial on the ground that he had been led to believe that he would be paroled by the court, evidence held to establish defendant's contention that he had pleaded guilty under misapprehension; hence denial of the motion was erroneous.

Appeal from Circuit Court, St. Charles County; Edgar B. Woolfolk, Judge.

Alvin E. Meyer was convicted of robbery on plea of guilty, and after the overruling of his motion for new trial he appeals. Reversed and remanded.

Defendant pleaded guilty in the circuit court of St. Charles county to an information charging him with robbery in the first degree, in that defendant feloniously took \$7 from the person of one Frank J. Bull, by force and violence to his person. Thereupon the court sentenced defendant to five years' imprisonment in the state penitentiary. At the time the plea of guilty was entered defendant was not represented by counsel, but afterwards, and within four days, defendant appeared by counsel and filed a motion for a new trial, setting up as a ground that he had entered a plea of guilty upon a promise that he would be paroled by the court. Testimony was heard by the court upon this motion and the motion was overruled. Defendant thereafter duly perfected an appeal to this court.

The evidence heard upon the motion for a new trial was as follows:

"Synopsis of Testimony of Alvin E. Meyer.

"My name is Alvin E. Meyer. I am 23 years old. My home is in St. Charles, where

my mother and sister live. I was arrested on the 21st of February, 1919, charged with holding up Frank Bull and taking \$7 off of him. After arresting me in the saloon there that night Mr. Grothe took me in the back room and searched me, then he took me outside of the saloon and had Frank Bull come and see if he could identify me, but he could not identify me as one of the men who had held him up and robbed him. The sheriff then took me over to the jail and locked me up, and after a little while, I guess about one-half hour, Mr. Hensler here came over to the jail, and the sheriff took me out of the cell into another room and he and Mr. Hensler began to question me about the robbery. I told them I knew nothing about it, and Mr. Hensler said that if I would make a confession and say that I had held up Mr. Bull and robbed him that it would be easier for me and that he was my friend, and that if I would say that I had committed the robbery, and come into court when my trial came up and plead guilty, he would have the court parole me.

"After we had talked about the matter there for quite a while I said all right. I thought Mr. Hensler was telling me the truth and I accepted his advice and stated that I had robbed Frank Bull and signed the statement; then when my trial came up I pleaded guilty, and instead of the court paroling me I was given five years in the penitentiary. I did not have an attorney. I never would have pleaded guilty except for what Mr. Hensler and the sheriff said to me."

"Synopsis of Testimony of John Grothe.

"My name is John Grothe. I am sheriff of St. Charles county. On the night of February 21, 1919, I arrested Alvin E. Meyer in a saloon in St. Charles. After arresting him I took him in the back room in the saloon and searched him and found a mask in his pocket, and then took him outside and had Frank Bull come and see if he could identify him. Bull said, "It looks like the two boys;" but he was not sure. I then took him over and locked him up in jail. Shortly thereafter Mr. Hensler, the prosecuting attorney, came over to the jail and we took Meyer out into a room and questioned him about the robbery and he made a statement. I told Meyer that I was his friend, but I did not tell him that if he would confess that he would be paroled by the court."

"Synopsis of Testimony of Osmund Hensler.

"My name is Osmund Hensler. I am prosecuting attorney for St. Charles county. On the night of February 21st I came from St. Louis and went over to the jail. I had a talk with Alvin E. Meyer about having robbed Frank Bull on that night of \$7. After talking with him for some time Grothe, the sheriff here, questioned him and he made a statement to us that he had robbed Frank Bull. I told Meyer that I was his friend, but I did not tell him that I would have him paroled if he would confess and plead guilty."

W. Neustadt, of St. Louis, for appellant.

Frank W. McAllister, Atty. Gen., and H. P. Ragland, Asst. Atty. Gen., for the State.

WILLIAMS, P. J. (after stating the facts as above). This is a companion case to the case of *State v. Dale*, 222 S. W. 763, which has just been delivered by this Division of the court.

We are of the opinion that the testimony in this case also tends strongly to show that defendant entered a plea of guilty under a misapprehension as to his rights in the premises and on account of being misled. The rule of law applied in the *Dale Case* is likewise applicable to this case.

For the reasons stated in the *Dale Case*, the judgment herein is reversed and the cause is remanded.

All concur.

DILLARD v. SANDERSON et al. (No. 20631.)

(Supreme Court of Missouri, in Banc. May 21, 1920.)

Courts \Leftarrow 231 (33)—Threatened trespass to lay out public highway does not involve title conferring jurisdiction on Supreme Court.

In a suit by a landowner against the members of the county court and a highway engineer and public road overseer to enjoin a threatened trespass upon his property for the purpose of laying out a public road already established, the title to real estate is only incidentally involved, and will not support jurisdiction on the part of the Supreme Court, where the judgment actually affecting the title to the land at the time of the establishment of the road has not been appealed from.

Appeal from Circuit Court, Pike County; Edgar B. Woolfolk, Judge.

Action by C. W. Dillard against R. R. Sanderson and others. Judgment for plaintiff, and defendants appeal. Transferred by the Court of Appeals. Retransferred.

J. O. Barrow, of Vandalia, and Hostetter & Haley, of Bowling Green, for appellants.

Pearson & Pearson, of Louisiana, Mo., for respondent.

GRAVES, J. This cause was transferred to this court by the St. Louis Court of Appeals on the ground that title to real estate is involved. In Division 1 it was transferred to this court on account of a contrariety of opinion in this court.

The action is one by a landowner against the members of the county court of Pike county, and the highway engineer of said county, together with one Williams, a public road overseer. The action is one by injunction, wherein the plaintiff seeks to restrain the defendants from entering upon and laying out a public road over the plaintiff's land. Plaintiff avers that defendants threatened to

enter upon his land for such purpose. The suit is to enjoin such threatened trespass upon his property. The answer avers that a public road had been duly established, by the order of the county court, over the lands of plaintiff, and that defendants were fully authorized to enter upon the property in question.

By its judgment the trial court perpetually enjoined defendants from entering upon the premises of the plaintiff. From such judgment appeal was taken to the St. Louis Court of Appeals, and that court has transferred the case here as above stated. The first question is our jurisdiction. The same state of facts was held in judgment by this court in *Hill v. Hopson et al.*, 221 Mo. 103, 120 S. W. 29. In that case we held that we had no jurisdiction, and transferred the case to the Court of Appeals, 150 Mo. App. 811, 131 S. W. 357. We said that in an injunction suit for a similar threatened trespass title to real estate was only incidentally involved, and was not involved in the sense which lodged jurisdiction here. The rule in that case determines our jurisdiction in this case. Under that rule we are without jurisdiction, and this cause should be recertified to the St. Louis Court of Appeals.

In cases of this character we have not ruled by a uniform voice. We should not overlook the fact that the real character of a case of the kind involved here is to restrain a threatened trespass. In such cases title to real estate is not so involved as to confer jurisdiction here. When the road was ordered, and the party's land was actually taken, was the time when title to real estate was so involved, as to cast the jurisdiction here. That was a judgment in the county court, and by appeal to the circuit court would have been tried de novo. If by the judgment of the circuit court the road was established and the land taken, the appeal from such circuit court judgment would lie here, because such judgment directly affected the title to land. But such is not the case here. The judgment actually affecting the title to lands was not appealed from by the landowner. In this injunction proceeding the title is only incidentally involved, depending upon the record deeds upon the one side, and this county court judgment on the other side. Like all trespass cases title to real estate may be incidentally involved, but the judgment itself (unlike the judgment ordering the road) does not take title from one and lodge it in another. Mere injunction to restrain trespass (as is the case here) does not so involve title to lands as to confer jurisdiction upon this court.

That we may speak with a united voice, the case of *Ripkey v. Gresham*, 214 S. W. 851, and the cases therein cited are hereby overruled. This ruling likewise applies to the

same case in the Springfield Court of Appeals, when it was transferred here, and the cases in that opinion cited, 190 S. W. 354, and all like cases. The cause is retransferred to St. Louis Court of Appeals.

All concur, except WOODSON, J., who is absent.

STATE v. PLOTNER. (No. 21550.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

1. Forgery \S 15—"Person dealing with corporation" as to making false entries must be one representing the adverse side of a transaction with the corporation.

A "person dealing with * * * corporation," within Rev. St. 1909, \S 4653, denouncing the making of false entries with intent to defraud in books of corporation to be delivered, or with intent to be delivered, to some "person dealing with the corporation," must be a person representing the other side in a transaction with the corporation, and not officers or directors acting for the corporation.

2. Forgery \S 15—Persons held "dealing" with bank, within statute denouncing false entries in books delivered to "person dealing with corporation."

State bank examiners, clearing house auditor, or any stockholder or depositor, would be persons dealing with the bank, within Rev. St. 1909, \S 4653, denouncing the making of false entries with fraudulent intent in books of corporation delivered or intended to be delivered to any "person dealing with * * * corporation."

3. Forgery \S 15—Bank's cash journal not "delivered" to depositor, within statute denouncing forgery, by permitting them to examine the book.

Permitting depositors, stockholders, or clearing house examiners to examine cash journal of bank does not constitute delivery of such book to such depositors, within Rev. St. 1909, \S 4653, denouncing as forgery the making of false entries with intent to defraud in books of corporation "delivered" or intended to be "delivered" to any person dealing with such corporation; the book not being "delivered" until there is at least temporarily a change of control or of possession.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Given.]

4. Statutes \S 188—Legislature presumed to have given word its ordinary meaning.

The court cannot assume that the Legislature, in the use of a word in the enactment, intended to give it a meaning radically different from that which ordinarily attaches to it, without some explanation of such intention.

5. Forgery \S 15—Books of bank may be "delivered" by temporary transfer of actual and absolute control of a book.

In order that a book of a bank be "delivered," within Rev. St. 1909, \S 4653, denounc-

ing as forgery the making of false entries with intent to defraud in books of corporation "delivered or intended to be delivered" to person dealing with such corporation, it is not necessary to place the book permanently beyond the control or demand of a bank, as in case of a sale or gift, but there may be a delivery for the purpose of inspection, or a conditional delivery; but to constitute delivery in such case there must be temporarily a transfer of actual and absolute control of book.

6. Forgery \S 15—Bank books "delivered" to person dealing with such bank by examination thereof by bank examiners.

In view of Rev. St. 1909, \S 1080, as amended by Acts 1911, p. 91, and section 1081, the books of a bank are "delivered" to person dealing with the bank, within section 4653, denouncing as forgery the making of false entries in books of corporation "delivered or intended to be delivered," to any person dealing with such corporation, on examination of such books by state bank commissioner, and his deputy, and the bank examiners; such examination constituting a temporary transfer of the control of books to the examiners.

7. Forgery \S 5—Intention of defendant, accused of making false entries in books of corporation, immaterial.

In prosecution for forgery, by making false entries with intent to defraud in books of bank delivered or to be delivered to any person dealing with bank, in violation of Rev. St. 1909, \S 4653, the intention of the defendant as to delivery of book is immaterial, in view of section 4921; the words "intended to be delivered," within former statute, referring to the intention of the corporation owning the books, and not the intention of the person making false entries.

8. Forgery \S 27—Information charging forgery by making false entries in book of bank held defective.

In prosecution for forgery by making false entries, with intent to defraud, in books of corporation, in violation of Rev. St. 1909, \S 4653, information held defective in failing to allege that the bank intended to deliver the book to any person, or kept book for that purpose, as required by the statute.

9. Forgery \S 21—Defendant held guilty on coconspirator making false entries in bank book.

Defendant, who instructed bank employé to make false entries in bank book, and who instructed employé to pick out some account that had not previously been tampered with, but that had sufficient money to withstand a false entry, was guilty of forgery, in violation of Rev. St. 1909, \S 4653, though employé made the false entry in account that had previously been manipulated, since in so doing the employé was carrying out the general purpose of the conspiracy to defraud by making a false entry.

10. Criminal law \S 59(4)—Rule as to guilt of coconspirator stated.

If two or more persons agree together to commit some crime, and enter upon the commission of the crime, and one of them, in pursu-

ance of the common design and for the purpose of carrying it out, performs some criminal act different from that in contemplation of the parties at the outset, the others will be guilty of the criminal act.

11. Criminal law ¶159 — Prosecution on amended information held not barred by limitations.

That information on which trial for forgery was had was filed more than three years after the commission of the crime did not bar prosecution by limitations, though such information was given a different number than a previous information, where order permitting the filing of an amended information recited that the amended information was given a different number, and where court by order corrected such number, so as to make it correspond with previous information.

12. Forgery ¶15—Statute denouncing making of "false entries" violated by making single false entry.

Rev. St. 1909, § 4653, denouncing as forgery the making of "false entries" in books of a corporation, is violated by the making of a single false entry, in view of sections 8053-8055, notwithstanding that, as originally enacted, the statute contained the singular "entry."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, False Entry.]

Appeal from Criminal Court, Jackson County; E. E. Porterfield, Judge.

James A. Plotner was convicted of forgery in third degree, and he appeals. Reversed and remanded.

See, also, 185 S. W. 192.

The defendant was convicted in the circuit court of Jackson county of forgery in the third degree, in violation of section 4653, R. S. 1909, and appealed. The amended information on which he was tried is as follows (caption and signatures omitted):

"Now comes Hunt C. Moore, prosecuting attorney for the state of Missouri, in and for the body of the county of Jackson, and upon his oath informs the court that John Edward Kornfeldt and James A. Plotner, whose Christian names in full are unknown to said prosecuting attorney, late of the county aforesaid, on the 14th day of September, 1914, at the county of Jackson, state of Missouri, did unlawfully and feloniously conspire, combine, and confederate with one another and together, with the felonious intent then and there to defraud the Mercantile Bank of Kansas City, Missouri, a moneyed corporation (existing under the laws of Missouri and engaged in the general banking business in the city of Kansas City, Jackson county, Missouri), and customers, depositors, and patrons of said bank and corporation aforesaid, particularly one William H. Toller, of the money and personal property of said bank aforesaid, and its said customers, depositors, and patrons, particularly said Toller, and in pursuance of and to effectuate their said unlawful and felonious intent and purpose, did then and

there unlawfully and feloniously cause to be made, and did make, a certain false entry and entries, in a certain book of accounts, then and there kept by said bank aforesaid, in which said book of accounts was then and there recorded and kept the accounts of said bank aforesaid, with its customers, depositors, and patrons, and particularly the account of the said William H. Toller, its customer, depositor, and patron as aforesaid, thus and thereby unlawfully and feloniously, by then and there making and entering the figures '200,' did then and there add and enter a charge of two hundred dollars (\$200.00) against said Toller, depositor of said bank, as aforesaid, on said book of accounts, and then and there thus and thereby unlawfully and feloniously did diminish and discharge the existing pecuniary obligation of said bank aforesaid to said Toller in the sum and to the amount of two hundred dollars (\$200.00), and at the same time and by the same act, and with the same unlawful and felonious intent and purpose, did then and there in manner and form as aforesaid create an, as well as increase the, existing pecuniary obligation of said Toller to said bank aforesaid, in the sum of and to the amount of two hundred dollars (\$200.00), which said book of accounts with the said false and fraudulent entry and entries therein unlawfully and feloniously made as aforesaid, the said defendants, John Edward Kornfeldt and James A. Plotner, did unlawfully and feloniously intend to and did deliver to the officers of said bank, to wit, George H. Ruddy, George M. M. Edwards, directors and officers of said bank, and William T. Kemper and others, persons then and there dealing with said bank aforesaid, and to the said William H. Toller, depositor of said bank aforesaid, against the peace and dignity of the state."

On a severance the trial proceeded against Plotner. John Edward Kornfeldt at the time of the trial had pleaded guilty, was under sentence to serve two years in the penitentiary, and at liberty on parole. He was the principal witness for the state.

The defendant, in August, 1914, and thereafter, was an attorney, with an office in the Lathrop Building, Kansas City, Mo., and a depositor in the Mercantile Bank mentioned in the information. At that time Kornfeldt, a young man 22 years of age and married, was a bookkeeper in the bank, and had charge of those books representing the alphabet from K to Z, covering Plotner's account. Plotner had done Kornfeldt some favors, so as to arouse a feeling of obligation on Kornfeldt's part. About August 17, 1914, Plotner requested Kornfeldt to come to his office, which Kornfeldt did. Plotner then told Kornfeldt that he was expecting certain checks to come through the bank, which he would not have money deposited to cover. He had a check for \$200 coming through that day, and asked Kornfeldt to "take care of it." Kornfeldt was unable to see how he could take care of it, in the absence of sufficient deposit to Plotner's credit.

Plotner suggested that it could be handled by charging the amount to some other depositor who had ample deposit, and promising that he would make it good the following day. The check was accordingly presented, drawn by James A. Plotner, payable to B. Himberg. Kornfeldt carried out the scheme by charging the amount, \$200, on the cash journal, to the account of William Toller, a depositor. No windfall came to Plotner that night or afterwards, and the amount still remained charged to the account of William Toller. Instead of having resources by which to make good the shortage, Plotner, apparently, was incurring continual drafts upon his resources, and a few days later drew another check for \$100 and Kornfeldt carried out the same sort of a scheme to cover up the transaction. Kornfeldt seemed to be completely under the influence of Plotner, and ready to do anything the latter requested in the direction indicated, although he hoped and expected all the time, he said, that Plotner soon would make his shortages good. He endeavored at times to get Plotner to straighten out the trouble, and was put off with promises and plausible explanations. Plotner's chronic need of money caused a repetition of the transaction mentioned through a period of about three months, until his total peculations amounted to \$9,800. Among the checks so drawn and paid was one for \$200, dated September 11, 1914, drawn by Plotner, payable to Hoff, Meservey, German & Michael, which was charged to the account of William Toller September 14, 1914. This was the check and the false entry described in the information.

About the middle of January, 1915, the Mercantile Bank was merged with the Commerce Trust Company of Kansas City, and when negotiations looking to that merger began, and some time prior to the merger, Kornfeldt told Plotner about it, and Plotner began to figure some way to escape the inevitable discovery which would follow an examination of the Mercantile Bank's books. He suggested several methods to bluff the matter through, and finally advised Kornfeldt to go to Kansas until he (Plotner) could fix it up, and Kornfeldt went. Plotner then, acting, he said, as attorney for Kornfeldt, went to the officers of the Mercantile Bank and told them Kornfeldt had been embezzling funds of the bank, and had confessed the same to him in his capacity as counsel; he suggested that a settlement in some way should be arranged. Before any definite conclusion of that matter, Kornfeldt returned from Kansas, was arrested, and gave all the facts to the police officers. Finally Plotner substantially admitted his guilt; that he had got practically all the money he was charged with getting, by means of checks which he drew on his own account

and which were charged by Kornfeldt to the accounts of others. It turned out that the \$200 check, the entry in regard to which constituted the offense for which the defendant was convicted, was drawn to pay a claim against Plotner, a claim which he owed for an account he had collected for some person.

The entry under consideration was made in the "cash journal" of the bank. It never appeared on Toller's passbook, but the entry on the cash journal affected Toller's account, in that it reduced his deposit account \$200, and thus reduced the obligation of the bank to him that much. It is not shown that this false entry relating to the \$200 appeared on any other book kept by the bank. The purpose for which the "cash journal" containing the false entry was kept, the use to which it was put, and what was done with it, were explained by several witnesses for the state. Kornfeldt testified that after the entry was made in the book that it was intended to be delivered to "any one coming in who wished to look at it." He did actually deliver the book to the board of directors of the bank, and to the committee appointed by the bank as the auditing committee to check the book up.

"They came and asked me for it, and I took it to them. That is a delivery, as nearly as I can figure it out. I carried it into the directors' room and laid it down on the table."

He then said, if William H. Toller had come in there and inquired for the book, it was there for the purpose of delivery to him. This was for the purpose of inspection in the bank. Kornfeldt testified further that at the time of the merger of the Mercantile Bank and the trust company, before the delivery of the books of the bank to the trust company, he worked one whole day on Plotner's passbook in order to balance it up and deliver it to him. He did not say that any false entries were in that passbook, and it may be inferred from his testimony that he was working to get entries in it that ought to have been there at the time of the transactions mentioned.

George H. Ruddy, who was cashier of the Mercantile Bank at the time of the transactions mentioned, swore that the cash journal in which the false entries appeared was under the control of Kornfeldt, whose duty as a bookkeeper was to take charge of it, and to deliver it "to me or any other officer of the bank, or any of our directors, or to our examining committee, as provided by the statute, or the clearing house examiner, or any customer who desired to examine his account in good faith, or any stockholder who wished to make an examination." He testified, further, that in the transfer of the stock of the Mercantile Bank to the Commerce Trust Company the dealing was

with one W. T. Kemper, and that the books of the bank, including the cash journal, were delivered to W. T. Kemper at the time of the transfer. The witness then explained that during all the time from the entry to the transfer to the trust company the books, including the cash journal, were there "for the inspection of people dealing with that bank." He then enumerated the people who might inspect the book:

"The officers of the bank; the stockholders of the Mercantile Bank; the auditing committee appointed by the directors of the Mercantile Bank; the clearing house auditor; the state bank examiner, whenever he chose to make an examination; any depositor that desired to examine his particular account, or any stockholder; and at this particular time, January 13th, on account of this merger of the two institutions, Mr. Kemper, president of the Commerce Trust Company or his representative."

Kornfeldt, on being asked if any of the officers of the bank requested him to bring the book, containing the false entry, to the Commerce Trust Company while the negotiation was pending, answered, "Yes." On being asked whether or not he delivered the cash journal, containing the false entries, to any members of the bank, "or others dealing with the bank," he answered:

"I carried the book over from the Mercantile Bank to the Commerce Trust Company under my arm."

It appeared that the witness was employed by the Commerce Trust Company at the time of the merger.

Stubbs & Stubbs and E. W. Sloan, all of Kansas City, for appellant.

Frank W. McAllister, Atty. Gen., and S. E. Skelley and Henry B. Hunt, Asst. Attys. Gen., for the State.

WHITE, C. (after stating the facts as above). I. The conviction was under section 4653, R. S. 1909. It is urged by appellant that the information does not charge an offense under that statute and that the evidence will not support a conviction of guilt. The section is as follows:

"False Entries in Books of Corporations, Third Degree.—Every person who, with intent to defraud, shall make any false entries, or shall falsely alter any entry made in a book of accounts kept by any moneyed corporation within this state, or in any book of accounts kept by any such corporation or its officers, and delivered or intended to be delivered to any person dealing with such corporation, by which any pecuniary obligation, claim or credit shall be or shall purport to be created, increased, diminished or discharged, or in any manner affected, shall, upon conviction, be adjudged guilty of forgery in the third degree."

Analysis of that section shows that the following facts must be shown to prove the commission of the crime; (a) There must be an

intent to defraud; (b) there must be a false entry made in a book of accounts kept by the corporation; (c) by which some pecuniary obligation, claim, or credit shall purport to be increased, diminished, or discharged, or in some manner affected; (d) the book must be delivered or must be intended to be delivered; (e) to some person dealing with the corporation. There can be no serious question that the conditions (a), (b), and (c), were properly alleged and established by sufficient proof; there was undoubtedly an intent to defraud by the false entry in the cash journal, and the account of William Toller was affected by the entry.

[1, 2] It remains to consider what is meant by "any person dealing with the corporation," and "delivered" or "intended to be delivered." Kornfeldt and Ruddy swore those books were delivered and intended to be delivered to the officers of the bank, the examining committee of the directors. Such persons could not come within the definition of persons dealing with the bank in such examination as they conducted; they were acting for the bank—they were the bank. A person "dealing with the bank" in any transaction must be one who represents the other side. Doubtless the other persons mentioned in the evidence, the state bank examiner, the clearing house auditor, any stockholder or depositor, were "persons dealing with the bank," within the meaning of the statute.

[3] There was testimony that the cash journal was intended to be "delivered" to the depositors, stockholders, or clearing house examiner, whenever they desired to examine it; but in explanation of that it is said by Mr. Ruddy that they were the people who "inspected" and "looked at" the books. It is not stated anywhere that the cash journal was permitted to be taken away from the bank; in fact, the evidence indicates that it was not. It was kept by the bank, and the only liberty allowed the persons last mentioned was to examine it. There is no definition of "delivery," or "deliver," which does not involve at least temporarily a change of control or of possession. 18 C. J. p. 476; State v. Mills, 146 Mo. 195, loc. cit. 204, 47 S. W. 938; State v. Watson, 65 Mo. 115, loc. cit. 122; Chambers v. Chambers, 227 Mo. 268, 127 S. W. 86, 137 Am. St. Rep. 567; Thomas v. Thomas, 107 Mo. 459, 18 S. W. 27; Gartside v. Pahlman, 45 Mo. App. 160; In re Estate of Soulard, 141 Mo. 642, 43 S. W. 617; Sneathen v. Sneathen, 104 Mo. 201, 16 S. W. 497, 24 Am. St. Rep. 326; Standiford v. Standiford, 97 Mo. 231, 10 S. W. 836, 3 L. R. A. 299; Mudd v. Dillon, 166 Mo. 110, 65 S. W. 973; McNear v. Williamson, 166 Mo. 358, 66 S. W. 160.

[4] We cannot assume that the Legislature, in the use of a word in the enactment, intended to give it a meaning radically different from that which ordinarily attaches to it, without some explanation of such intention. If it had been the intention of the Legisla-

ture to declare a crime is committed in making a false entry in a book to be "inspected by," or "exhibited to," or "examined by," any person dealing with the bank, it would have been not only easy, but it would have been the obvious thing, to use such words in describing the crime. Of course we cannot say what reason actuated the Legislature in so restricting the operation of the statute. We can only give it effect as it reads.

Manifestly the definition under consideration would apply to passbooks kept and intended to be delivered to the customers of the bank. But there was no false entry nor alteration in the passbook of Mr. Toller. His passbook showed exactly the correct statement of his account. There is no definite testimony that there was a false entry in the passbook of Plotner, the defendant, although it may be inferred from the testimony of Kornfeldt that Plotner's passbook did not show the true state of his account because, when the transfer was made to the trust company, Kornfeldt worked all day on that passbook to get it to balance correctly. While it did not show the false entry in relation to the \$200, the footings in the passbook probably were false. But the information does not charge that the false entry was made in his passbook.

[5, 6] It was not necessary, in order to come within the meaning of the term "deliver," to place the book permanently beyond the control or demand of the bank, as in case of gift or sale, as involved in some of the above cases. There may be a delivery for the purpose of inspection, or a conditional delivery; yet in any such case there would have to be temporarily a transfer of actual and absolute control of the book. Would the state bank commissioner, his deputy, and the bank examiners, in the examinations of the bank which the law required them to make, possess such control in any degree different from that enjoyed by stockholders and clearing house examiners? Undoubtedly yes. Under section 1080, R. S. 1909, amended Acts 1911, pp. 91, 92, the bank commissioner and subordinates are required to visit and examine every bank and trust company doing business under the laws of this state. They have power to cause proceedings to be instituted against any bank which they find mismanaged, and if they find its continuance in business will seriously jeopardize the safety of its depositors, they are authorized to "close said bank" and take charge of its property and effects (R. S. 1909, § 1081), and may appoint a special agent to take charge, pending the appointment of a receiver. Obviously, in making their examinations, the bank commissioner and examiners have absolute control of the books of the bank; the books must be "delivered" to them for that purpose. They are persons "dealing with the bank." Persons dealing with the bank, also, would include any one who might at any time purchase the bank, or negotiate with the bank

for that purpose. Kemper and the trust company would come within that definition.

[7] Now the intention of the defendants in regard to delivery of the book is immaterial. The words "intended to be delivered," used in the statute, refer to the intention of the corporation which owns the book—the purpose for which the book is kept. The criminal must entertain an intention to defraud, but it does not matter against whom the intention would operate. Section 4921, R. S. 1909. Obviously the delivery of, or intention to deliver, the book in which the false entry is made, is no element of the crime, so far as it includes the intent and acts of the defendants. That is merely a description of the conditions under which the crime may be committed—the instrumentalities at hand which the criminal may use in the perpetration of his crime. The entry must be made in that kind of a book.

[8] It is not alleged that the bank intended to deliver the book to any person, or kept it for that purpose. While the proof is sufficient to show the commission of the crime by making a false entry in a book intended to be delivered to persons dealing with the bank, the information is defective in failing to make the necessary allegations concerning that element. For that reason the cause will have to be reversed.

II. It is claimed by the appellant that the crime is not proved, because Plotner directed Kornfeldt not to charge the particular check in question to the account of Toller, and therefore the false entry was made in direct violation of the defendant's direction. Plotner's checks, falsely charged to other accounts, had been coming through since August, and some of them charged to Toller's account. The check which caused the false entry mentioned in the information was drawn September 11th. On cross-examination Kornfeldt said that Plotner had told him to charge the check of September 11th to some account that he had not manipulated before. The reason was, as the witness explained, he had so much money off of other accounts that Plotner told him to pick out an account "that had some money that would stand that." After considering the various accounts to which he might make the charge, the witness said he could not run any chances by taking it off an account that might have a big pay roll at the end of the week and wipe off the balance. Therefore he charged it to Toller's account again, because he knew his account would be good for it.

[9] It will be borne in mind that Plotner in the first instance instructed Kornfeldt how to conceal the shortage by charging it to some one whose account would be good, and Kornfeldt carried out the instruction as best he could. The mere suggestion that he pick out some account that had not been manipulated was general; it did not particularly designate Toller's account as one to avoid, nor imply

that Kornfeldt should not use any discretion in the matter. He was conforming to the desire of Plotner when he selected an account which, as Plotner indicated, "would stand it." The conspiracy between the two was clearly and perfectly shown. The general purpose of the conspiracy was to get the money and make false entries to conceal the act. What one conspirator did in carrying out the general purpose was the act of the other, even though they might differ in unimportant details as to how the scheme should be carried through. The particular account to be selected for the purpose of manipulation was necessarily left to the judgment of Kornfeldt.

[10] If two or more persons agree together to commit some crime, and enter upon the commission of the crime, and one of them, in pursuance of the common design and for the purpose of carrying it out, performs some criminal act different from that in contemplation of the parties at the outset, the others will be guilty of the criminal act. The doctrine is fully explained and illustrated in the case of *State v. Darling*, 216 Mo. 450, loc. cit. 458 to 464, 115 S. W. 1002, 23 L. R. A. (N. S.) 272, 129 Am. St. Rep. 526. See, also, *People v. Friedman*, 45 L. R. A. (N. S.) 55, note.

The point is without merit.

III. Appellant assigns error to the admission of evidence showing numerous other checks besides the one under consideration, all followed by false entries, drawn by the defendant. Other crimes of the same character may be proven for the purpose of showing the intent with which the act charged was done, when the crime is of a character such as is shown in this case. Several late cases fully elucidate the limits of the rule. *State v. Hill*, 273 Mo. 329, 201 S. W. 58, loc. cit. 60; *State v. Cummins*, 213 S. W. 969, loc. cit. 974; *State v. Patterson*, 271 Mo. 99, loc. cit. 110, 196 S. W. 3.

[11] IV. It is claimed by appellant that the case is barred by the statute of limitations. The false entry was made September 14, 1914, and the information on which the trial was had was filed September 26, 1917, more than three years thereafter. An information was filed charging the same offense September 10, 1917, within the three years. The point appellant makes is that the information on which the trial was had is not shown to be an amendment to the first information and bears a different number. However, there appears in the record an order of court to the effect that the state was given leave to file an amended information in case No. 15130, the number in which the first information

was filed, and the order recites that by mistake the amended information was given a different number. The court thereupon entered an order correcting the number, so as to show the information upon which the case then being tried was the same case as that in which the first information was filed. Thus the record shows the statute of limitations does not bar the action.

V. Appellant makes the point that no offense was committed, because section 4653 uses the word "entries" in describing the crime, and therefore a single false entry would not be a violation of the law. Section 8053, R. S. 1909, is as follows:

"The Singular Included under the Plural.—Whenever, in any statute, words importing the plural number are used in describing or referring to any matter, parties or persons, any single matter, party or persons shall be deemed to be included, although distributive words may not be used."

Appellant points out that section 4653 as originally enacted contained the singular "entry," and in 1845 was amended making it plural, "entries," and argues that the amendment indicated an intention to change the meaning, and exclude the application of the act to a single entry. Section 8055, R. S. 1909, however, provides that the rules prescribed in section 8053 and section 8054 "shall apply in all cases unless it be otherwise specially provided, or unless there be something in the subject or context repugnant to such construction."

[12] That provision excludes the possibility of a construction which would limit the operation of the word "entries," as section 8053 says it shall *not* be limited. The construction which appellant desires to apply is not "specially provided," nor is there anything in the "subject or context" of section 4653, defining the offense, which is "repugnant to" the construction definitely required by section 8053. Section 8053 was enacted long before, and was the law at the time the amendment of section 4653 in 1845 changed the word "entry" to "entries." The Legislature must be presumed to have made the change with a full understanding of the construction which section 8053 would apply to it.

The judgment is reversed, and the cause remanded.

RAILEY and MOZLEY, CC., concur.

WILLIAMS, P. J., and WALKER, J., concur.

WILLIAMSON, J., not sitting.

REGAN et al. v. ENSLEY. (No. 20821.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920. Rehearing Denied
June 25, 1920.)

1. Homestead §5 — Construction of laws should not extend beyond plain purpose of enactment.

Though homestead laws are construed with great liberality, such construction should not extend beyond the plain purpose of their enactment, as evidenced by the usual and obvious meaning of the words employed, or dispense with the necessity of parties bringing themselves within the spirit and purpose of the laws unaided by judicial construction.

2. Homestead §139—Widow gets conditional life estate.

Under Rev. St. 1909, §§ 6704, 6708, homestead, on death of husband, vests as a conditional life estate in the widow.

3. Homestead §136—Under statute, husband may designate the heirs who will take on death of wife.

Under Rev. St. 1909, §§ 6704, 6708, providing that husband shall not sell, mortgage, or alienate the homestead, but permitting joint alienation, and that it shall descend to widow and children, and on death of wife it shall pass to the heirs of the husband, the husband may provide by will for unconditional life estate in widow, and then to designated heirs, thus cutting off heirs not mentioned; the word "alienate," being restricted by the words "mortgage and sell," and will giving greater estate than statute.

4. Statutes §235 — Mandatory statute not strictly construed if purpose of act is limited.

While a mandatory statute should as a general rule be literally construed and strictly applied, this rule becomes inoperative when its application will limit, if it does not destroy, the purpose of the act being construed.

5. Statutes §194—General words do not amplify particular terms.

General words in a statute do not explain or amplify particular terms preceding them, but are themselves restricted and explained by the particular terms.

Appeal from Circuit Court, Montgomery County; E. S. Gamtt, Judge.

Suit for partition by Mary Alice Regan and another against William Ensley. From a judgment for defendant, plaintiffs appeal. Affirmed.

Claude R. Ball, of Montgomery City, for appellants.

W. C. Hughes, of Montgomery City, for respondent.

WALKER, J. This is a suit to partition certain town lots in New Florence, Montgomery county. Mary Alice Regan and Sarah Anderson, appellants, and William Ensley,

respondent, are the children of Solomon and Rebecca Ensley, through whom appellants claim title by descent as tenants in common to the lots in question. A trial in the circuit court resulted in a finding that appellants had no title to the property and that the fee in same was in the respondent. From the judgment rendered thereon, appellants have prosecuted this appeal.

Solomon Ensley died testate in April, 1896, seized in fee of the lots, which at the time he occupied with his wife as a homestead. The pertinent portions of his will are as follows:

"1st. I give and bequeath to my beloved wife, Rebecca Ensley, all the real estate and personal property I may have or own at the time of my death to have and to hold and use during her lifetime and at her death all of such real estate to descend to my son, William Ensley, to have and to be held and owned by him in fee simple to use and dispose of as he may see proper.

"2d. I give and bequeath to my two daughters, Sarah Anderson, the wife of Thomas Anderson, and Alice Regan, the wife of Jeff Regan, each the sum of ten dollars to be paid to them out of my personal estate or by my son, William Ensley, and in the event my son, William Ensley, pays to my two said daughters the said sums of ten dollars then and in that event it is my will and desire that my son, William Ensley, shall fall heir to any and own all of my personal estate which may remain in existence at the time of the death of my said beloved wife which has not been disposed of by her for use and support."

Rebecca, relict of Solomon, continued after his death to occupy the premises, not only during her widowhood, but after her marriage to one Austin, and until her death in March, 1917. The authority of the testator to devise the lots which constituted his homestead is the matter at issue. The applicable statute is the amendatory act of the homestead laws (Laws 1895, p. 185) in force at the time of the testator's death (Balance v. Gordon, 247 Mo. loc. cit. 131, 152 S. W. 358). Sections 6704 and 6708, R. S. 1909, are in no material features different from the relevant portions of the act of 1895, which in the first section prescribes the limitations upon the right of the disposal of a homestead as follows:

"Sec. 5435. The homestead of every housekeeper or head of a family, consisting of a dwelling house and appurtenances, and the land used in connection therewith, not exceeding the amount and value herein limited, which is or shall be used by such housekeeper or head of a family as such homestead, shall, together with the rents, issues and products thereof, be exempt from attachment and execution, except as herein provided; such homestead in the country shall not include more than one hundred and sixty acres of land, or exceed the total value of fifteen hundred dollars; and in

cities having a population of forty thousand or more, such homestead shall not include more than eighteen square rods of ground, or exceed the total value of three thousand dollars; and in cities having a population of ten thousand and less than forty thousand, such homestead shall not include more than thirty square rods of ground, or exceed the total value of fifteen hundred dollars; and in cities and incorporated towns and villages having a population less than ten thousand, such homestead shall not include more than five acres of ground, or exceed the total value of fifteen hundred dollars. The husband shall be debarred from and incapable of selling, mortgaging, or alienating the homestead in any manner whatever, and every such sale, mortgage or alienation is hereby declared null and void: Provided, however, that nothing herein contained shall be so construed as to prevent the husband and wife from jointly conveying, mortgaging, alienating or in any other manner disposing of such homestead, or any part thereof."

And in the second section defines the manner in which such homestead shall pass and vest, as follows:

"Sec. 5439. If any such housekeeper or head of a family shall die, leaving a widow or any minor children, his homestead to the value aforesaid shall pass to and vest in such widow or children, or if there be both, to such widow and children, and shall continue for their benefit without being subject to the payment of the debts of the deceased, unless legally charged thereon in his lifetime, until the youngest child shall attain its legal majority, and until the death of such widow: that is to say, the children shall have the joint right of occupation with the widow until they shall arrive respectively at their majority, and the widow shall have the right to occupy such homestead during her life or widowhood, and upon her death or remarriage it shall pass to the heirs of the husband; and the probate court having jurisdiction of the estate of the deceased housekeeper, or head of a family, shall, when necessary, appoint three commissioners to set out such homestead to the person or persons entitled thereto."

[1] Under these statutes appellants contend that the inhibition therein upon the alienation of a homestead, whether by devise or otherwise, is absolute; and upon the death of the testator a life estate in the property vested in his widow with a vested remainder in the parties hereto, appellants and respondent, which ripened into a fee upon the death of the widow. While homestead laws are purely statutory in their origin, their salutary intent is such as to incline the courts to uniformly construe them with great liberality. Such construction, however, should not extend beyond the plain purpose of their enactment as evidenced by the usual and obvious meaning of the words employed, or dispense with the necessity of parties bringing themselves within the spirit and purpose of the laws unaided by judicial construction. *Dalton v. Simpson*, 270 Mo. loc. cit. 300, 193 S. W. 546; *Keeline v. Sealy*, 257

Mo. 498, 165 S. W. 1088; *Sperry v. Cook*, 247 Mo. 132, 152 S. W. 318; *Hines v. Duncan*, 79 Ala. 112, 58 Am. Rep. 580; *Fred v. Bramen*, 97 Minn. 484, 107 N. W. 159, 114 Am. St. Rep. 740; *Charless v. Lamberson*, 1 Iowa, 435, 63 Am. Dec. 457.

[2, 3] Mindful of these rules, the meaning of the statute as applied to the facts at bar should not be difficult of determination. That the homestead interest upon the death of the husband vests as a conditional life estate in the widow we have repeatedly held. *Bushnell v. Loomis*, 234 Mo. 371, 137 S. W. 257, 86 L. R. A. (N. S.) 1029; *Snodgrass v. Copple*, 208 Mo. 480, 101 S. W. 1090; *Hufschmidt v. Gross*, 112 Mo. 649, 20 S. W. 679; *West v. McMullen*, 112 Mo. 405, 20 S. W. 628; *Rhorer v. Brockhage*, 86 Mo. 544. In this far, therefore, no question can arise as to the correctness of appellants' contention. That one of the conditions under the statute on which the widow's estate was terminable, viz. her marriage, need not concern us, as it did not the parties hereto. She continued in the possession and occupancy of the premises thereafter until her death, and if any conclusion is to be drawn as to the character of her tenure after her marriage it is that thenceforth she was holding under the will and not under the statute. In any view of this phase of the facts it cannot affect appellants' title.

A further provision of the statute is that the children of a householder or head of a family shall upon his death use and occupy the homestead jointly with his widow during her tenure and thereafter until each of such children reaches its legal majority. The effect of this statute is to create in said children an estate for years terminable upon each reaching full age as stated. This provision has no application here. Each of the children, the parties to this proceeding, had reached full age at the time of the death of their father, *Solomon Ensley*. This provision may therefore be dismissed from consideration, except as to the effect its elimination may, as contended by appellants, have upon the determination of their title.

Appellants' contention in this regard is that under the first section of the act (1895) the husband is debarred from alienating the homestead in any manner whatever, and under the second section of the act, there being no minor heirs and the life estate of the widow having terminated with her death, that the fee in said property vested in appellants under the provision that "it shall pass to the heirs of the husband." This conclusion necessitates a literal and mandatory construction of the statute, and it remains to be determined if it is in harmony with the rules of interpretation applicable hereto and as a consequence comports with the spirit and purpose of this character of legislation. We have repeatedly held that the nature of the

homestead law is benign, and its purpose the protection of the widow and minor children from the vicissitudes of fortune, when they have been bereft by death of the strong arms and helpful hands of the husband and father. He, therefore, in whose kindly mind this statute had its origin, framed it in comprehensive terms, with a mandatory meaning that its beneficent purpose might not be thwarted and the objects of its tender care thus deprived of its protection.

From the nature of a will, as contradistinguished from a conveyance of real property, Rebecca Ensley cannot be said to have joined therein with her husband in such manner as is contemplated by the statute to render the alienation valid. Section 5435, *supra*. This portion of the statute must, in our opinion, from its terms, be held to have a more specific reference to conveyances than to wills. So far, however, as it was possible for her to join in the will, she did so. Not that any overt act of hers was necessary at the time of the death of her husband to complete her investiture of title, because the homestead comprised all of the real property of the estate, and did not exceed the value of this interest. Being in possession, she continued therein, and, while her right and title to the property terminated in law upon her remarriage, her peaceful possession continued until severed by death. This attitude, although not determinative, affords persuasive support to the conclusion that, while not joining in the will, which, as we have indicated, was not possible, she at least acquiesced in its provisions in accepting and enjoying the extended tenure if afforded.

We are not, however, and we should not be, limited to persuasive reasoning in determining the propriety of the husband's will. The statute itself and the purpose of its enactment, interpreted in the light of the rules stated, should furnish the safest measure as to its meaning. The husband's alienation by devise in no wise injuriously, but rather beneficially, affected the widow's use and occupancy of the property. She took a life estate coupled with a condition under the statute, and a like estate free from a condition under the will. Her last estate was therefore better than her first.

[4] It being apparent that the disposition of this property by the testator in his will helped rather than hurt the beneficent purpose of the law, we are of the opinion that the inhibition therein in regard to alienation as here exercised has not been violated. While it is true that a mandatory statute should as a general rule be literally construed and strictly applied, this rule becomes inoperative when its application will limit, if it does not destroy, the purpose of the act being construed. There is nothing in our ruling in *Rockhey v. Rockhey*, 97 Mo. 76, 11 S. W. 225, which militates against this con-

clusion. We simply held there that a husband could not by a will deprive his widow and minor children of their homestead right in his estate. This is consonant with the purpose of the homestead law, but furnishes no precedent for the determination of the matter at issue. Here there are no minor children, and the widow had no cause of complaint, and made none.

The ruling of this court in *Kaes v. Gross*, 92 Mo. loc. cit. 659, 3 S. W. 840, 1 Am. St. Rep. 767, to the effect that it is out of the power of a husband to devise the homestead, as much so as by his sole deed to convey or mortgage it, was under a statute (section 2693, R. S. 1879) which excepted a homestead out of the law relating to devises. This exception was eliminated by the amendment of section 2693 in 1895 (Laws 1895, p. 186). Moreover, the above conclusion, reached in the *Kaes-Gross Case*, was in *Greer v. Major*, 114 Mo. loc. cit. 155, 21 S. W. 481, declared to be obiter and expressly overruled.

All that was decided in *Schorr v. Etling*, 124 Mo. loc. cit. 46, 27 S. W. 395, and cases cited, pertinent to the matter at bar, was that a widow cannot by the will of her husband be deprived of rights secured to her under the law of 1875, and that the homestead passes to the widow by operation of law, and is expressly excepted from the operation of the will of her husband. This ruling, as stated in reference to the *Kaes-Gross Case*, was under the law of 1875, and has since been eliminated from the statute by repeal. These cases, therefore, are fallen timber so far as concerns the matter here seeking solution.

A further ruling is made in the *Schorr-Etling Case* as to the homestead law of 1865 concerning the widow's right of election, which is not relevant in the determination of the instant case; nor is anything in *Ball v. Ball*, 165 Mo. 312, 65 S. W. 552, which construed a will under the law of 1865, or in *Armor v. Lewis*, 252 Mo. 568, 161 S. W. 251, construing the homestead law of 1895, decisive of the question here demanding solution. The foregoing are all of the cases cited by appellants in support of their contention. It is apparent that they fall short of accomplishing this purpose.

[5] There is no dearth of technical reasons, based purely upon the canons of construction, to sustain the conclusion we have reached herein. The language of that portion of the statute (section 5435, *supra*) under discussion is as follows:

"The husband shall be debarred from and incapable of selling, mortgaging, or alienating the homestead in any manner whatever," etc.

A rule of construction provides that, where general words follow particular words, the former will be construed as applicable only to persons or things of the same nature or class as the latter; or, as we have stated it:

"General words do not explain or amplify particular terms preceding them, but are themselves restricted and explained by the particular terms." *State ex rel. Pike County v. Gordon*, 268 Mo. 321, 188 S. W. 88.

In the application of this rule to the statute quoted, the meaning of the general word "alienation" may properly be restricted to that embodied in the particular words "selling" and "mortgaging." A like construction may be given to that portion of the proviso of the same section that—

"nothing herein contained shall be construed to prevent the husband and wife from jointly conveying, mortgaging, alienating or in any other manner disposing of such homestead or any part thereof."

As we have shown, there could not well be a joint alienation by devise and the framers of the law evidently did not so intend. The reasonable construction of this proviso, therefore, is that such a joint alienation was authorized as is expressed by the words "conveying or mortgaging," and that the word "alienating" should be restricted in its meaning to that given to the preceding words, while the words "or in any manner disposing" may be construed as supplementary. Thus interpreted, the husband's power of alienation by devise is not prohibited by the statute. In the application of this rule the purpose of the homestead law is not to be lost sight of. This necessitates a modification of the foregoing rule of construction, which, while not prohibiting alienation by devise, limits the exercise of same to cases where the rights of the widow and minor children are not thereby affected.

Our rulings in *Ball v. Ball*, supra, and in *Wetzel v. Hecht* (not yet [officially] reported) 220 S. W. 888, while not precedents decisive of the instant case, on account of a difference in the issues, nevertheless recognize the right of the husband to alienate the homestead by devise, where the spirit and purpose of the law is not thereby violated. Of such is the instant case.

The right of alienation having been established under the facts at bar, the ruling of the trial court was not error, and its judgment should be affirmed.

It is so ordered.

All concur.

STATE v. ANGLIN. (No. 21943.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920. Rehearing Denied
June 25, 1920.)

1. False pretenses \S 17—Larceny \S 14(3)
—Obtaining money by matching coins held false pretense, and not larceny.

Defendant in obtaining the money of the prosecuting witness by matching coins and bet-

ting on the result was guilty of the crime of obtaining money under false pretenses, and not of the crime of grand larceny.

2. Larceny \S 23—Defendant who fled with ring handed him as collateral security for payment of gambling debt held guilty of grand larceny.

Where prosecuting witness handed defendant, a stranger with whom he was matching coins and betting on the result, his diamond ring, worth \$700, to hold as collateral security for the payment of \$200 he had lost to defendant, and where defendant, having obtained possession of ring, fled with it, he was guilty of grand larceny.

3. Criminal law \S 1172(7)—Instruction placing burden greater than that required by law on the state not reversible error.

In prosecution for grand larceny of money and a ring, where under the evidence the taking of the money constituted merely the offense of obtaining money under false pretenses, and not the offense of larceny, the giving of an instruction requiring state to prove the taking of both money and ring held not reversible error, being favorable and not prejudicial to defendant in that it imposed too great a burden on state.

4. Criminal law \S 1162—No reversal except for prejudicial error.

The Supreme Court is authorized to reverse a conviction only for prejudicial error.

5. Criminal law \S 775(3)—Instruction on issue of alibi held sufficient.

In grand larceny prosecution, where defense was an alibi, instruction to acquit defendant if jury had a reasonable doubt as to defendant's presence at the time and place where the crime was committed held sufficient on the question of alibi without a specific instruction that an alibi was a legitimate defense.

6. Larceny \S 68(1)—Evidence held sufficient for submission to jury.

In grand larceny prosecution, evidence held sufficient for submission of the case to the jury.

Appeal from St. Louis Circuit Court; Willson A. Taylor, Judge.

Thomas Anglin was convicted of grand larceny, and he appeals. Affirmed.

The defendant, Thomas Anglin, having been convicted of grand larceny upon an indictment in the circuit court of St. Louis county, and sentenced to imprisonment in the penitentiary for the term of five years, has duly appealed. The indictment, omitting the formal portions, alleges that defendant and another, "at the city of St. Louis aforesaid, \$100, lawful money of the United States of the value of \$100, and one diamond ring of the value of \$700, all of the value of \$800, of the money, goods, chattels, and personal property of William J. McCoshen, then and there feloniously did steal, take and carry away, with the felonious intent then and there to permanently deprive the owner of the use

thereof, and to convert the same to their own use."

The evidence, so far as it is necessary to set it out, was substantially as follows: The prosecuting witness, a stranger in St. Louis, became engaged in conversation with the defendant, who was a stranger to him. In the course of a few minutes a third person appeared, one Kelly, who was also ostensibly a stranger to both the other two, and shortly thereafter the three were engaged in matching coins and betting on the result. The prosecuting witness speedily lost \$100 in cash, which he paid, and also lost the additional sum of \$200, which he was unable to pay. Thereupon, at the suggestion of defendant, the prosecuting witness handed defendant a diamond ring of the value of \$700, to hold as collateral security for the payment of the \$200 which remained unpaid. Having obtained the diamond ring, the defendant fled. The prosecuting witness reported his loss, and two days thereafter the defendant was arrested by the police and identified by the prosecuting witness. This is the substance of the evidence for the state. At the conclusion of the state's evidence, the defendant asked a peremptory instruction, which was refused.

The defense was an alibi. The defendant's wife, another woman, and the defendant himself testified that at the time when the alleged larceny occurred the defendant was in his own home in the city of St. Louis, far away from the place where the larceny occurred.

Complaint is made of instructions numbered 1 and 2 given in behalf of the state, which were as follows:

"(1) If you find from the evidence that at the city of St. Louis and state of Missouri, at any time within three years next before the finding of the indictment herein, the defendant, either alone or acting jointly with another person, did wrongfully take and carry away \$100 lawful money of the United States and one diamond ring from the possession of William J. McCoshen with intent to fraudulently and feloniously convert the same to his own use and permanently deprive the owner thereof without his consent, and that the same was the property of William J. McCoshen and of the value of \$30 or more, you will find the defendant guilty of grand larceny and assess his punishment at imprisonment in the penitentiary not less than two years nor more than five years. Unless you find the facts to be as stated above, you will acquit the defendant."

"(2) If you have a reasonable doubt of the presence of the defendant at the time and place where the crime was committed, if you believe and find any crime was committed, you will give defendant the benefit of such doubt and acquit him."

Thomas J. Rowe, Jr., and Henry Rowe, both of St. Louis, for appellant.

Frank W. McAllister, Atty. Gen., and J. W. Broadus, Asst. Atty. Gen., for the State.

WILLIAMSON, J. (after stating the facts as above). It will be noticed that the indictment charged the appellant with having stolen \$100 in money "and one diamond ring." Instruction No. 1 required the jury to find that appellant "did wrongfully take and carry away \$100 lawful money of the United States and one diamond ring." It is urged upon our attention that this instruction is fatally erroneous. Learned counsel for appellant, however, seems to mistake the effect of this instruction; for he says that it "authorizes the jury to convict defendant of the offense of grand larceny if they find that he stole, took and carried away *either* the currency *or* the diamond ring." A reading of the instruction discloses the error of this statement. The jury was required by the instruction to find the defendant guilty only in the event that it found that he stole both the currency and the ring. In *State v. Anderson*, 186 Mo. 25, loc. cit. 38, 84 S. W. 946, 950, this court quoted with approval from *Loomis v. People*, 67 N. Y. loc. cit. 327, 23 Am. Rep. 123, as follows:

"While the element of trespass is wanting and the offense is not larceny, where consent is given, and the owner intended to part with his property absolutely, and not merely with a temporary possession of the same, even although such consent was procured by fraud, and the person obtaining it had an *animus furandi*, yet, as is well said by a writer upon criminal law: "It is different where, with the *animus furandi*, a person obtains consent to his temporary possession of property, and then converts it to his own use. The act goes farther than the consent, and may be fairly said to be against it. Consent to deliver the temporary possession is not consent to deliver the property in a thing, and if a person, *animus furandi*, avail himself of a temporary possession for a specific purpose, obtained by consent to convert the property in the thing to himself and defraud the owner thereof, he certainly has not the consent of the owner. He is therefore acting against the will of the owner, and is a trespasser, because a trespass upon the property of another is only doing some act upon that property against the will of the owner." * * *

"There is, to be sure, a narrow margin between a case of larceny and one where the property has been obtained by false pretenses. The distinction is a very nice one, but still very important. The character of the crime depends upon the intention of the parties, and that intention determines the nature of the offense. In the former case, where by fraud, conspiracy, or artifice the possession is obtained with a felonious design, and the title still remains in the owner, larceny is established. While in the latter, where title, as well as possession, is absolutely parted with, the crime is false pretenses." To the same effect is *People v. Morse*, 89 N. Y. 662."

State v. Anderson, 186 Mo. 25, loc. cit. 38, 84 S. W. 946, 950.

[1-4] The doctrine of this case was approved also in the case of *State v. Buck*, 186

Mo. 15, loc. cit. 21, 84 S. W. 951. Applying the doctrine of these cases to the case at bar, it is apparent that in taking the currency the defendant was guilty only of the crime of obtaining money under false pretenses, but that in taking the ring he was guilty of the crime of grand larceny. The question then presents itself whether or not the giving of the instruction above quoted constitutes reversible error in this case. If under the facts and circumstances shown in this record the giving of this instruction was prejudicial to the rights of the appellant, then it was reversible error to give it, but was this error prejudicial to the appellant? The effect of the instruction was simply to impose upon the state a greater burden than that which the law imposed upon it. Otherwise stated, the jury was required to find more under the instruction than it was required to find under the law in order to convict the appellant. We do not perceive, and appellant's able and ingenious counsel has not pointed out, how the imposition of this greater burden upon the state could possibly have been injurious to the rights of the accused. It is only for prejudicial error that we are authorized to reverse a conviction. The doctrine, as most favorably stated in behalf of the accused, is found in *State v. Brown*, 188 Mo. 451, loc. cit. 464, 87 S. W. 519, 523, as follows:

"Whenever error is committed in the trial of a criminal cause presumptively it is prejudicial, and unless it is made manifest by the disclosures of the entire record that such error could not have reasonably resulted in any harm to the defendant, it will be so treated by the appellate court."

Had the instruction authorized the jury, as counsel for appellant contends that it did, to find the accused guilty if the jury believed that he had stolen either the currency or the ring, this cause would have to be reversed, but, as we have shown, the instruction contains no such language.

We think that it is manifest upon the face of this record that no harm could reasonably have resulted to the appellant in this instance, and we therefore conclude that there is no merit in this assignment of error.

[5] II. Appellant next assigns as error the giving of instruction No. 2, upon the question of alibi. The specific complaint made is that this instruction failed to inform the jury that an alibi is a legitimate defense. Appellant cites in support of this statement the case of *State v. McGinnis*, 158 Mo. 105, 59 S. W. 83. It is true that in the case cited the instruction there given did inform the jury that such a defense "is as proper and legitimate, if proved, as any other." That instruction was justly criticized because of the insertion of the words "if proved." But not in that case, nor in any other within our

knowledge, was it held necessary to instruct the jury in so many words that an alibi is a legitimate defense. The instruction here complained of has been, in effect, approved in numerous cases. Such an instruction, in almost identical language, was given in the case of *State v. Bonner*, 259 Mo. 342, loc. cit. 348, 168 S. W. 591, and was expressly approved. An instruction to the same effect was approved in the case of *State v. Shelton*, 223 Mo. 118, loc. cit. 187, 122 S. W. 732, and substantially the same instruction was approved in *State v. Brown*, 247 Mo. 715, loc. cit. 728, 153 S. W. 1027. In the last-named case the general doctrine was thus stated:

"The principle to be deduced from the foregoing cases and many others is that the purpose of an instruction in regard to an alibi where that defense is interposed is that the jury may be told in plain terms that if upon a full consideration of all the evidence in the cause they entertain a reasonable doubt of the presence of the defendant at the time and place of the alleged commission of the offense, they should acquit him." *State v. Brown*, 247 Mo. 715, loc. cit. 728, 153 S. W. 1027, 1031.

We think the instruction in the case in hand is not subject to criticism.

[8] The evidence was unquestionably sufficient to carry the case to the jury, and that being true, the request for a peremptory instruction was properly refused.

The judgment of the trial court should be and is affirmed.

All concur.

CAMPBELL v. AETNA LIFE INS. CO. OF HARTFORD, CONN. (No. 21119.)

(Supreme Court of Missouri, Division No. 2, June 4, 1920.)

1. Insurance — 147(2)—Contract governed by law of state where policy delivered.

A contract of accident insurance is governed by the laws of the state of the insured's residence, where the policy was issued and delivered in that state.

2. Insurance — 846(6)—Burden on plaintiff to show death was result of accident independent of other causes.

Where a policy insured against injury resulting solely from external violent and accidental means, the beneficiary, to recover, the contract being governed by the laws of California, has the burden of proving the incident claimed to be the cause of an internal rupture of insured, that it was accidental, and that the accidental injury caused death independent of other causes.

3. Courts — 108 — Later decisions of foreign state may be considered.

Where decisions of a foreign state were introduced in evidence as showing the law in that jurisdiction, later decisions, though not offer-

ed in evidence, may be considered in construing them.

4. Insurance §466—Rupture due to accident and cancer not result solely of accident "Independently of all other causes."

Where a policy governed by the California laws insured against loss resulting directly and independently of all other causes from bodily injuries effected solely by accidental means, death resulting from rupture caused by accidental strain is not "independently of all other causes," where a cancerous growth was ruptured and but for such growth the injury could not have occurred.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Independently of All Other Causes.]

Appeal from St. Louis Circuit Court; Kent K. Koerner, Judge.

Action by Anna Campbell against the Ætina Life Insurance Company of Hartford, Connecticut, a corporation. From a judgment for defendant, plaintiff appeals. Affirmed.

Bryan, Williams & Cave, of St. Louis, for appellant.

Jones, Hocker, Sullivan & Angert, of St. Louis, for respondent.

WHITE, C. This suit is brought to collect insurance on the life of plaintiff's deceased husband, Joseph C. Campbell. The petition filed in the circuit court of the city of St. Louis is in two counts, each based upon an accident policy which contains the usual stipulation in accident policies, as follows:

"Against loss, as herein defined, resulting directly and independently of all other causes from bodily injuries effected solely through external, violent, and accidental means, suicide (sane or insane) not included."

The answer in each count contains a general denial, and for a further defense alleges that Joseph C. Campbell was, at the time of the issuance and execution of each of the policies mentioned in the petition, a citizen of the state of California, and continued so at all times until his death; and that each of the policies mentioned in the petition became operative and in force in California and every premium was paid in California; that there was in force in the state of California the following statute (Pol. Code, § 4468):

"Common Law, When Rule of Decision.—The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this state, is the rule of decision in all the courts of this state."

The answer then proceeds:

"And that at the time of the death of the said Joseph C. Campbell he was afflicted with cirrhosis of the liver, cancer of the liver, and a

cancerous tumor of the liver; that the immediate cause of his death was hemorrhage resulting from a rupture of said cancerous tumor; that if the insured suffered any accidental occurrence which contributed to cause said rupture (which the defendant denies), nevertheless said cirrhosis, cancer, and cancerous tumor also directly contributed thereto."

The allegation follows that under the law of California the manner of the insured's death was not accidental, within the meaning of the policies.

Campbell died at San Francisco, July 1, 1915, at the age of 63 years. He was a lawyer with a large practice. On June 4th, preceding his death, his son Robert Campbell arrived from Chicago on a visit to San Francisco. Saturday, June 5th, Joseph Campbell and his son played golf in the forenoon. The insured played hard; he was a strenuous player and strenuous in everything he undertook; he strained hard in making his strokes, was awkward about it—an inexperienced player. On Sunday forenoon, June 6th, Campbell and his son again played golf, 18 holes. After they had played to about the middle of the second 9, Campbell's ball lodged in a bunker toward the top. He took his mashie and stepped up to the side of the bunker to make a stroke and was thrown off his balance by catching his foot in something so that he almost fell, but by a violent effort recovered his balance and continued the game. After the game he took the usual shower and went home with his son, without making any complaint. The next morning, Monday, June 7th, he went to his office as usual, still making no complaint. The son returned Monday afternoon and found his father at home lying on a settee. A doctor was called. Campbell complained of distention of the stomach; for three or four days he was in bed and lounged around the house. On Wednesday, June 9th, his abdomen became very much distended; his physician introduced a cannula in the lower part of his abdomen and drew off 8 quarts of fluid, 15 per cent. blood. This operation was repeated three or four times, until about 40 quarts of fluid were drawn off. Campbell continued to grow weaker from day to day, and finally died July 1st. An autopsy showed that his aorta and arterial circulatory system was diseased, but not seriously; his pancreas was shrunken and atrophied; the spleen considerably enlarged, twice its normal size; his liver was contracted to one-half or three-fourths its normal size; there was cirrhosis of the liver, and on the right lobe was a tumor about four inches in its greatest diameter; it is described as a primary carcinoma, cancer of the liver, a malignant tumor. This tumor showed necrosis; on it was a nodule projecting sufficiently to cause friction against the adjacent parts of

the body in case of movement; a piece of this projecting nodule was broken off, and that rupture, in the opinion of the physicians, caused insured to bleed to death. No other disturbance or condition of the internal organs was apparent to account for the hemorrhages.

The defendant introduced in evidence two California decisions: *Rock v. Travelers' Insurance Co.*, 172 Cal. 462-468, 156 Pac. 1029, L. R. A. 1916E, 1196; *Price v. Insurance Co.*, 169 Cal. 800-803, 147 Pac. 1175. The plaintiff in rebuttal offered a number of California decisions. Upon this evidence the court instructed the jury that under the law of the state of California, as applied to the case, plaintiff was not entitled to recover, and directed a verdict for the defendant. The verdict was accordingly returned and judgment rendered for the defendant, from which the plaintiff appealed to this court.

[1] I. The policies having been issued and delivered in the state of California, of which state the insured was a resident at all times, the law of California must be applied in the construction of the contracts.

Three principal propositions are formulated by the respondent, claiming either to be sufficient to defeat recovery: First, that there is no sufficient proof that the rupture and consequent hemorrhage which caused death was the result of the strain in the golf game when the deceased attempted to get his ball off the bunker. Second, the rupture, if caused by the exertion at that time, was not through "accidental means;" and, under the law of California as shown by the decisions introduced in evidence, the exertion which produced the rupture, if it was so produced, was an intended act and not an accidental one within the meaning of the policy. Third, under the law of California there is no liability on the part of the insured against accidents where pre-existing disease contributes to or co-operates with an accidental injury to produce the injury. In this case a cancer of the liver was a pre-existing disease and a contributing cause; therefore the death was not "effected solely" through the accident.

[2] Under the law of California there is no doubt that the burden was on the plaintiff to prove the death was caused by: (a) The incident in the bunker; (b) that the movement, effort, or strain of the deceased which caused the rupture was not intentional but accidental; and (c) that this accidental injury resulted in death "directly and independently of all other causes," as that phrase is understood and construed by the California court. If the plaintiff has failed to establish either one of the above propositions the demurrer to the evidence was properly sustained. Without determining, we may say it seems that the first two were sufficiently established; that there was sufficient

evidence to go to the jury tending to show the rupture and hemorrhage were caused by the strain on the golf links, and that the exertion of the deceased to recover his balance was accidental and not an intentional movement.

[3,4] II. It remains, then, to inquire whether the death was produced by that accident "independently of all other causes." That the rupture was the immediate cause of the insured's death, there is no doubt, and that the rupture would not have occurred but for the existence of the cancerous tumor is equally certain.

Under the Missouri decisions, if the rulings in Missouri should be applied, there is no doubt but the evidence was sufficient to submit that issue to the jury. *Fetter v. Fidelity & Casualty Co.*, 174 Mo. 256, loc. cit. 267, 73 S. W. 592, 61 L. R. A. 459, 97 Am. St. Rep. 560; *Belle v. Protective Association of America*, 155 Mo. App. 629, loc. cit. 646, 135 S. W. 497; *Young v. Railway Mail Ass'n*, 126 Mo. App. 325, 103 S. W. 557.

It was said in the *Belle* Case:

"The fact that the physical infirmity of the victim may be a necessary condition to the result does not deprive the injury of its distinction as the sole producing cause."

Accident insurance, so far as the record in this case shows, is issued without regard or inquiry as to the physical condition of the insured, whether it is one which makes him more susceptible to a certain class of accidents than ordinary or not. An accident policy is issued to a one-legged man the same as to one who has two legs, although he may be likely to receive injury from some kinds of accidents which a two-legged man would not so easily incur. It is not shown that knowledge by the insurer of the existence of a cancerous liver would have prevented the issuance of the policies, although that condition necessarily made insured more susceptible to certain kinds of accidental injury; for instance, the injury which he actually received. The accident which thereafter produced his death is exactly what the contract insures against, whatever the condition of the insured may have been which made the injury possible. Such is the Missouri rule. The Missouri rule is mentioned here because cited and disapproved by the California courts.

Since the law of California must apply to the case, it is necessary to ascertain just what the common-law rule in California is in construing contracts of this character. In the case of *Price v. Occidental Life Ins. Co.*, introduced in evidence by the defendant, the court said (169 Cal. 802, 147 Pac. 1175):

"In order to recover, the plaintiff was bound to allege and prove an injury of the kind covered by the contract."

And in the case of *Rock v. Travelers' Ins. Co.*, 172 Cal. loc. cit. 466, 156 Pac. 1030, L. R. A. 1916E, 1196, the court makes the following statement as the approved rule in that state:

"We shall not take the time to review in detail the facts of the cases which we have cited. It will suffice to say, by way of illustration, that among them are decisions holding that death was not the result of bodily injury sustained through accidental means where an insured who was afflicted with tuberculosis died from a hemorrhage occasioned by a ruptured artery, the rupture of the artery being due to the act of the insured in standing on a chair and reaching out to close the shutter of a window (*Feder v. Iowa State, etc., Ass'n*, 107 Iowa, 538 [70 Am. St. Rep. 212, 43 L. R. A. 698, 78 N. W. 252]), or where the insured, convalescing from an attack of pneumonia, arose, and in attempting to remove his nightshirt made a more or less violent effort, which caused the rupture of a blood vessel resulting in his death (*Smouse v. Iowa State, etc., Ass'n*, supra), or where the insured died of appendicitis, caused, as the evidence tended to show, by his riding a bicycle over a rough road (*Appel v. Etna Life Ins. Co.*, 86 App. Div. 83 [83 N. Y. Supp. 238]), or where the insured went to Colorado Springs and ascended the stairs of a hotel, carrying in each hand a traveling bag, his death resulting from paralysis of the heart caused by the high altitude and the strain of his exertions (*Schmid v. Indiana, etc., Ass'n*, 42 Ind. App. 483, 85 N. E. 1032)."

In this connection the court cites some Missouri cases, including the *Belle Case*, supra, and distinctly repudiates the Missouri doctrine.

It may be said that the *Price Case* and the *Rock Case*, introduced in evidence, turn upon the question as to whether the death of insured was through "accidental means" and not in construing the phrase "independently of all other causes." Nevertheless the statement quoted from the *Rock Case* shows the general principle announced by that court as applied to the latter proposition.

The court in the *Price Case* cites with approval the case of *National Masonic Acc. Ass'n v. Shryock*, 73 Fed. 774, 20 C. C. A. 3, in support of the position taken, so that the *Shryock Case* must be understood as expressing the proper rule to be followed by the courts of California, where the opinion says (73 Fed. loc. cit. 775, 776, 20 C. C. A. 5):

"The burden of proof was upon the defendant in error to establish the facts that William B. Shryock sustained an accident, and that that accident was the sole cause of his death, independently of all other causes. If Shryock suffered such an accident, and his death was caused by that alone, the association agreed by this certificate to pay the promised indemnity. But if he was affected with a disease or bodily infirmity which caused his death, the association was not liable under this certificate, whether he also suffered an accident or not. If he sustained an accident, but at the time it occur-

red he was suffering from a pre-existing disease or bodily infirmity, and if the accident would not have caused his death if he had not been affected with the disease or infirmity, but he died because the accident aggravated the effects of the disease, or the disease aggravated the effects of the accident, the express contract was that the association should not be liable for the amount of this insurance. The death in such a case would not be the result of the accident alone, but it would be caused partly by the disease and partly by the accident, and the contract exempted the association from liability therefor."

The *Price Case* and the *Rock Case* have been cited and construed by later decisions of the California Supreme Court. In *Kellner v. Travelers' Ins. Co.*, 181 Pac. 61, loc. cit. 62, the court holds, citing the *Rock* and *Price Cases*, that the burden is on the plaintiff to prove that the injury and the death were caused by an accident independently of any disease or diseased condition. *Kellner*, the insured, had had an operation for appendicitis and two subsequent operations for hernia. He tripped on a rug in his office and fell, producing strangulated hernia, from which he died in a short time. One physician testified that the fall forced a large part of the intestine through the weak spot in the abdominal wall, so as to become strangulated and cause his death; another physician testified that there must have been a hernia sac existing before the time of the accident; that the fall alone could not have produced the result at the time. That issue was submitted to the jury on that evidence, and the jury found for the defendant. The judgment was affirmed.

An instruction was asked by plaintiff to the effect that—

If the jury "believed the fall was the 'sole and only direct cause' of Mr. Kellner's death, they must find for the plaintiff, notwithstanding a further belief that in previous years deceased may have had a reducible hernia, provided they further find that 'said Ernest F. Kellner would not have died at the time, under the circumstances, and in the manner he did die had it not been for said accident and fall.'" Loc. cit. 62.

This instruction, the court held, did not properly declare the law, and said:

"The last part of the offered instruction would ignore this part of the contract and make the criterion of recovery the shortening by the accident of the life of a person assured without any reference to the possible concurrence of disease in producing death. The court correctly instructed the jury that there could be no recovery under the policy for death caused partly by disease and partly by accidental injury."

The Supreme Court of California also, in the case of *Clarke v. New Amsterdam Casualty Co.*, 179 Pac. 195, passed upon this same question. In that case *Clarke*, the insured, while crossing a street was struck by an au-

tomobile and incurred severe concussion of the brain. He was later operated upon for appendicitis and died in about a month. The immediate cause of his death was a disease of the heart, acute myocarditis. There was a verdict for the plaintiff and the judgment was affirmed, but the court, in considering the law of the case, said (loc. cit. 196):

"The court instructed the jury that if disease plays a part in the death of an assured person after an accident, it is essential to recovery that such disease was due to the accident."

This was held to be a correct instruction. And further the jury were instructed:

"If you shall find that the death was caused in part by the heart disease, and that this heart disease was not in fact caused by this accident, your verdict must be for the defendant."

And this was held to state the rule correctly. There was evidence by physicians to the effect that the heart disease was due to the lowered resistance caused by the concussion of the brain; that is, it was caused directly by the accident. In further commenting upon it, after citing a federal case (Maryland Casualty Co. v. Morrow, 213 Fed. 599, 130 C. C. A. 179, 52 L. R. A. [N. S.] 1213), the court said (loc. cit. 197):

"In that case the jurors were told, in effect, that although death might have resulted from two concurring causes—one being the injury and the other being pre-existing diabetes—the plaintiff would nevertheless be entitled to recover. This was very properly held to be error. But in the present case the theory of the plaintiff, supported by testimony which the jurors are entitled to accept, was that no heart disease existed before the accident, and that both the appendicitis and the myocarditis were results of the injury itself."

The court further said, on page 198:

"Undoubtedly, death from any independent cause, whether existing prior to or supervening at a time subsequent to the accident, would defeat the claim of plaintiff, but the instruction was dealing with one phase of the problem, namely, the existence or nonexistence of disease prior to the accident."

Appellant objects to a consideration of the decision in the Kellner Case and the Clarke Case, because they were not introduced in evidence, and would have us reverse the judgment and remand the case for trial, so that the defendant upon another trial could introduce them in evidence when the court would again have to direct a non-

suit. While it may be said that the Price Case and the Rock Case are not as clear as they might be in expressing the rule subsequently stated by the California Supreme Court, still by reference to the federal case cited and approved the rule may be very well ascertained from those cases. This court has a right to consider the later decisions of the California Supreme Court in construing the cases which were offered in evidence.

In each of those later cases the issues were submitted to a jury because there was a conflict of evidence as to whether the pre-existing disease contributed to the death and whether in fact there was a pre-existing disease. In the present case there is no question of the existence of the malignant tumor growing on the liver of Campbell at the time of the accident. It is not contended that the fatal rupture, without the existence of the tumor, could have been caused by a strain of the kind mentioned in the evidence. In other words, it is undisputed that Campbell would not have met his death by the hemorrhage and there would have been no hemorrhage if the cancer had not been there, just as in the Kellner Case there would have been no injury but for the existence of the hernia, as the jury found. The only difference between the two cases is that the evidence was conflicting as to whether the hernia existed before the accident or was produced by it in the Kellner Case; whereas, in this case, it is undisputed that the cancer existed before the accident. If it had been conceded in the Kellner Case that there was hernia and a protruding intestine at the time he stumbled upon the carpet, although death was immediately produced by the accident, there would have been nothing to submit to the jury. In the Clarke Case the issue was submitted to the jury because there was evidence pro and con as to whether the heart disease from which death ensued was caused by the accident and concussion of the brain or whether it existed before and was simply aggravated by that accident. Under the California rule it is clear that the plaintiff was not entitled to recover.

The judgment is affirmed.

RAILEY, C., not sitting.

MOZLEY, C., concurs.

PER CURIAM. The foregoing opinion by WHITE, C., is adopted as the opinion of the court.

All the Judges concur.

STATE ex rel. NORTH KANSAS CITY DEVELOPMENT CO. v. ELLISON et al.,
Judges. (No. 21571.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1920.)

1. Appeal and error ¶302(4)—Motion for new trial for error in refusing instructions held sufficient for review.

A motion for new trial on the ground that the court erred in refusing instructions requested by defendant is sufficient to warrant review of such refusal.

2. Courts ¶91(1)—Court of Appeals should follow last determination of Supreme Court in banc.

The last determination of the Supreme Court in banc is binding on the various Courts of Appeals, although a division of the Supreme Court may have otherwise ruled.

Certiorari by the State of Missouri, on the relation of the North Kansas City Development Company, to Hon. James Ellison and others, Judges of the Kansas City Court of Appeals, to review a judgment of that tribunal affirming a judgment for plaintiff (209 S. W. 990) in an action by Arch Roy against the North Kansas City Development Company. Record of Court of Appeals quashed.

Kenneth McC. De Weese, of Kansas City, for relator.

Ellis, Cook & Dietrich and Fred W. Lewis, all of Kansas City, for Arch Roy.

GRAVES, J. Certiorari to the Kansas City Court of Appeals, which brings before us the opinion of that court in the case of Arch Roy (Plaintiff) Respondent, v. North Kansas City Development Company (Defendant) Appellant, 209 S. W. 990. That case originated in a justice of the peace court, and was an action for damages growing out of the fact that plaintiff was kicked by a mule owned by defendants. For the purposes of this case the details of that case are immaterial. Suffice it to say that from the court of the justice of the peace it got to the circuit court, and from there on the appeal of the defendant therein to the Kansas City Court of Appeals, where the judgment of the circuit court was affirmed in an opinion filed, which opinion is now before us on the charge that it conflicts with our rulings.

[1, 2] At the trial in the circuit court certain instructions asked by defendant were refused, and their refusal urged as error in the Court of Appeals. As to this assignment of error, the Kansas City Court of Appeals said:

"In addition to the foregoing, defendant has complained of the refusal of instructions offered by it. The motion for new trial is not sufficiently specific to permit an examination of such complaint. It reads that 'the court erred in refusing instructions as requested by

defendant.' The later rulings of the Supreme Court are that will not do. *Disinfecting & Mfg. Co. v. Bates Co.*, 273 Mo. 300, 201 S. W. 92; *Wynne v. Wagoner Undertaking Co.*, 274 Mo. 593, 204 S. W. 15."

See *State v. Dinkelkamp*, 207 S. W. 770, 771.

It will be noted that the cases cited by the Kansas City Court of Appeals are all cases from Division No. 2 of this court, and they are cited as being "the later rulings of the Supreme Court." The question here involved was determined in *Wampler v. Railroad*, 269 Mo. 464, 190 S. W. 908, and determined adversely to the ruling of our learned brothers of the Court of Appeals. At the time the instant case was determined the *Wampler Case*, supra, was the last expression of the Supreme Court, because it was a ruling upon the exact point by the whole court, and not by a mere division thereof. This is made clear in the case of *State ex rel. United Rys. Co. v. Reynolds et al.*, 213 S. W. 782. This is another expression of our court in banc, as was *Wampler's Case*. This ruling was made the very day that the writ of certiorari was granted in the instant case. It forced the granting of our writ. The same question had been just previously determined in *Kilpatrick et al. v. Robert et al.*, 212 S. W. loc. cit. 886. In that case the ruling in *Wampler's Case* was specifically approved and followed by all of Division No. 1 of this court. The question is not an open question here, and has not been since the *Wampler Case*, and the opinion of our learned brothers not only conflicts with *Wampler's Case*, but with the other two rulings mentioned supra. The result is that the record of the Court of Appeals should be quashed; and it is so ordered.

All concur, except WOODSON, J., absent.

SEDBERRY v. GWYNN. (No. 21709.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1920.)

1. Appeal and error ¶766—Lack of assignment of error supplied by points and authorities.

An appeal from an order refusing to vacate an order appointing a receiver will not be dismissed because the brief contained no assignment of error, where the points and authorities stated the court was without jurisdiction to appoint a receiver.

2. Receivers ¶6—Breach of contract no ground for appointment of receiver for business.

That defendant, who enjoyed a patent monopoly, broke his contract to sell plaintiff sufficient of the patented articles to fill plaintiff's orders, is no ground for appointing a receiver of defendant's manufacturing business; defendant alone being before the court, and there be-

ing no showing of insolvency or other ground which would render execution under Rev. St. 1909, §§ 2122 and 3881, or equitable remedies other than receivership, unavailing.

Appeal from St. Louis Circuit Court; Victor H. Falkenhainer, Judge.

Action by Hervey H. Sedberry against William Gwynn. From an order refusing to vacate a previous order appointing a receiver to take charge of his business, defendant appeals. Reversed, with directions.

J. D. Johnson, of St. Louis, for appellant.
D'Arcy & Neum and Rippey & Kingsland, all of St. Louis, for respondent.

GRAVES, J. This is an appeal from an order of the circuit court of the city of St. Louis, refusing to vacate a previous order appointing a receiver to take charge of defendant's business. The pertinent facts are few. March 15, 1918, the plaintiff filed a petition in said circuit court, in which he prayed:

"Wherefore, plaintiff prays judgment that defendant may be decreed to deliver to plaintiff all apparatus, appliances, and parts that may be ordered by plaintiff under said contract, and to otherwise fully comply with and carry out the terms of said contract; that the defendant be enjoined from selling any of said apparatus, appliances, or parts thereof to any person or persons other than plaintiff, or from disposing of said inventions and patents to any third party, or from otherwise placing it beyond his power to comply with his contract with plaintiff; that defendant be enjoined from enticing away or interfering with or employing plaintiff's salesmen or in any other way interfering with or injuring plaintiff's business; that defendant be ordered to account to plaintiff, as provided in said contract, for all sums to which plaintiff is entitled on sales of said goods made by defendant as above set forth and for all other sums of money which may be due to plaintiff under said contract and for all moneys due to plaintiff which defendant has collected; that plaintiff may recover his costs herein, and for such other and further relief as to this honorable court may seem proper."

By the petition it was charged that the defendant was the owner of certain letters patent from the United States government to use and vend certain vulcanizers, known as the "Gwynn-Bacon vulcanizers"; that plaintiff had a written contract as to the sale of the same with defendant, who was manufacturing them; that defendant had declared that said contract was void, and was threatening to sell his business, including his patent, to another, so that plaintiff could not get from him the vulcanizers to carry on his (plaintiff's) business in the sale thereof; that prior to defendant's cancellation or ignoring of such contract plaintiff had orders for goods which could not be filled by him, but were before filled by defendant with plaintiff's at the conduct of defendant

was destroying plaintiff's business, which was dependent upon his contract with defendant.

The answer admitted that defendant was doing business under the name of "Gwynn-Bacon Vulcanizer Company," which was accompanied by specific denials of many things charged in the petition. The answer admitted the execution of the contract pleaded by plaintiff, but averred that certain provisions therein rendered said contract void as one in restraint of trade.

Motion was made to strike out portions of the answer, which was sustained, which is duly preserved in a term bill of exceptions. Reply was a general denial. Such is a very general outline of the case made by the pleadings.

On May 19, 1919, a trial of the issues under the pleadings was had, and the court entered the following decree:

"Now on this day come the plaintiff and the defendant, and this cause being called for hearing upon the issues raised under the pleadings herein as to the right of plaintiff to an injunction against, and an accounting by, defendant, and the evidence of both plaintiff and defendant upon said issues having been introduced and heard by the court, and arguments and briefs of counsel for plaintiff and defendant upon said issues having been heard and considered by the court, and said issues having been fully submitted to the court for adjudication, the court thereupon finds said issues in favor of the plaintiff and against the defendant.

"The court further finds the facts to be as follows:

"(1) That plaintiff and defendant are residents and citizens of the city of St. Louis, state of Missouri, and that defendant, William Gwynn, has been since on and before the filing of the petition herein doing business in said city and state under the name and style of Gwynn-Bacon Vulcanizer Company.

"(2) That at all times mentioned in the second amended petition herein said defendant was and is the owner of a certain invention relative to pressure-closed electric switches covered by letters patent of the United States No. 1,015,225, dated January 16, 1912, by virtue of which defendant enjoys the exclusive right to make, use, and vend appliances or apparatus embodying said invention. That said invention was and is an essential feature of commercial appliances known as 'Gwynn-Bacon vulcanizers,' and that said vulcanizers cannot be made, used, or sold without the license or consent of said defendant and cannot be procured upon the open market by reason of the monopoly enjoyed by the defendant by virtue of the ownership by defendant of said invention and letters patent.

"(3) That on November 1, 1918, the defendant, being the owner of the exclusive right to make, use, and vend vulcanizers of the type referred to, as aforesaid, entered into a contract in writing with plaintiff, for a good and sufficient consideration, which contract was and is a lawful, valid, and subsisting contract as to all the terms and conditions thereof between plaintiff and defendant. A copy of said contract is annexed to the original petition herein

and marked Exhibit A, and is hereby referred to and made a part of this decree. That in and by said contract defendant agrees, among other things, to sell to plaintiff, at the prices and on the terms specified in said contract, a sufficient number and amount of said vulcanizers, repair parts, and appliances therefor, mentioned in said contract, to fill all orders therefor sent by plaintiff to defendant.

"(4) That said contract further provides that upon receipt of an order for any of the goods covered by said contract the defendant would promptly execute the same by supplying the required goods, either direct to the purchaser or to plaintiff, as the latter might direct. That said goods should be boxed in first-class condition by the defendant and should be free from defects, thoroughly tested before leaving the factory, and should be guaranteed (in the case of vulcanizers) by the defendant for one year from date of purchase. That all goods should be delivered by the defendant to the transportation company in St. Louis at the expense of the defendant; also that the plaintiff in billing said goods to the consumer might bill them under his own name or under the name of any partnership or corporation he might organize, and that he shall have the exclusive right to use, in connection with said billing, the name Gwynn-Bacon vulcanizer, or of any of the other Gwynn-Bacon products covered by said agreement; also that the defendant should promptly forward to the plaintiff an invoice of all goods shipped, whether shipped to the plaintiff direct or to the consumer direct.

"(5) That said contract further provides that all goods shipped by the defendant, either to the customer or to the plaintiff, during any one calendar month, are to be paid for by the plaintiff on the 20th of the succeeding month. That failure of the plaintiff to pay the defendant for any goods within 15 days after the 20th of the month following date of shipment should entitle the defendant to cancel said contract; provided that the defendant should give the plaintiff written notice of said cancellation and the cause thereof within 7 days after the expiration of said 15-day period.

"(6) That said contract further provides that the defendant shall not during the life of said contract sell, or allow any third party to sell, any of the goods covered by said contract to any party or parties other than the plaintiff, and stipulates that it is the intention of said agreement that all sales to customers of the goods of the defendant are to be made by the plaintiff, whether the orders for said goods are secured by the plaintiff himself, or through agents, or by advertising, or whether said orders come to the defendant, either through his efforts or the efforts of others, or come through the mails or otherwise without solicitation, and that defendant shall promptly transmit to the plaintiff all orders for said goods which may come to him during the life of said agreement for such action thereon as the plaintiff may elect to take.

"(7) That said contract further provides that the plaintiff shall purchase from the defendant, at the prices and on the terms specified in said contract, during each year of the life of said contract, at least a minimum quantity of said goods sufficient to make up a total of \$5,000 of gross sales of said goods to the cus-

tomers of plaintiff during such year at the prices named in said contract.

"(8) That said contract further provides that the same should continue in force for one year from its said date, and that if during the first year of said contract the amount of gross sales made by plaintiff should be not less than \$10,000, then said contract should be continued during each of the next succeeding four years; provided that during each of said four years the gross amount of sales made by plaintiff to customer should not be less than as follows:

Gross sales second year	\$15,000.00
Gross sales third year	20,000.00
Gross sales fourth year	30,000.00
Gross sales fifth year	40,000.00

"That said contract further provides that after the expiration of five years from its said date it shall continue to remain in force from year to year so long as the gross sales by plaintiff to customers during each year shall be not less than \$40,000.

"(9) That said contract further provides that either party shall have the right, at any reasonable time, to inspect and copy the books, papers, and records of the other, whenever such inspection is reasonably necessary or proper to effectuate the objects of said contract.

"(10) That said contract further provides that it shall be binding upon the heirs, representatives, and assigns of both plaintiff and defendant.

"(11) That immediately upon the making of said contract both plaintiff and defendant entered upon the performance thereof, and have so continued until on or about the 11th day of March, 1918, as hereinafter stated.

"(12) That plaintiff invested considerable sums of his own money in the development of said business and has advertised said apparatus, and has established a valuable custom and good will for said goods.

"(13) That the gross sales made by plaintiff of goods covered by said contract, during the first year of the life thereof, amounted to over \$40,000. That plaintiff has in that and in all other respects fully complied with all the terms, conditions, and agreements in said contract contained and by him to be performed, and still stands ready and willing to comply with and to carry out the terms of said contract.

"(14) That on or about the 11th day of March, 1918, plaintiff received from defendant a notice in writing, whereby defendant wrongfully and unlawfully and without just cause or excuse notified plaintiff that he (the defendant) refused to comply further with the terms of said contract and that he considered said contract terminated.

"(15) That defendant did wrongfully and unlawfully and without just cause or excuse refuse, on said 11th day of March, 1918, and still refuses, to deliver to plaintiff the apparatus and appliances which defendant contracted to deliver under said contract, and refused and still refuses to comply with or in any manner to be bound by the terms of said contract, although defendant is fully able to perform and carry out said contract.

"(16) That defendant, prior to and since refusing so to deliver the apparatus called for by said contract to plaintiff, in violation of said contract, has secretly employed plaintiff's sales-

men and has been and is now, in violation of said contract, selling appliances covered by said contract direct to plaintiff's customers and others, without transmitting said orders to plaintiff or accounting to plaintiff therefor, thereby securing for himself and for his own profit the result and fruits of plaintiff's expenditure of money and labor, which plaintiff was induced to expend by reason of said contract with defendant. That defendant is appropriating to himself and destroying plaintiff's business. That defendant has collected large sums of money on sales made by him of said articles to the customer direct, to which sums plaintiff is entitled, and that defendant now has on hand a large number of unfilled orders for said articles, for all of which defendant has failed and refused and still fails and refuses to account to plaintiff, but, on the contrary, has notified plaintiff as aforesaid that defendant will no longer be bound by the terms of said contract.

"(17) That plaintiff is wholly unable to obtain any of the apparatus, appliances, or parts covered by said contract from any other source except from defendant by reason of the exclusive monopoly enjoyed by the defendant to make, use, or vend said apparatus, appliances, and parts.

"(18) That by reason of plaintiff's inability to obtain said apparatus or appliances from said defendant, and by reason of the other unlawful and wrongful acts of defendant as above set out, plaintiff has suffered great and irreparable damages and injury and will continue to suffer great and irreparable injury and damage, but the exact amount of which it is impossible to state, until an accounting be had between plaintiff and defendant. That plaintiff has no adequate remedy at law. That the ascertainment of said damage to plaintiff requires a complicated accounting.

"Wherefore, it is ordered, adjudged, and decreed by the court as follows:

"(19) That the plaintiff herein be and he is hereby granted the relief prayed for in his second amended petition herein; and

"(20) That the defendant herein be and is enjoined and ordered to sell and deliver to plaintiff and to all parties claiming by, through, or under him, in accordance with the terms of said contract of November 1, 1916, all apparatus, appliances, and parts which he is called upon to sell and deliver to plaintiff under the terms of said contract, and to forthwith fully and completely comply with and carry out all the other terms and conditions of said contract; and

"(21) That the defendant herein, his agents, servants, or any one acting through or under him, either directly or indirectly, be and they are hereby enjoined and prohibited from selling any apparatus, appliances, or parts covered by said contract, or any of defendant's rights in the inventions and patent covering said apparatus, appliances, or parts, to any person or persons other than plaintiff, and from doing any act or acts placing it beyond defendant's power to comply with the said contract, and from in any way interfering with or injuring plaintiff's business carried on in accordance with the terms of said contract; and

"(22) That this cause be referred to Geo. F. Haid, Esq., as referee, for an accounting between plaintiff and defendant, and to hear, determine, and report his findings upon all is-

sues of law and fact connected with said accounting, including in his report a statement of all sales made by defendant subsequent to March 10, 1918, of any of the apparatus, appliances, or parts covered or contemplated by said contract of November 1, 1916, and of all transactions and business of the defendant subsequent to March 10, 1918, relating to or connected with any of said apparatus, appliances, or parts covered by said contract, and showing also all amounts to which plaintiff may be entitled by reason of the violation by defendant of plaintiff's rights under said contract.

"The court retains jurisdiction of this cause pending final judgment herein to be entered subsequent to the filing of the referee's report."

Thereafter, on June 26, 1917, the plaintiff filed his motion for the appointment of a receiver for defendant's business and on June 28th following the same was sustained by the following order:

"Now at this date, the above-named cause coming on for hearing on the application of the plaintiff, duly verified, for an order for the appointment of a receiver herein, come the above-named parties, plaintiff and defendant, by their attorneys of record, and the evidence of plaintiff and defendant having been introduced, and the arguments of counsel heard by the court, and the court, being fully advised in the premises, does find that the facts stated in said application of plaintiff for the appointment of a receiver are true.

"Wherefore, it is by the court ordered, adjudged, and decreed that said application of plaintiff for an appointment of a receiver be and is hereby sustained, and the court appoints Edward E. Rudolph, of the city of St. Louis, as receiver in the above-entitled cause, to take charge of the assets and to operate the business of the defendant, for the manufacture, sale, and disposal of the vulcanizers, repair parts, and materials, covered and contemplated by the contract of November 1, 1916, between plaintiff and defendant, and to carry out and perform the decree of the court entered in this cause on May 19, 1919, and subject to such further orders as the court may hereinafter enter in this cause. Said receiver shall take charge immediately upon filing bond approved by the court in the sum of \$5,000."

June 30th defendant filed his motion to vacate such order appointing a receiver, which motion was overruled by the trial court, and it is this order overruling the motion to vacate the order appointing a receiver which is now here for review. The cause was advanced as required by statute, and hence this early hearing thereof. Further details may well be left to the opinion.

I. We have a peculiar situation in this case. It will be noted that the judgment upon the merits of the case is not here. The only thing here is the legal propriety of the appointment of a receiver for defendant's business. The pleadings and judgment (whether such judgment be either final or merely interlocutory) may be, and we think are, competent upon the issues here involved, but the facts which superinduced such judgment un-

der such pleadings are not here for review. It will be time enough to consider them when the case upon the merits reaches us. We have set out the findings of facts in the case upon the merits, but with the sole view of enabling us to determine the question of the propriety of the court in the appointment of the receiver, and for the further reason that such findings of facts are incorporated in and made a part of the interlocutory decree herein. We say interlocutory decree, because the court has appointed a referee, with full power to hear and report upon certain matters before final judgment could be entered. But to our mind it is really immaterial whether the judgment entered (quoted supra) be called an interlocutory or a final judgment. The sole purpose of it, and of the pleadings in this case, is to enable us to properly pass upon the propriety (legal) of a receivership in this case.

[1] The foregoing is suggested because it is urged that the appeal should be dismissed because the appellant has failed to comply with our rule as to assignments of error. In this case there could be but one assignment of error, and that is that the court erred in refusing to sustain the appellant's motion to set aside its order appointing a receiver for appellant's business. There is no formal assignment of error contained in appellant's brief. It goes from a statement of the case to "Points and Authorities," and then under head of "Brief of the Argument" is the printed argument. In other words the brief contains (1) statement of case, (2) points and authorities, and (3) arguments. But under the head of "Points and Authorities" we have these two (with others) specific statements:

"(2) The lower court had no power to appoint a receiver, as it did in this instance, for the purpose of executing the interlocutory decree for specific performance of the contract in suit. See," etc.

"(3) The lower court had no jurisdiction over appellant's property and business empowering it to legally appoint a receiver to take possession and operate the same as provided in said order. See," etc.

Under each of the above are cited cases to which we are referred. Whilst it is better for counsel to make formal assignments of error, we have continuously ruled that where the "Points and Authorities," as here, charged specific error to the trial court, that such would be considered as a compliance with our rule. With this ruling (and our cases are numerous and well known) we are satisfied. This contention of respondent is therefore overruled. *Collier v. Lead Co.*, 208 Mo. loc. cit. 258, 259, 106 S. W. 971; *Wallace v. Libby*, 231 Mo. loc. cit. 344, 132 S. W. 665; *Mugan v. Wheeler*, 241 Mo. loc. cit. 379, 145 S. W. 462. These cases cover both Divisions of this court. Of late our Brothers in Division No. 2, have been a little more rigid in the enforcement of rule 15 (198 S. W. vi). *Vahldick v. Vahl-*

dick, 264 Mo. 530, 175 S. W. 199; *Frick v. Insurance Co.*, 213 S. W. 854.

But neither of those cases, in our judgment, go to the extent respondents would have us go in this case. When in this case the record shows that the court did appoint a receiver, and the brief charges (as here) that the court was without power to appoint such, the assignment of error is sufficient. Our rules should be, and, in most instances, have been, liberally construed.

[2] II. As suggested above, we can and do consider the pleadings and judgment upon the merits in determining the legal propriety of the appointment of this receiver. The plaintiff sought and obtained (1) specific performance of his alleged contract, (2) injunctive relief, and (3) an order for an accounting as between the parties; the accounting to be had before a referee of the court. Nowhere in these pleadings is the business of the defendant placed or sought to be placed in the hands of the court, *custodia legis*. The facts pleaded and the facts found show that defendant had a business of his own, separate and distinct from that of the plaintiff. Defendant was manufacturing a patented article, and plaintiff, under contract, was selling such article for defendant. Plaintiff's contract gave him no control of defendant's business and property. Nor has the judgment so found or decreed. Defendant's business (as a business enterprise) was not before the court, nor in the charge of the court. Nor can it be said that plaintiff's business (as a business enterprise) was before the court, or in the hands of the court. The questions before the court were the three which we have set out above. If the plaintiff has a valid subsisting judgment, either (1) for the specific performance of a contract, or (2) for the stated injunctive relief, he has ample legal remedy for the enforcement of the same under our statutes. Vide sections 2122 and 3881, R. S. 1909. If he should get specific judgment for money upon the incoming of the referee's report, an execution would get full results, absent, as here, any charge of fraud or of insolvency.

This case has a state of facts all its own. Defendant, so far as the record goes, has a thoroughly solvent business, all his own. Personally he may have made a contract which ought to be enforced. And personally he may have threatened things which should have been enjoined. Of these matters our cognizance is limited, in the determination of the one question before us.

The alleged contract (ordered enforced) does not go to defendant's business as a going, solvent business concern, but it only goes to a contract as to the filling of certain orders out of the manufactured stock of this business. The business enterprise of the defendant has never been seized by the strong arm of the law and placed before the court, save and except as it might be through this receiver.

Up to the date of this judgment the business and property of the defendant was not before the court. The defendant was before the court, and its judgment is against defendant, and not against his property. Even the specific performance part of the judgment is personal in character, and does not reach the whole business of defendant, which the receiver is directed to take charge of by the order before us. The powers of a court of equity are very broad as to property involved in the litigation, and a receiver therefor may be appointed for divers reasons, but the rule is just as clear that there should be no receiver appointed for property which is not in litigation and thereby before the court. 23 R. C. L. p. 13.

The manufacturing business of this defendant (as a business and as his property) was not involved in the suit out of which this receivership grows. So that for the two reasons (1) the statutes furnish ample powers for the enforcement of the court's judgment, and (2) the property turned over to the receiver by the order was not involved in the litigation, the court erred in not vacating, upon defendant's motion, the order appointing the receiver.

We shall not discuss the merits of the case, even as they appear before us on the pleadings and judgment. The instant judgment or order should be and is reversed, with directions to the circuit court to vacate its order appointing the receiver. The merits of the case will no doubt reach us in due time.

All concur, except WOODSON, J., absent.

**JOHN O'BRIEN BOILER WORKS CO. v.
THIRD NAT. BANK OF ST. LOUIS.
(No. 20795.)**

(Supreme Court of Missouri, Division No. 2,
June 4, 1920.)

Courts 231(5)—Supreme Court is without jurisdiction of appeal by board of managers of state hospital, where amount is less than \$7,500.

Under Const. art. 6, § 12, limiting the jurisdiction of the Supreme Court to cases where the amount is less than \$7,500, unless a political subdivision of the state or a state officer is a party, etc., as well as Rev. St. 1909, § 3937, as amended by Laws 1911, p. 190, relating to jurisdiction of Courts of Appeals, etc., the Supreme Court is without jurisdiction of an appeal by the board of managers of a state hospital from a judgment finding that plaintiff was entitled to a cashier's check for \$2,800 as against the board; for, in view of Rev. St. 1909, §§ 1366-1403, it is apparent that members of the board are merely appointive administrative officials, so jurisdiction cannot be taken on the theory

either that the state hospital is a political subdivision or that the managers are state officers.

Appeal from St. Louis Circuit Court; Wilson A. Taylor, Judge.

Action by the John O'Brien Boiler Works Company against the Third National Bank of St. Louis, which filed an answer in the nature of an interpleader, and in which action the Board of Managers of State Hospital No. 1 at Fulton, Mo., intervened. From a judgment for plaintiff, the intervener appealed to the St. Louis Court of Appeals, and the cause was transferred to the Supreme Court. Cause transferred to the St. Louis Court of Appeals.

Leahy, Saunders & Barth, of St. Louis, for appellant.

Irwin & Haley, of Jefferson City, for respondent.

WALKER, J. The plaintiff brought suit in the circuit court of the city of St. Louis against the defendant, the Third National Bank of that city, to require the bank to deliver to plaintiff a cashier's check for \$2,800 and for an injunction to prevent any other disposition of the check during the pendency of this action.

The board of managers of the State Hospital No. 1 at Fulton moved that it be permitted to intervene as a party defendant and to assert its ownership of the check. The motion was granted. The bank filed an answer, disclaiming any ownership in the check, alleging that it was a stakeholder without pay, and declaring its willingness to deposit the check in the registry of the court and abide any order or judgment of same. An order was made sustaining the prayer of this answer, and the check was impounded by the clerk of the trial court pending the determination of the case. The answer of the board of managers set forth its claim of ownership, on grounds not necessary to be stated here, on account of our view as to the proper disposition of this case, and that it was entitled to a judgment for the possession of said check. The trial court so found, and an appeal was granted to the St. Louis Court of Appeals on the application of the plaintiff. Upon the appeal being perfected, the latter court, on the 17th of July, 1917, made and entered of record an order transferring the case to this court for review and final determination, on the ground that the cause was not within the jurisdiction of said Court of Appeals.

The original jurisdiction of the Supreme Court, as defined by the Constitution (section 12, art. 6, Const. Mo.), is limited to cases where the amount in dispute, exclusive of costs, exceeds the sum of \$7,500 (section 3937, R. S. 1909, as amended by Laws 1911, p. 190), to cases involving the construction of the

Constitution of the United States or of this state, to cases where the validity of a treaty or a statute of, or authority exercised under, the United States is drawn in question, to cases involving the construction of the revenue laws of this state, or the title of any office under this state, to cases involving title to real estate, to cases where a county or other political subdivision of the state, or any state officer, is a party, and in all cases of felony.

This section must, under a reasonable construction of its terms, furnish the measure of this court's jurisdiction; the greater portion of it, being clearly inapplicable under the facts, may be dismissed from consideration without comment. It cannot be said with any degree of reason that a state hospital is in any sense a political subdivision of the state, nor that its managers are state officers. They are appointive administrative officials, clothed with such limited power, both as to its nature and extent, as is defined under article 6 of chapter 19, R. S. 1909. Moreover, they did not seek and were not granted leave to intervene as individuals, but in their quasi corporate capacity as a board. Thus appearing, a review of the claim made involves no jurisdiction of this court.

The sole question involved is: Who is entitled to the check? The Court of Appeals is clothed with ample power to determine whether or not the finding of the trial court in this regard was correct. The case should therefore be transferred to that tribunal for its final determination.

It is so ordered.

All concur.

STATE v. THOMPSON. (No. 21915.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920. Rehearing Denied
June 25, 1920.)

1. Larceny \S 64(1)—Unexplained possession of recently stolen property prima facie evidence of guilt.

The unexplained possession of recently stolen property is prima facie evidence of guilt.

2. Larceny \S 68(1)—Evidence held for jury.

In larceny trial, evidence of accused's guilt held sufficient to carry the case to the jury.

3. Criminal law \S 1159(2)—Verdict conclusive on appeal.

A jury verdict is conclusive on appeal, when there is substantial evidence to support it.

4. Criminal law \S 784(8)—Instruction on circumstantial evidence held sufficient.

Instruction on the weight to be given circumstantial evidence held sufficient.

5. Criminal law \S 823(4)—Instructions construed together held sufficient as requiring showing that stealing was from the owner.

In trial for larceny of automobile, instructions were not erroneous, in that they did not require the jury to find that the automobile was stolen from the owner, where the first instruction required the jury to find that accused stole the automobile "of the goods and property of" the prosecuting witness, naming him, and the later instruction required the jury to find beyond a reasonable doubt that the property had been stolen; for reiteration of the requirement that the machine should have been stolen from the prosecuting witness would have tended to confuse and not enlighten the jury.

6. Criminal law \S 761(9)—Instruction not error as assuming stealing.

In trial for stealing an automobile, an instruction which twice required the jury to find beyond a reasonable doubt that the property had been stolen was not open to the objection that it assumed that the automobile had been stolen; there being no dispute in the case concerning the state's claim that the property had been stolen.

7. Criminal law \S 787(1) — Instruction held not bad as commenting on accused's failure to testify.

In trial for automobile stealing, a portion of an instruction to the effect that the burden of satisfactorily accounting for his possession of recently stolen property was upon accused was not objectionable as a comment upon his failure to testify upon the point, where accused did, in fact, testify at length upon the question of how he obtained possession of the stolen automobile.

8. Criminal law \S 829(1)—Instructions need not be duplicated.

There was no error in refusing instructions in a larceny case, where they all related to questions upon which proper instructions had already been given; for duplication of instructions is not required.

Appeal from Circuit Court, Jackson County; E. E. Porterfield, Judge.

Don Thompson was convicted of grand larceny, and he appeals. Affirmed.

The defendant was convicted of grand larceny upon the following evidence:

A practically new Ford car, sedan type, was left upon the street in the downtown section of Kansas City at about noon. At about half past 3 o'clock that afternoon it had disappeared. Five days later the body of the car was found at a storage house in Kansas City, where defendant, under the name by which he was prosecuted, had stored it on the second day after the car was stolen. The motor number had been filed off and a new number had been substituted. When defendant stored the body of the car he took the chassis away with him. The bolts which fastened the body to the chassis had been cut when defendant took the car to the storage

house. Some employes helped him to lift the body off of the chassis, and while doing so one of the employes raised the hood in order to look at the motor number, whereupon defendant, with an oath, demanded to know what the employe was about. After the body of the car had been found the defendant was arrested and questioned as to what had become of the chassis. He stated that he had bought the body only. At the time of his arrest he was in possession of a new car of a different manufacture. This car he said he had bought of a sales agent at Independence, Mo. Inquiry revealed that defendant had in fact taken the chassis of the stolen car to Independence and had traded it for the new car, paying the difference in cash. When confronted with this evidence defendant said to the chief of police, "It looks like you have got it on me." Both portions of the stolen car were identified by the owner, and the value was shown to be about \$700. This is the material evidence, in chief, for the state.

Defendant testified that he bought the stolen car from one Carpenter on the day after it disappeared from where the owner had left it on the street; that he paid \$650, in cash, for it; that the money was furnished, also in cash, by his sister-in-law; that he took an unacknowledged bill of sale for it, which he had on his person when arrested; that when he spoke to the storage house employe, when the body was being lifted off, he merely reproved him for failing to assist in lifting the body off; denied the admission attributed to him by the chief of police, and said, instead, that when informed that this was a stolen car he had said that it was "tough," as he had spent \$650 for it. Carpenter was not present at the trial. Defendant's wife testified that she was with defendant when he was introduced to Carpenter on the day after the car was stolen; his sister-in-law testified she had loaned defendant the cash in question; a saloon keeper testified that the bill of sale was executed in his saloon and that he saw defendant pay to a man who said his name was Carpenter \$600 in cash, and another witness testified that he introduced defendant and Carpenter at the time and place stated by defendant. This is the sum of the evidence in behalf of defendant.

In rebuttal, the state showed that defendant's reputation for truth and veracity was bad. The jury fixed defendant's punishment at two years' imprisonment in the penitentiary. He was sentenced accordingly, and has duly appealed.

John T. Barker, of Kansas City, for appellant.

Frank W. McAllister, Atty. Gen., and George V. Berry, Asst. Atty. Gen., for the State.

WILLIAMSON, J. (after stating the facts as above). It is said that the evidence is insufficient to support the verdict. Error is as-

signed in the giving and in the refusal of instructions and in a failure to instruct upon the whole law of the case. No other errors are alleged.

[1-3] I. The unexplained possession of recently stolen property is prima facie evidence of guilt. This has so long been the settled law of this state that a citation of authorities is unnecessary. We have set out the facts with sufficient fullness to show that there was abundant evidence on this point to carry this case to the jury. The verdict of the jury is, of course, conclusive on appeal, when there is substantial evidence to support it. Hence there is no merit in the contention that the verdict is not supported by the evidence.

[4] II. Appellant asserts that the instructions failed to define circumstantial evidence, and claims that that is fatal error. *State v. Hubbard*, 223 Mo. 80, loc. cit. 84, 122 S. W. 694, is cited in support of this assertion. We have read that opinion very carefully, but have been unable to find in it any reference to a definition of circumstantial evidence. What is there said, in substance, is that where circumstantial evidence alone is relied upon an instruction upon the weight of such evidence should be given. Such an instruction was given in this case. Instruction No. 5, upon that point, was as follows:

"The court instructs the jury that the guilt of the defendant cannot be presumed, but must be proven by direct or circumstantial evidence, and the court instructs the jury that there is no direct evidence of the guilt of the defendant in this case. Before you can convict the defendant on circumstantial evidence alone, the facts and circumstances must all form a complete chain, and all point to his guilt, and must be irreconcilable with any reasonable theory of his innocence; and before the jury can convict the defendant on circumstantial evidence alone the circumstances must not only be consistent with his guilt and point directly thereto, but must be absolutely inconsistent with any reasonable theory of his innocence."

This instruction was sufficient. *State v. Maggard*, 250 Mo. 335, loc. cit. 342, 157 S. W. 354; *State v. David*, 131 Mo. 380, loc. cit. 398, 33 S. W. 28.

We overrule this assignment of error.

[5] III. Instructions numbered 2 and 4 are said to be erroneous, in that they do not require the jury to find that the automobile in question was stolen from the owner.

Instruction No. 2, in pointed terms, required the jury to find that the appellant "feloniously did steal, take, and carry away" the automobile in question "of the goods and property of one Victor Martino," the prosecuting witness. Instruction No. 4 twice required the jury to find beyond a reasonable doubt that the property had been stolen, but did not expressly say that the jury must find that it had been stolen from the prosecuting witness. Instructions numbered 2 and 4, tak-

en together, in plain terms required the jury to find both that the property in question had been stolen and that it had been stolen from the prosecuting witness. The jury could not have been misled by a failure to reiterate these requirements, nor could appellant have been prejudiced thereby. Such reiteration would tend to complicate the instructions and to confuse rather than to enlighten the jury. This criticism is devoid of merit.

[6] Instruction No. 4 is also criticized, in that, as it is said, it assumes that the automobile had been stolen. This instruction, as we have stated, tells the jury twice in plain language that it must first be found beyond a reasonable doubt that the automobile had been stolen before the appellant could be found guilty. In the case of *State v. Lee*, 272 Mo. 121, 182 S. W. 972, loc. cit. 974, cited by appellant in support of this contention, the question of whether or not the property there involved had been stolen was a vital issue, and the instruction assumed that it had been stolen. The court said:

"In a case where there was no dispute concerning the state's claim that the property in question had been stolen, this assumption would, perhaps, not be considered as harmful. * * *"

There was no such dispute in this case, and, as stated, the instruction criticized twice told the jury that it must find that fact before returning a verdict against appellant. Appellant's complaint in this particular is not well founded.

[7] The concluding paragraph of this instruction is to the effect that the burden of satisfactorily accounting for his possession of recently stolen property was upon appellant, and this is said to be a comment upon his failure to testify upon this point. That such burden is upon the accused, under appropriate circumstances, admits of no doubt, and we do not think that he could prevent the jury from being so instructed by the simple device of refusing to testify on this issue. But in view of the fact disclosed by this record that appellant did testify at great length upon the question of how he obtained possession of the stolen property, we do not think this instruction can be condemned upon the ground urged.

[8] Various other alleged errors are assigned by appellant, but after careful consideration we think them lacking in substantial merit. The court gave ten instructions which fully covered the applicable law. It refused four asked by appellant. The refused instructions all related to questions upon which proper instructions had already been given. Duplication of instructions is not required. We think that the appellant was afforded a fair trial, and was awarded very moderate punishment.

The judgment should be affirmed. It is so ordered.

All concur, except WILLIAMS, P. J., not sitting.

DAVENPORT et ux. v. CASEY et al. (No. 26888.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1920.)

1. Brokers \Leftrightarrow 31 — Broker to whom owners conveyed as trustee to sell could not purchase land.

When broker took from owners a deed to their property to enable him to transfer it for them on making authorized trade or sale, he was not only their agent, but held property as trustee for them, and could not purchase himself nor sell or trade them any property in which he was interested without fully informing them and securing full value.

2. Brokers \Leftrightarrow 102—Exchange of broker's for principal's property subject to rescission.

Transaction wherein broker took deed from owners to effect sale for \$2,000, but instead conveyed to them without their consent or knowledge property in which he was interested, worth only \$1,200, whereas owners' was worth at least \$1,800, held open to rescission by owners as in violation of broker's duty as trustee.

3. Appeal and error \Leftrightarrow 174 — Objection that plaintiff had parted with title must be raised below.

In suit by owners of land to rescind transaction whereby broker to sell conveyed to them in exchange property in which he was interested, if fact that before bringing suit plaintiff owners had made a quitclaim deed of half of the land to two of their attorneys was material, broker and other defendants waived it by not presenting some objection on such account in lower court.

4. Brokers \Leftrightarrow 102—Owners entitled to rescind exchange with broker, though they had disposed of half their land.

In suit by owners of land to rescind transaction, whereby their broker to sell conveyed to them in exchange property in which he was interested, though owners had made quitclaim deed conveying to two of their attorneys south half of property, they were still owners of north half, and entitled to relief sought.

Appeal from Circuit Court, Stoddard County; W. S. C. Walker, Judge.

Suit by James Davenport and Melvina Davenport, his wife, against F. E. Casey and Sarah E. Casey, his wife, and others. From judgment for plaintiffs, defendants appeal. Affirmed.

Geo. Munger, of Bloomfield, for appellant F. E. Casey.

Wammack & Welborn and J. W. Farris, all of Bloomfield, for respondents.

SMALL, C. I. Suit in equity to set aside a deed to 80 acres of land in said county. The substance of the petition is: That plaintiffs, being the owners of said real estate, and desirous of selling the same for \$2,000 in cash, employed the defendant F. E. Casey as their agent to sell the same for that price; that on or about the 5th of July, 1915, said defendant informed the plaintiffs that he could exchange their land for a lot in the town of Essex in said county 100 by 200 feet in dimensions; that plaintiff James Davenport examined said real estate and informed said defendant that he would not make the exchange; whereupon said defendant F. E. Casey informed the plaintiffs that he would sell said Essex real estate for \$2,000, and would deposit the money to their credit in the Citizens' Bank of Dexter in said Stoddard county in payment for their land; that on the 28th of July, 1915, said defendant F. E. Casey fraudulently represented to plaintiffs that in order to do so it was necessary that plaintiffs should make a deed for their said 80-acre tract to the said defendant F. E. Casey; that said defendant, in fact, had made no such arrangements, but relying on the truth of such statement, plaintiffs were induced to and did make a warranty deed to their said 80-acre tract to said defendant, but not for the purpose of conveying title to him as owner, but only for the purpose of enabling him to complete the alleged arrangements that he had made for procuring \$2,000 in cash for the plaintiffs for their said land, and that he was not to record said deed until he had procured said sum in cash for the plaintiffs; that plaintiffs were unlearned and ignorant in business transactions, and said defendant F. E. Casey was a shrewd business man; that plaintiffs inquired of him whether or not he meant in any way to cheat or defraud them, and he assured plaintiffs that he was their friend, and would under no circumstances do anything to injure or defraud them, and plaintiffs believed and had full confidence in him when they made and delivered to him their said deed; that afterwards, on September 23, 1915, for the purpose of cheating the plaintiffs, and without their knowledge and consent, and in violation of his agreement, said defendant F. E. Casey caused said deed to be recorded in the recorder of deeds office in said county, and also on the same day said defendant executed a deed of trust upon said property to the defendants, Asa Norman and E. L. Casey, to secure a note of \$1,200 made to them by said defendant F. E. Casey; that in said month of July, 1915, said defendant F. E. Casey had himself obtained title to said parcel of land in the town of Essex from one P. W. Crowley, subject to a deed of trust for \$2,200 in favor of said defendants Asa Norman and E. L. Casey; that plaintiffs were ignorant that said

F. E. Casey had any interest in said land, and that for the purpose of keeping them in ignorance thereof said defendant F. E. Casey represented that said land was owned by said Crowley, and that he would sell the same and obtain \$2,000 in cash with which to pay the plaintiffs for their 80-acre tract and thereupon convey their land to said Crowley; that on the 21st of September, 1915, said F. E. Casey and wife, without the knowledge or consent of plaintiffs, executed a warranty deed purporting to convey said parcel of land at Essex to the plaintiffs, and caused the same to be recorded on the 23d of September, 1915; that afterwards said F. E. Casey handed said deed to the plaintiff James Davenport, who did not understand the purpose of said deed, or that defendant F. E. Casey had violated the purpose for which he had received the deed from the plaintiffs, and that said plaintiff James Davenport did not by receiving said deed from said Casey intend to become the owner of said lot at Essex, or to relinquish the ownership of the 80 acres belonging to the plaintiffs; that the plaintiffs relinquish all claim to said deed and said land at Essex, and deposit said deed in court for the defendants F. E. Casey and Sarah E. Casey, his wife.

The prayer is for the court to set aside and cancel said deed of July 28, 1915, given by plaintiffs to defendant F. E. Casey, and to cancel and set aside the deed of trust given by said defendant F. E. Casey on the plaintiffs' property to the other defendants, and that the court render personal judgment against said defendant F. E. Casey for any damages caused by his act which cannot be fully compensated by the cancellation of said deed, and for general relief.

The answer was a general denial.

There is no dispute with reference to most of the principal facts in the case. That the plaintiffs owned the land as alleged is not denied. That defendant F. E. Casey received the deed from them for their land in the first place for the purpose of enabling him to sell it or trade it for them is not denied. Plaintiffs testify that he was not to record their deed, and was not to trade it for the piece of property in the town of Essex mentioned in the petition, unless he first procured a purchaser for said Essex property, so as to obtain \$2,000 in cash for them for their property, and that, if he could not do this, their deed to him was to be returned to them; that under no circumstances would they take the Essex property for their land. At the time plaintiffs made their deed to said Casey, he admits that he told them that he had a deed from Mr. Crowley, the owner of the Essex property, so he could handle it for Crowley, and he wanted their deed for the same purpose. He also admits that he did not notify the plaintiffs that he had any interest, directly or indirectly, in the proper-

ty of Crowley, except merely to handle it for Crowley for the purpose stated to the plaintiffs. The plaintiffs' deed to said defendant, was dated July 28, 1915. Crowley's deed to said defendant F. E. Casey was dated July —, 1915.

A few days after making their deed, the plaintiff Mrs. Melvina Davenport became uneasy, and the plaintiff James Davenport thereupon visited the defendant F. E. Casey and told him that his wife was uneasy, and he wanted Casey to go up to their home and assure her that everything was safe. Accordingly said defendant F. E. Casey went to the plaintiffs' house, August 3, 1915, accompanied by Miss Bond, a relative. While there, said F. E. Casey dictated, and Miss Bond wrote, the following document:

"Dexter, Mo., 8-3-15.

"This contract entered into by and between James Davenport and Melvina Davenport, parties of the first part, and F. E. Casey, party of the second part, under the consideration that, if F. E. Casey, party of the second part, conveys to James Davenport and Melvina Davenport a certain parcel of real estate lying and being in the city of Essex herein not described for twenty hundred or more dollars, then this deed dated 7-28-1915 will stand the proved; otherwise these deeds are null and void and will revert to the parties of the first part for disposery.

his
"James X Davenport.
mark
"Melvina Davenport.
"F. E. Casey.

"Elsie Vaughn in witness."

Plaintiff James Davenport could neither read nor write. His wife could write her name and could read a little. She did not attempt to read the document. They heard what said defendant F. E. Casey told Miss Bond to write. She read it to them, and they thought she read what he had dictated. Both of them, however, testified that at and before the time the writing was signed Casey assured them that, unless they obtained \$2,000 in cash for their property, he would not put their deed on record and it was to be returned to them. This testimony was objected to by the defendants as contradicting the writing, which objection the court overruled, and defendants excepted. Defendant F. E. Casey denied that he so stated at that time in portions of his testimony. But on cross-examination he said:

"Q. That was the understanding, was it? A. Yes, sir. Q. That at any time the money could be realized for this Essex property the old man, Davenport, would make the deed? A. Yes, sir. Q. And that is what you understood about it? A. Yes, sir. Q. What did you go back there on the next morning for, to draw up this contract? A. It was for their satisfaction."

When the contract was read to plaintiffs, Casey testifies, he asked them how it sounded, and they said, "All right," and then he said:

"I don't want you to go worrying about this deed, because until I pay for it, it don't belong to me."

Said defendant Casey made several attempts, after this contract was made, to sell the Essex property for \$2,000. He says:

"Q. You were all the time trying to find a buyer for \$2,000 or make a deal by which he could get \$2,000 for his property all this time, were you not? A. Yes, sir."

But nothing came of these attempts to sell the Essex property to others.

It appears from the evidence that said defendant Casey had an interest in this Essex property. Defendants' witness Crowley, who owned the property, testified that he made the deed for the property to Casey and put it in the Dexter Bank, to be delivered to Casey when Casey should procure a credit for him of \$1,800 on a note for \$2,200 which defendants Asa Norman and Ed L. Casey held against him; that said defendant F. E. Casey, on account of said \$1,800 credit, delivered to Crowley a team of mules worth \$200, which left \$1,600 to be credited on the \$2,200 note. Crowley did not remember the exact date, but some time in the fall of 1915 defendant Asa Norman (who was connected with the bank) told him that his deed had been turned over to defendant F. E. Casey and his note had been credited. "The deed was to be in Norman's hand till I got my credit, and then turned over to Ed Casey (F. E. Casey). That was my instructions, which was wrote down." Defendants Norman and Ed L. Casey obtained this note of \$2,200 from Crowley, as the balance due on a farm which they had sold said Crowley. Defendant F. E. Casey acted as agent in effecting this sale, and the understanding between them was that for his services after they had received \$1,800 out of this \$2,200 note, he could have the balance.

On September 23, 1915, without any notice or knowledge of the plaintiffs, F. E. Casey put their deed to himself on record, and made a deed to them for the town property in Essex, and put it on record. On the same date he made a deed of trust upon the plaintiffs' property in favor of defendants Asa Norman and Ed L. Casey to secure his note for \$1,200, and delivered it to them in pursuance of a previous understanding that they were to release the Essex property conveyed to the plaintiffs by him from their \$2,200 deed of trust.

This suit was brought on the 29th of October, 1915. Said F. E. Casey did not convey the plaintiffs' property to said Crowley until nearly a year after the suit was brought,

to wit, September 2, 1916, when he made a quitclaim deed to it. This quitclaim deed, however, was made to Crowley, not in pursuance of any agreement he had with said Casey with reference to the transaction in question in this suit, but in pursuance of a trade made in September, 1916, in which Crowley conveyed another piece of property to said defendant F. E. Casey for plaintiffs' land. The arrangement between the defendants F. E. Casey and Norman and E. L. Casey by which he secured a credit for Crowley of \$1,600 on their note against Crowley by giving them his note for \$1,200 secured on the plaintiffs' property was made because they "didn't care" if F. E. Casey did get the difference. Shortly after the deed from defendant F. E. Casey to the plaintiffs for the Essex town property was recorded he delivered it to the plaintiff James Davenport. Said plaintiff says he, being unable to read, did not know it was a deed, and did not understand that it was given him in exchange for plaintiffs' farm. But defendant F. E. Casey testified, he told him it was for his deed for the Essex property, and one or two other witnesses corroborate Casey. But plaintiff James Davenport says that, if anything of the kind was said, he did not hear it, and that he did not know that plaintiffs had transferred their farm, and had become the owners of this town property, until shortly afterwards, when he went to pay his taxes. He then learned of it and had the matter looked up. Thereupon plaintiffs instituted this suit.

There was testimony pro and con as to the defendant F. E. Casey's reputation for truth and veracity and honesty and fair dealing. The evidence showed that the town property which Casey transferred to plaintiff was worth about \$1,000 or \$1,200, and that the plaintiffs' farm was worth \$1,800 or \$2,000. The evidence further showed that plaintiffs were ignorant and confiding people and likely knew nothing of the value of this town property. Whereas defendant F. E. Casey was an experienced trader in real estate and capable business man. There is no evidence that plaintiffs had any independent advice when they signed the contract shown in evidence or made the deed. And plaintiff James Davenport testified that he told defendant F. E. Casey that he would not take the Essex property unless it could be first sold for \$2,000 cash and the cash paid to him; while defendant F. E. Casey testified, in which he is corroborated by one of his witnesses, that plaintiff James Davenport said he would take the town property in trade whether he could get the \$2,000 cash for it or not.

The court found for the plaintiffs and against the defendant F. E. Casey, and rendered judgment cancelling the deed from the plaintiffs to said defendant, and also the

deed from said defendant to the plaintiffs for the property in Essex. But the court found the defendants, Asa Norman and E. L. Casey were bona fide holders without notice of the \$1,200 note and deed of trust on plaintiffs' property given them by said defendant F. E. Casey. In lieu of canceling said note, and to compensate the plaintiffs on account thereof, the court rendered personal judgment for the amount of the note against the defendant F. E. Casey in favor of the plaintiffs.

After unsuccessfully moving for a new trial, defendant F. E. Casey brought the case here by appeal.

[1] II. We hold that when defendant F. E. Casey took from the plaintiffs a deed to their property in order to enable him to transfer it for them, upon making a trade or sale, which they might authorize, he was not only their agent, but held the property as trustee for the plaintiffs. He thereby established a highly confidential relation between himself and the plaintiffs, and could not purchase said property from the plaintiffs, nor sell or trade them any property in which he was interested, without at least fully informing the plaintiffs in regard to his interest, and securing for the plaintiffs the full value of their property.

In *Meek v. Hurst*, 223 Mo. loc. cit. 698, 122 S. W. 1024, 135 Am. St. Rep. 531, this court said:

"To allow one acting in the fiduciary relation of agent to buy from or to sell to himself is a solecism in the realm of law; for the moral stamina of the average man is inadequate to preserve a fine glow of fidelity to his trust and confidential relation in such transaction; and the interdiction is enforced with a strong hand in courts of justice. *Montgomery v. Hundley*, 205 Mo. loc. cit. 148 et seq.; *Moore v. Mandlebaum*, 8 Mich. 434; *Grumley v. Webb*, 44 Mo. 444; *Evans v. Evans*, 196 Mo. loc. cit. 23."

And to like effect are *Martin v. Baker*, 135 Mo. loc. cit. 503, 36 S. W. 369; *Cornet v. Cornet*, 248 Mo. loc. cit. 234, 154 S. W. 121; *Ryan v. Ryan*, 174 Mo. loc. cit. 286, 73 S. W. 494; *Dingman v. Romine*, 141 Mo. 466, 42 S. W. 1087; *Cohron v. Polk*, 252 Mo. loc. cit. 278, 158 S. W. 603; *Murdock v. Milner*, 84 Mo. loc. cit. 103; *Jones, Ex'r, v. Belshe*, 238 Mo. loc. cit. 540, 141 S. W. 1130; *McClure v. Lewis*, 72 Mo. 322; *Connecticut Mutual Ins. Co. v. Smith*, 117 Mo. loc. cit. 295, 22 S. W. 623, 38 Am. St. Rep. 656; *Witte v. Storm*, 236 Mo. loc. cit. 487, 139 S. W. 394.

In *Perry on Trusts*, vol. 1, § 196, it is laid down as elemental law:

"The trustee is in such a position of confidence and influence over the *cestui que trust* that the contract or bargain will either be void or he will be a constructive trustee, at the election of the *cestui que trust*, unless the trustee can show that the contract was entirely fair and advantageous to the *cestui que trust*. * * *

The general rule is that the trustee shall not take beneficially by gift or purchase from the *cestui que trust*, even although the supposed trustee and purchaser is a mere intermeddler, and not a regularly recognized trustee. The question is not whether there is fraud in fact. The law stamps the purchase by the trustee as fraudulent *per se*. * * * But there are exceptions to the rule, and the trustee may buy from the *cestui que trust*, provided there is a distinct and clear contract ascertained after a jealous and scrupulous examination of all the circumstances; that the *cestui que trust* intended the trustee to buy, and there is fair consideration and no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee. *The trustee must clear the transaction of every shadow of suspicion.* * * * Lord Eldon said he admitted that the exception was a difficult case to make out. And it may be said generally that it is difficult to find a case where such a transaction has been sustained. *Any withholding of information, or ignorance of the facts, or of his rights on the part of the cestui, or any inadequacy of price, will make such a purchaser a constructive trustee. The cestui que trust must know that he is dealing with the trustee.* Therefore, if the trustee purchases through an agent or third person, and the *cestui que trust does not know the trustee in the transaction, the contract will be void.*" (The italics are ours.)

[2] Tested by the foregoing rules, the acquisition of plaintiffs' property by defendant F. E. Casey must be condemned. It appears from the practically undisputed evidence, and we find, that said Casey was interested in the Crowley property; that he did not notify plaintiffs of such interest; that he did not fully inform them as to the value of the Crowley property; that they were ignorant, confiding people, and relied altogether on him to take care of their interests; that they had no independent advice; and that the Crowley property was worth much less than their property. A trustee and agent's sale of his own property to the *cestui que trust*, or principal, or purchase of their property by him, under such circumstances, will not withstand the scrutiny of a court of equity, but will be set aside upon timely application, such as was made in this case. It is not necessary to pass, therefore, upon any other questions raised and discussed by learned counsel relating to the merits of this appeal.

[3, 4] III. It also appears in evidence that, before bringing this suit, the plaintiffs had made a quitclaim deed conveying to two of their attorneys the south half of their property. No special point was made, as shown by the record in the court below on this account, except to bring out the fact on cross-examination of plaintiff James Davenport. If such fact was material, defendants waived it by not pressing some objection on account thereof in the lower court. But, however

that may be, plaintiffs are still the owners of the north half of the property and entitled to the relief sought on account thereof without regard to their having disposed of the south half of the property. There is no merit in appellants' contention in this regard.

The judgment of the learned chancellor below was without error, and it is affirmed.

BROWN and RAGLAND, CC., concur.

PER CURIAM. The foregoing opinion of SMALL, C., is adopted as the opinion of the court.

All concur, except WOODSON, J., absent.

REEVES et al. v. GREEN. (No. 19925.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1920.)

1. Appeal and error \S 628(2) — Direction, with payment of fees, to file transcript sufficient to prevent dismissal.

A showing by appellant that he directed the clerk of the circuit court to file the transcript of judgment in the appellate court in time, and that he paid the docket fee in the appellate court and thought transcript had been filed, is sufficient showing to prevent dismissal of the appeal for delay in filing the transcript.

2. Appeal and error \S 20—Circuit court acquires no jurisdiction from a county court which had none.

Where a cause is appealed from the county court to the circuit court, the circuit court acquires no jurisdiction unless the county court had jurisdiction, but errors in county court after it acquired jurisdiction do not affect the jurisdiction of the circuit court.

3. Appeal and error \S 20—Sufficient petition for road gives county court jurisdiction over proceedings.

Where a petition for a public road contained every necessary averment of Rev. St. 1909, \S 10435, and was accompanied with a list of land-owners and other matters required by the section, and the notice accorded with the petition, county court acquired jurisdiction of the subject-matter and the parties sufficient to give circuit court jurisdiction on appeal from the county court.

4. Appeal and error \S 1088—On appeal from trial de novo in circuit court errors in county court are immaterial.

Where the county court had acquired jurisdiction of proceedings to open a road, so that the circuit court could obtain jurisdiction thereof by appeal, errors committed in proceedings by the county court are immaterial on appeal from the judgment of the circuit court, in which the cause was tried de novo.

5. Highways —29(5)—Omission from petition of name of one township held immaterial.

Where a petition for public road correctly described its route, but stated it was in two townships, when in fact it was partly along the dividing line between one of the named townships and an unnamed one, and the circuit court correctly found the route to be in the three townships, in which all the petitioners resided, the omission of one township from the petition could not have misled the parties, and does not require reversal of judgment opening the road.

Appeal from Circuit Court, Ripley County; J. P. Foard, Judge.

Proceedings by Frank Reeves and others against I. E. Green and others for the opening of a public road. From the judgment of the circuit court on appeal from the county court ordering the road, Green appealed to the Court of Appeals, which transferred the cause to Supreme Court (185 S. W. 218). Motion to dismiss appeal overruled, and judgment affirmed.

Chas. B. Butler, of Doniphan, for appellant.

Borth & Ferguson and J. F. Fulbright, all of Doniphan, for respondents.

GRAVES, J. After the rejection of one opinion here, this cause has been reassigned to the writer. It involves the establishment of a public road in Ripley county. The appeal was taken to the Springfield Court of Appeals (185 S. W. 218), and by that court certified here on the ground that title to real estate is involved. Plaintiffs (respondents) were petitioners for the establishment of a certain public road in Ripley county, a proceeding instituted in the county court of Ripley county. The road was ordered, and a part of the appellant's land will be required and taken therefor. Upon appeal to the circuit court the road was ordered, appellant's damages assessed, and from such judgment is this appeal. The questions urged by the assignment of error in the brief go to the jurisdiction of the county and circuit courts of said county. The pertinent facts can best be stated with the points made and in the course of the opinion.

[1] I. A preliminary question presents itself. There was a motion filed in the Springfield Court of Appeals to affirm the judgment for a failure to file therein a transcript of the judgment within the time prescribed by law, and for a failure to comply with the rules of that court in filing an abstract and brief. The appeal was granted more than 60 days prior to the October term of the Springfield Court of Appeals, but no transcript of the judgment was filed there until October 20th of the year of the appeal. The appellant filed in that court an affidavit showing that he had directed the circuit clerk, to make out and forward a transcript of the judgment

to the Springfield Court of Appeals, and had paid the docket fee of that court (\$10), and thought the clerk of the circuit court had attended to the matter. The transcript when filed shows that the docket fee of \$10 was paid to the clerk of the Springfield Court of Appeals by the circuit clerk of Ripley county. The Springfield Court of Appeals, finding itself without jurisdiction, has certified the whole matter here, including this motion to affirm the judgment and the showing contra. We need not go further than to say that, under our statute, appellant made a good showing as against the motion to affirm the judgment, and this motion is therefore overruled.

II. As suggested, the attack is upon the sufficiency of the showing as to jurisdiction, both in the county court and the circuit court. In the circuit court there was a motion to dismiss the proceeding for want of jurisdiction. The petition for the road (as filed in the county court) in part said:

"We, the undersigned citizens of said county, at least 12 duly qualified and competent adult petitioners, residents of and in own proper right owners of land in the municipal townships hereinafter named, that is to say, at least 12 freeholders of the municipal townships hereinafter named, 8 of whom reside in the immediate neighborhood of the following described proposed road, respectfully represent and aver that the proposed public road hereinafter described is 40 feet in width, and situated in the municipal townships of Thomas and Washington, in the county of Ripley and state of Missouri, and is of sufficiently great utility to the general public, and is not a change of a previous location, and that the beginning, courses, and termination thereof, with not less than two points named on the direction of said public road, are as follows, to wit. * * *

"And we further aver that said public road is entirely practicable and a public necessity. And we further aver that the said public road is, whenever practicable, along government surveys, and that this petition is accompanied by the names of all residents and other persons owning land through which said proposed public road shall run, with the amounts of damages claimed by each of them so far as can be ascertained, and also by the names of all those who are willing to give the right of way for said proposed public road. And we further aver that as and for public notice of this application not less than three triplicate original written handbills were by said petitioners duly put up in not less than three distinct, separate, and independent public places in said municipal townships, one at the proposed beginning of said public road, and one at the proposed termination of said public road, and one at Naylor post office, in said Thomas township, in said county, more than 20 days before the first day of the regular term of said county court at which this application is presented, to wit, before and on Monday, the 3d day of August, 1914, and there maintained to this date, and that a duplicate original copy of one of said public notices is herewith filed with return thereof duly entered thereon, and that by said

means public notice of this application has been duly given, and said county court has duly obtained jurisdiction of the subject-matter and of all parties herein, and that the facts herein justify the establishment of said public road at the expense of said petitioners.

"Wherefore, said petitioners pray an order for the establishment of said proposed public road, and for all proper relief.

"Dated at said county this 8d day of July, 1914, as witness our respective hands, full names, and proper signatures."

Then follow the signatures of 19 persons. The foregoing is the entire petition, except the description of the proposed road. At the August term of the county court the following order was made:

"The court orders the highway engineer to survey and report at the next regular term of this court, commencing in the municipal township of Thomas at the center of section 2, in township 22 north, range 4 east, and run thence north on the half section line across section 35, township 23 north, range 4 east, and to the center of section 26, township 23 north, range 4 east, and run thence east on the half section line to the county line between Butler and Ripley county and terminating at the northeast corner of the southeast quarter of said section 26, same township and range, in the municipal township of Washington, and the said petition coming on to be heard and having been publicly read in open court and being proven by two witnesses, namely, to wit, Frank Reeves and C. H. Scott, to the satisfaction of the court, that due legal notice had been given according to law and that the signers thereto are 12 freeholders residing in Ripley county and that 3 of them live in the immediate neighborhood of said proposed road. The court therefore orders the highway engineer to survey and mark out said proposed road, 40 feet wide, as set forth in said petition, between the points as set forth as herein set forth, and make due report of his proceedings at next regular term of this court."

At the November adjourned term, 1914, the court entry shows the following:

"Frank Reeves et al., Petitioners. In the Matter of a Petition for the Location of a Public Road.

"Court orders same established when cut out and received by highway engineer."

At the regular February term following, the appellant filed his exceptions, giving as his reasons the following:

"Your exceptor therefore excepts to said road and the report of the commissioners aforesaid for the following reasons: (1) Said road is not a public necessity; (2) that the right of way has not been legally secured; (3) that the amount of damages awarded by the commissioners appointed by the court to exceptor is inadequate for the injury done.

"Wherefore your exceptor prays that a jury be summoned according to law to try the question of damages to exceptor herein.

"I. E. Green, Exceptor.

"Chas. B. Butler,

"Attorney for Exceptor."

Trial was had and the jury in the county court allowed exceptor \$118 in damages.

At the same term (February, 1915), the county court made the following order:

"It is ordered by the court that the report of the highway engineer be and is hereby approved and road ordered established, and the road overseer through whose district the said proposed road runs proceed, under direction of the highway engineer, to open the same, and that the owners of land condemned shall have five months in which to erect the necessary fences for the opening of said road."

On the same day appeal was granted to the circuit court, wherein the motion to dismiss the appeal, mentioned supra, was filed.

Upon a trial in the circuit court de novo, that court by its judgment, after reciting the verdict of the jury, which found the issues for petitioners and fixed the appellant's damages at \$200, found the following fact:

"And it appearing to the court in the trial of this cause that on the 5th day of August, 1914, there was presented to the Ripley county court at its regular August, 1914, term, a petition for the establishment of a new county road, 40 feet wide, in Thomas, Washington, and Varner townships, commencing at the center of section 2, in township 22 north, range 4 east, in Thomas township, and running thence north on the half section line across section 35, township 23 north, range 4 east, to the center of section 26, township 23 north, range 4 east, and running thence east on the half section line to the line between Butler and Ripley counties and terminating at the northeast corner of the southeast quarter of section 26, township 23 north, range 4 east, in the municipal townships of Washington and Varner; and it further appearing to the satisfaction of the court by two witnesses, namely, Frank Reeves and C. H. Scott, that notice of said intended application had been given by written handbills put up in three public places in said municipal townships of Thomas, Washington, and Varner, that one of the said notices was put up at the proposed beginning and one at the proposed termination of said road, more than 20 days before the first day of the regular August, 1914, term, of the Ripley county court; and it further appearing to the court that said petition is signed by more than 12 freeholders of the municipal townships of Thomas, Washington, and Varner, through which said proposed road runs, and that 3 of whom live in the immediate neighborhood of said road, and that said petition is accompanied by the names of all resident persons owning land through which said proposed road runs, with the amount of damages claimed by them so far as was ascertained and the names of those who are willing to give right of way for said proposed road; and it further appearing to the court that said proposed road is practical and a public necessity: It is therefore ordered that all the proceedings herein had for the establishment of said proposed road, 40 feet wide, between the points as set forth herein, be confirmed and are hereby adjudged in full force and effect.

"And it further appearing to the court from the petition herein filed that the said petitioners prayed for the establishment of said public road at the expense of said petitioners and that said petitioners have paid into court \$120, it is ordered, considered, and adjudged that said proposed road be established in the manner provided by law, and that said exceptor, I. E. Green, have and recover of Ripley county, Mo., the sum of \$200 as his damages and all costs herein expended."

It should be noted that prior to the trial the circuit court, upon application of the petitioners for the road, directed the county court to correct its record so as to conform to the facts and recertify its record to the circuit court.

[2] From the judgment of the circuit court, as above set out, this appeal was taken. As the jurisdiction of the circuit court, in proceedings of this character, is dependent upon the jurisdiction of the county court in the first instance, it is a question first to be determined as to whether or not the county court had jurisdiction of this proceeding. It is trite law that, absent jurisdiction in the county court, the circuit court acquires no jurisdiction by appeal. But there is a broad distinction between jurisdiction and errors of record in the county court. A failure of jurisdiction is one thing, and errors in the record after the proper acquisition of jurisdiction is another thing. The above outlines the record sufficiently for us to determine the basic question, *i. e.*, Did the county court acquire jurisdiction?

[3] III. If this petition for a public road, set out above, be compared with section 10435, R. S. 1909, it will be found to contain every necessary averment. The petition was accompanied with list of landowners and other matters required by this section. The notice accorded with the petition. The only thing to be noted is the fact that it speaks of only two townships, *i. e.*, Thomas and Washington. The description of the road, as given in the petition, is in detail, as follows:

"Commencing in the municipal township of Thomas at the center of section 2, in township 22 north, range 4 east, and run thence north on the half section line across section 35, township 23 north, range 4 east, and to the center of section 26, township 23 north, range 4 east, and run thence east on the half section line to the county line between Butler and Ripley county and terminating at the northeast corner of the southeast quarter of said section 26, same township and range, in the municipal township of Washington."

The petition and notice stated all the necessary jurisdictional facts for the establishment of the road in the petition described. When the petition was acted upon by the county court, it was found that the signers

thereof were "12 freeholders residing in Ripley county and that 3 of them live in the immediate neighborhood of said proposed road." It was also found that "due legal notice had been given according to law." The order establishing the road at November adjourned term makes no further findings. There is no special finding of a public necessity in the county court, but there is a petition stating all required jurisdictional facts, including public necessity, and a finding of legal notice having been given.

Whatever may have been the early rulings in this state, it is now settled doctrine that the filing or presentation of a proper petition, of which due notice has been given, confers jurisdiction upon the county court in these road cases. *Bennett v. Hall*, 184 Mo. loc. cit. 414 et seq., 83 S. W. 439; *Stutz v. Cameron*, 254 Mo. loc. cit. 358 et seq., 162 S. W. 221; *Ripley v. Binns*, 264 Mo. 505, 175 S. W. loc. cit. 208; *Davis v. O'Bryant*, 175 S. W. loc. cit. 932.

The latter two cases were not officially reported, because they followed the *Bennett* and *Stutz* Cases, *supra*. However, *Williams, C.*, in the *Binns* Case, *supra*, so concisely states the present rule that we borrow from the opinion the following:

"The county court acquired jurisdiction when the petition, in due form, accompanied by the names of the resident landowners, was filed, and the required statutory notice given. Irregularities, if any, occurring in the proceedings in the county court after jurisdiction is once acquired, will not deprive the circuit court of its jurisdiction on appeal. *Stutz v. Cameron*, 254 Mo. 340, loc. cit. 358, 359, 162 S. W. 221; *Bennett v. Hall*, 184 Mo. 407, loc. cit. 415-421, 83 S. W. 439."

[4] We are dealing with a judgment of the circuit court where there was a trial *de novo*, and we judge the sufficiency of that judgment, and not the judgment in the county court. As to the county court, we are only concerned in the matter of a sufficient petition and proper notice. With a sufficient petition and proper notice the county court acquired jurisdiction. This would sustain the derivative jurisdiction of the circuit court upon appeal. We then are interested (upon appeal from the circuit court) only in the proceedings and findings there. So go all our recent rulings. There was therefore no error in overruling the motion to dismiss the appeal for want of jurisdiction.

IV. Complaint is urged as to a *nunc pro tunc* order by the county court in conformity to a direction of the circuit court to make its record show the facts. This is beside the case. If, as we rule, the county court acquired jurisdiction of the cause by the filing of the proper petition and the giving of a

sufficient notice, the circuit court became possessed of the cause upon appeal, and we are only interested in the course of the case there.

See authorities cited, *supra*.

[5] V. We reach now the real crux of this case. The judgment of the circuit court must be considered. The circuit court cannot change the petition filed in the county court. This is the very basis of the case. This petition averred that the proposed road was to be 40 feet in width, and was situated in the municipal townships of Thomas and Washington, in Ripley county. The petition averred that it terminated at the county line between Butler and Ripley counties, "in the municipal township of Washington." There is an apparent conflict between these allegations and the specific description of the road as given in that portion of the petition which gives the lines upon which the road (40 feet in width) should run. By its judgment the circuit court found that the line of the road as set out in the petition made it run through Thomas, Washington, and Varner townships, instead of Thomas and Washington townships, as averred in one portion of the petition. It seems that the dividing line between Washington and Varner townships is the half section line of section 28, so that when the 40-foot road ran east a half mile from the center of section 28 it ran upon this dividing line, and the south 20 feet of this half mile portion of the road would be in Varner township. The circuit court found and located the road on the exact line set out in the petition and notice, but this 20-foot strip of a half mile was in fact in Varner township, and the road, or this 20-foot portion of it, terminated in Varner township, and the north half of the road (20 feet in width) terminated in Washington township. But, whilst this is true, the road terminated at the northeast corner of the southeast quarter of section 28, in Washington township, as averred in the petition. This particular corner was the center of the road at its termination. The circuit court judgment finds all the facts necessary to establish a road on the designated lines in the petition, but finds that it involved three townships instead of two, and found that the petitioners came from the three townships. We are impressed with the idea that, as the petition gave the width of the road and the exact lines upon which it was to run, and as the petitioners came from the three townships interested (according to the findings of the circuit court) no harm came from the omission of Varner township (by name) in the petition. This for the reason that the width of the road and its fixed line showed that this small portion was in fact in Varner township. No person was misled.

Let the judgment be affirmed.

All concur, except WOODSON, J., absent.

HODDE v. HAHN et al. (No. 20478.)

(Supreme Court of Missouri, Division No. 2
June 4, 1920. Motion for Rehearing
Denied June 25, 1920.)

1. Corporations §562(1)—Receivers may sue for amount unpaid on stock.

A receiver of a corporation may, under order of court, institute and maintain an action against stockholders to recover the amount unpaid on their stock.

2. Corporations §77—Implied promise that subscriber for stock will pay therefor in full.

A subscriber to corporate stock impliedly promises to pay in full therefor, so that the corporation or its assignee or receiver, after the conditions of the subscription have been performed, may, in an action, recover the amount due and unpaid thereon.

3. Estoppel §52—Defined.

Estoppel is a preclusion in law which prevents a man alleging or denying a fact in consequence of his own previous act; allegation or denial of a contrary tenor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Estoppel.]

4. Corporations §247—Creditors not estopped to sue stockholders by electing to take over business.

Creditors of a corporation were not estopped from suing stockholders for the amount unpaid on their stock by reason of having taken over the assets, by trustee, of the corporation and operating the business at a loss, although at the time the trust deed was executed the assets were sufficient to pay the entire indebtedness, where there was no fraud and the continuation of the business was suggested by the stockholders.

5. Corporations §269(1)—Creditors entitled to rely on statement that stock was paid up in money.

The creditors of a corporation had a right to rely on a statement in the articles of incorporation that \$50,000 of the capital stock had been paid up in lawful money, and therefore, where it appeared in an action against stockholders that the incorporators had merely transferred to the corporation property worth \$7,000 and the good will of a business, the duty devolved upon defendants to show that the good will was a real asset and had a value of \$43,000.

6. Good will §2—"Good will" of failing business an imaginary quantity.

Since "good will" is the advantage or benefit acquired by an establishment beyond the mere value of the capital stock, funds, or property employed therein in consequence of the general public patronage, where in consequence of the general public patronage, such declared advantage or benefit turns out to be a disad-

vantage and a loss, then the good will is purely an imaginary quantity and has no money value.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Good Will.]

7. Corporations — 244(1) — Sales of unpaid stock does not relieve of liability to creditors.

Sales by incorporators of their unpaid stock did not relieve them from liability to the creditors of the corporations; articles of incorporation reciting that the stock was paid up.

Appeal from St. Louis Circuit Court; Thos. C. Hennings, Judge.

Action by Cyrus E. Hodde, receiver, against Peter Hahn, James H. Roach, and Victor Diering. Judgment for plaintiff, and defendants appeal. Affirmed.

O. F. Karbe and S. C. Rogers, both of St. Louis, for appellants.

Grant & Grant, of St. Louis, for respondent.

WALKER, J. This is an action against appellants, and others not appealing, for alleged unpaid stock subscriptions. In January, 1909, the George Henseler Oil Company, a \$10,000 corporation, was doing business in oils and kindred commodities in the city of St. Louis. None of these appellants were stockholders in this company. It enjoyed a lucrative business. The Mercantile Supply Company was a \$50,000 corporation, having \$30,000 of its capital stock paid up. All of these appellants were stockholders therein. A suggestion of merger or consolidation of the two companies was made, agreed to, and consummated in January and February, 1909. The Mercantile transferred all its assets and good will to the consolidated corporation, the Henseler Mercantile Oil & Supply Company, for stock issued to the several shareholders thereof to the extent of \$25,000. The merged or consolidated company did business with varying success until in 1914. Some time in 1912 appellant Diering, while the corporation was solvent, disposed of his stock. Appellant Hahn disposed of all of his stock to his wife, who was a defendant below, saving four shares. In March, 1914, the directors realized the company was in financial straits, and attempted to settle with their creditors. As a result there was a meeting of the creditors held on the 26th day of March, 1914, when there was presented to them an expert accountant's statement of the condition of the company. It was proposed to do anything the creditors might direct. The creditors finally appointed a committee of three to determine the course to be pursued. It decided to transfer the assets and property of the company to a trustee. In the meantime the creditors had charge of the affairs of the company. They prepared a deed, named their trustee, the transfer was made to him,

and he took charge without bond or the taking of an inventory or appraisal of the assets, and attempted to operate the business. The first two months he made a profit of \$3,145. Thereafter the creditors enlarged the business, created various liabilities, and the assets began to depreciate and decrease and the liabilities increase until in October or November, 1914, when the trustee advised discontinuance, but the creditors were obdurate, and a substitute trustee was appointed at the request of the Union Petroleum Company, one of the largest creditors. The new trustee attempted to operate the business until in March, 1915. The result was disastrous financially, and the Union Petroleum Company applied for the appointment of a receiver, and the present plaintiff was appointed as such. According to the books of the company in March, 1914, the assets exceeded the liabilities; that is, the assets were in excess of \$37,000 and the liabilities less than \$34,000. During the operation of the trusteeship under the direction of the creditors the entire assets were dissipated, lost, or squandered, and the liabilities increased, with the result that when the receiver sold the assets on hand there was not enough to pay the liabilities incurred during the trust. Thereafter the receiver brought this suit against the then and former stockholders for balances due on their unpaid stock.

The petition alleges the appointment of a receiver; sets forth the facts upon which the liabilities of the defendants were based, to wit, the amounts due and unpaid by each upon their respective shares of stock, the assets on hand, the debts, the order authorizing the receiver to institute this action, the allowance of claims amounting to \$27,037.94, and that there remained but \$1,300 in the receiver's hands with which to pay the same; that the defendants were liable as subscribers for their unpaid stock, the incorporation of the Henseler Mercantile Oil & Supply Company; that the two former corporations had been so operated that their capital stock was impaired, and that on the 30th day of January, 1909, there was but \$7,253.72 as assets on hand in payment of the capital stock of the Henseler Mercantile Oil & Supply Company; that said articles represented \$50,000 of the stock was paid up and all of it subscribed; that there were no assets of the value of \$50,000 paid in in payment of the capital stock; and that the difference between the value of the property paid over to said corporation and the face value of the stock was therefore due. An account was prayed to be taken of the amount due the creditors and costs and the amount paid by each of defendants on account of the subscriptions and the stock issued to them, and that judgment be entered for the amount due, respectively, from each of the defendants on

unpaid stock and for other relief. The answers, which were several, were: First, general denials; and, second, pleas of estoppel. Other defenses were also pleaded, but the assignment of errors does not render a reference to them necessary; there being no question as to the sufficiency of the pleadings. The reply was a general denial.

A hearing was had before the court, in which it was decreed that plaintiff have and recover from defendants Frederick Nobbe, Peter Hahn, Belle Gregory, Victor Diesing, James H. Roach, and William Grafeman the sum of \$27,037.94, and that execution issue against said defendants as follows: Against Frederick Nobbe, \$21,793.58; Peter Hahn, \$874.06; Belle Gregory, \$1,748.12; Victor Diesing, \$874.06; James H. Roach, \$874.06; William Grafeman, \$874.06. If for any reason any one or more of said apportionments could not be made out of the defendants, then such apportionment so in default was to be levied out of the property of the other defendants in proportion to their respective liabilities as hereinbefore set forth. After unavailing motions for new trial and in arrest, this appeal was perfected.

Much of the foregoing statement, seemingly irrelevant, is inserted that a clearer understanding may be had of the grounds of appellants' defense.

Error is assigned in the trial court's holding that the receiver was not authorized to maintain this action. The attitude assumed by appellants is best stated in their own language, which is as follows:

"Where the creditors of a financially embarrassed or insolvent corporation, after being duly advised of its condition, take over its business and assets while there is a dispute as to the amount of the liabilities and the value of the assets, without adjusting that question, and also the question as to whether the assets, if disposed of and the proceeds applied to the debts, were sufficient to satisfy the debts, and they continue the business of the company after being warned by the receiver of the inadvisability of such a course, and they refuse to heed his warnings, and upon his resignation secure the appointment of another trustee, and thereafter there is an utter failure of the business as conducted by the trustee, and none of the original debts are paid, but all of the assets dissipated, the creditors cannot disregard the assets they had in their possession, and which they squandered or dissipated, but which might have been applied by them on the liabilities, and then hold the stockholders for their unpaid stock, if there remained, when the creditors took charge of the assets, sufficient funds to pay the liabilities then extant."

In short, it is contended that the receiver is but the creditors, whose conduct has been such as to estop him from prosecuting this action.

[1, 2] I. The right of the receiver, under the order of the court, to institute and maintain an action of the character here under

review is too well established to require discussion. *Lyons v. Corder*, 253 Mo. loc. cit. 559, 162 S. W. 606, and cases. Nor is it necessary, in defining the legal status of a stockholder who has not paid for stock subscribed for by him, to say more than that the prevailing rule is that, upon his having made the subscription, such a promise is implied that he will pay for the stock in full as to authorize an action against him by the corporation or its assignee or receiver, after the conditions of the subscription have been performed, to recover the amount due and unpaid thereon. *Berry v. Rood*, 168 Mo. 316, 67 S. W. 644; *Shields v. Hobart*, 172 Mo. 491, 72 S. W. 669, 95 Am. St. Rep. 529. The reason of this rule becomes apparent when we consider the relation which the stockholder and the receiver bear to the corporation. Upon the failure of the former to pay a stock subscription there is created a liability on his part in the nature of debt to the corporation; and the latter, by his appointment being invested with the title of the property and the rights of action of the corporation, becomes the proper party to enforce obligations due to it, by legal proceedings. *Coleman v. Hagey*, 252 Mo. 102, 158 S. W. 829; *Thompson v. Greeley*, 107 Mo. loc. cit. 590, 17 S. W. 962.

[3] II. This brings us to the affirmative defense that the receiver is estopped from prosecuting this action on account of the conduct of the directors. Preliminary to a consideration of this contention it is not inappropriate to refer briefly to what has been declared necessary to constitute estoppel. Our reports, as well as those of other jurisdictions, are replete with definitions of this defense. Among others are the following: A preclusion in law which prevents a man alleging or denying a fact in consequence of his own previous act, allegation, or denial of a contrary tenor. *Reid's Adm'r v. Benge*, 112 Ky. loc. cit. 814, 66 S. W. 997, 57 L. R. A. 253, 99 Am. St. Rep. 334; *Coogler v. Rogers*, 25 Fla. loc. cit. 873, 7 South. 391; *Gavin v. Graydon*, 41 Ind. loc. cit. 566. A conclusive ascertainment of a fact by the parties, so that it can no longer be controverted between them. *Wilkins v. Suttles*, 114 N. C. loc. cit. 556, 19 S. E. 606. A fictitious statement treated as true. *Gen. Financ. Co. v. Liberator, etc., Co.*, 10 Ch. Div. 15. The conclusion of a truth. *Moore v. Willis*, 9 N. C. loc. cit. 558. Where a man has done some act which the law will not permit him to gainsay or deny. *South v. Deaton*, 113 Ky. loc. cit. 320, 68 S. W. 137, 1105. Where one is concluded from speaking against his own act or deed. *Demarest v. Hopper*, 22 N. J. Law, 619. Our rulings are in effect the same as the foregoing. *De Lashmutt v. Teetor*, 261 Mo. 412, 169 S. W. 34; *Osburn v. Court of Honor*, 152 Mo. App. 652, 133 S. W. 87; *Spurlock v. Sproule*, 72 Mo. 503; *Acton v. Dooley*, 74 Mo. 63; *Hart*

v. Gilles, 67 Mo. 175; and numerous other cases cited in 16 Cyc. p. 679, note 1.

[4] As concisely applying the foregoing definitions, the St. Louis Court of Appeals in *Henson v. Mercantile Co.*, 49 Mo. App. 224, holds that to constitute an estoppel three things must occur: First, fraudulent representations, or withholding the truth when it is one's duty to speak; second, reliance upon such representations; third, the consequent act by the defrauded party to his disadvantage. Let the facts determine, therefore, whether the doctrine can be applied here. It is conceded that the management of the business of the company under the trusteeship created by the directors was a losing venture. The creditors, however, did nothing or made any false representations which misled the defendants, including appellants, which caused them to execute the trust deed whereby the loss was incurred in their attempting in this manner to continue the business. The proposition and plan pursued did not originate with the creditors, but with the defendants.

As it now appears, a mistake was made by the defendants, as well as the creditors, in attempting to continue the business. But the record discloses no act of the latter essential to sustain the plea of estoppel. The assets were such, due to the nature of the business, that they were practically worthless, except to a going concern. If, therefore, the business was discontinued, the property practically ceased to have any commercial value, and if subjected to sale would have commanded no greater price than the separate value of the wood and iron it contained, classified by the respondent as "junk." This will apply to the filling stations and other equipment. Moreover, a large proportion of the accounts receivable were afterwards shown to be uncollectable. If under this state of facts the affairs of the company had been liquidated, the assets, if any had been realized from a sale, would have been nominal. The receivership inaugurated by the directors, therefore, viewed from any vantage, was a mistake, but it does not appear that another course would have brought a different pecuniary result or have resulted in any greater advantage. In no sense was the conduct of the creditors such as to justify the plea of estoppel now sought to be interposed by appellants, whose legal relation to the company is nothing more than that of debtors made so by their own obligations.

III. The liability of a stockholder for unpaid stock, if not made clear by what has been said, is too well defined to admit of question. Our statutes (section 3350, R. S. 1909) provide explicitly that capital stock shall be paid up in lawful money of the United States. The articles of this company provided that this had been done, and that it

was in the custody of the board of directors. It now appears that this statement was false, and the receiver, to sustain this action, was only required to establish this fact and the several liabilities by reason thereof of the appellants, when it became their duty to show, if payment was pleaded otherwise than in money, that the substitute therefor was equal in money value to the extent of the par value of the stock.

As we said in *Van Cleve v. Berkey*, 143 Mo. loc. cit. 136, 44 S. W. 750, 42 L. R. A. 593:

"The proposition that the stock of a corporation must be paid for 'in meal or in malt,' in money or in money's value, is not a mere figure of speech, but really has the significance of its terms. It may be paid for in property, but in such case the property must be the fair equivalent in value to the par value of the stock issued therefor. That it is the duty of the stockholders to see that it possesses such value. That when a corporation is sent forth into the commercial world, accredited by them as possessed of a capital in money, or its equivalent, in property, equal to the par value of its capital stock, every person dealing with it, unless otherwise advised, has a right to extend credit to it on the faith of the fact that its capital stock has been so paid, and that the money or its equivalent in property will be forthcoming to respond to his legitimate demands. In short, that it is the duty of the stockholder, and not of the creditor, to see that it is so paid."

[5] IV. In the case at bar the incorporators of the Henseler Mercantile Oil & Supply Company stated in the articles of incorporation, in the language of the statute, that \$50,000 of the capital stock of this company had been paid up in lawful money of the United States. The creditors had a right to rely upon that statement. Therefore, when the receiver showed that this statement was false, and that the incorporators had not paid up the \$50,000 in lawful money of the United States, but in truth had merely transferred to the new company property with a real value of some \$7,000 and good will, in payment of the remainder of the \$50,000, then the duty devolved upon appellants to show that what was called good will was in fact a real asset, and had a value equal to the value placed on it in their books, to wit, \$30,433.10 (afterwards increased to \$34,268.73). A portion of the \$50,000 capital stock was never paid up, even by good will. This is evident from the following facts: Some of the defendants were owners of the Geo. Henseler Oil Company, others were owners of the Mercantile Oil & Supply Company. The two sets got together. As a result, all the assets of the two companies were transferred to defendants, including appellants, and these in turn transferred them to the new company, and received back 500 shares of its stock as full paid. The assets of the Geo. Henseler Oil Company were set out in the books of the new company as amounting

to \$25,000, in which was included good will at a valuation of \$14,143. However, in the agreement by which these assets were turned over to the new company it was further provided that the new company should pay the debts of the Geo. Henseler Oil Company, amounting to \$7,606.75. Some of these accounts receivable were worthless. When these accounts and the amount of liabilities assumed by the new company of the Geo. Henseler Oil Company were deducted from the real assets, it left net assets actually turned over to the new company by the Geo. Henseler Oil Company, good will, of course, excluded, of only \$2,219.56.

The assets of the Mercantile Oil & Supply Company, also transferred to the new company, were entered on the books of the Henseler Mercantile Oil & Supply Company at \$25,000, and include good will, \$16,290, and other assets, \$8,710, but included in these assets are a number of accounts worthless at the time, and subsequently charged to good will so as to increase the amount of good will on the books. Deducting these bad accounts from the real assets left net real assets of \$5,592.55. From this is to be deducted a dividend paid to the stockholders of the Mercantile Oil & Supply Company by the new company, under an agreement to that effect, amounting to \$800, making real net assets received by the new company from the Mercantile Oil & Supply Company of only \$4,792.55. We have therefore, in the first instance, capital stock to the extent of \$30,483, represented by alleged good will of the two constituent companies, afterwards, to the extent of \$34,268.73, being the aggregate debts of the Geo. Henseler Oil Company, the dividend paid to stockholders of the Mercantile Oil & Supply Company, worthless accounts receivable of the Mercantile Oil & Supply Company, and the remainder, \$7,012.11, which represents tangible assets of approximately that value.

[6] Conceding, therefore, that the capital stock of the corporation may be represented by good will of constituent companies where no money passes, and that all the stockholders of the constituent companies become stockholders of the new company, did these constituent companies have any real good will? There was no competent proof offered of the value of the good will of either of these companies. One witness, it is true, testified that he thought the good will of the Mercantile Oil & Supply Company was worth \$15,000, because that company had always paid a dividend, and had also paid its debts. In this statement he evidently ignored the fact that these dividends had been paid out of the capital stock, as is sometimes done in mushroom organizations, to which class none of these companies, it is but fair to say, belonged. The position of the receiver was

that the good will of a company can only be estimated by the results of its business operations from the time it commences until it ceases to do business; and, where the consolidated company, as here, was controlled and managed by the same people as those who managed and controlled the constituent companies, good will may also be shown by the results of the business operations of the consolidated company. The books of these companies showed that the Geo. Henseler Oil Company started out with a paid-up capital stock of \$10,000, and that after five years' operation it wound up with assets of only \$2,219.56. The Mercantile Oil & Supply Company commenced business with a paid-up capital of \$30,000, of which \$15,000 was preferred and \$15,000 was common stock. The common stock paid no dividends, but during the five years of operation the preferred stock paid a dividend of 8 per cent. At the close of these five years of business the net assets of this company amounted to only \$4,792.55. Inasmuch as during that period the company paid out to its stockholders \$5,200 in dividends, it is proper, in order to arrive at the total loss, to add this to the assets above stated, making \$9,992.55. Deducting this from the \$30,000 assets with which the company started, leaves a balance of \$20,008, which represents the net loss of the company in five years of operation. The two companies, therefore, during their business lives show an operating loss in the one case of 77 per cent. and in the other case 66 per cent. of their respective capitalizations. Under this state of facts the companies can hardly be said to have had a good will which can be represented by dollars and cents when the continued business was managed by the same persons as when operated at the loss stated. It was further shown that the consolidated business with the added good will of the former companies, when operated by the same persons who had owned and operated said former companies, resulted in no profit, but, on the contrary, suffered a net loss in its five years of business.

We have defined good will to be "the advantage or benefit * * * acquired by an establishment beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage," etc. *Milling Co. v. Hanebrink*, 247 Mo. loc. cit. 221, 152 S. W. 357, Ann. Cas. 1914B, 875. If in consequence of the general public patronage such declared advantage or benefit turns out to be a disadvantage and a loss, then the good will becomes nothing more than a purely imaginary quantity. Paraphrasing a Pauline mysticism, it is neither "the substance of things hoped for nor the evidence of things not seen." Heb. 11:1.

V. During the five years of business, although this company possessed wagons,

horses, tools, oil stations, etc., yet it charged nothing off for loss, depreciation, or waste, except \$90 for the loss of a horse. Everything else it owned or possessed was carried during the five years of business at original cost. The loss which, according to its books, was due to operation, is much less than the actual loss. An expert accountant found that there was an actual deficit or difference between assets and liabilities of \$13,302.68. As we have shown, the company commenced business with real assets of about \$7,000. Five years later, when the books were examined, not only had the capital stock been dissipated, but the company owed \$13,000 more than it had assets. Therefore there was a total loss during this period of \$20,314.79. While this was but the estimate of an experienced accountant, the events proved it to be fairly accurate, and tallied with that made by the receiver two years afterwards.

[7] VI. The sale of their unpaid stock by certain of the appellants before the institution of this suit will not relieve them from liability to the creditors of the company for their respective balances due on such stock. *Eyerman v. Kriekhaus*, 7 Mo. App. loc. cit. 457; *Epstein v. Clothing Co.*, 87 Mo. App. loc. cit. 228.

We have thus reviewed the facts to enable it to be determined whether there was a payment in any manner by these appellants of the amounts they respectively obligated themselves to pay upon their subscription for and the issuance to them of the shares of their stock. We do not find that the stock was paid for either "in money, meal, or malt;" and, if good will be held to be property, however its existence may be ascertained, it constitutes no factor in the determination of the matter at issue because it did not exist; if it did exist its value was negligible.

Under no view of the facts in this case have appellants interposed a meritorious defense, and the judgment of the trial court is therefore affirmed.

All concur.

COSHOW et al. v. OTEY. (No. 20942.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1920.)

1. Evidence ⇨278—Admissions of decedent as to gift admissible to characterize defendant's possession.

In ejectment by devisees against defendant, a negro, claiming to have been given the land by testator, and to have acquired title by adverse possession, testimony as to testator's declarations or admissions that the land was defendant's, and that he (testator) had given it to him, held admissible as characterizing defendant's possession.

2. Adverse possession ⇨64—Possession under parol gift is adverse.

Possession under a parol gift is adverse, not permissive.

3. Adverse possession ⇨106(4)—Ten years gives title.

One who holds open, notorious, continued, uninterrupted, adverse, and actual possession of realty for 10 years or more acquires legal title as fully as if he held deed from the owner.

4. Adverse possession ⇨55—Death of owner does not interrupt adverse possession.

If defendant had adverse possession of realty owned by plaintiff's predecessor prior to such predecessor's death, and after the death continued in such possession and held it for the 10 years last before commencement of plaintiff's ejectment suit, defendant acquired title, as the death did not stop the running of the statute.

5. Adverse possession ⇨116(5)—Instruction held not erroneous, as authorizing finding title passed by gift.

In ejectment by devisees against defendant, a negro, claiming by adverse possession, instruction that if testator gave the property to defendant absolutely, and defendant, before testator's death, took possession pursuant to the gift, and such possession was adverse and continued for 10 years last before commencement of suit, defendant acquired title, was not erroneous, as authorizing the jury to find that title passed to defendant by the gift.

6. Trial ⇨260(1)—Instruction need not be repeated on request.

An instruction, fully and completely covered by another given at the party's request, was properly refused.

7. Trial ⇨243—Instructions presenting conflicting theories of proof not in conflict.

Two lines of instructions, following conflicting proof, and presenting fully the two theories of the case, are not in conflict.

Appeal from Circuit Court, St. Charles County; Edgar B. Woolfolk, Judge.

Action in ejectment by John W. Coshaw and others against Orlaney Otey. From a judgment for defendant, plaintiffs appeal. Affirmed.

C. W. & J. W. Wilson, of St. Charles, for appellants.

Theodore C. Bruere, of St. Charles, for respondent.

GRAVES, J. Action in ejectment for two small tracts of land (aggregating less than 45 acres) in St. Charles county. The petition is in usual form, alleging ouster of plaintiffs by defendant on March 2, 1916, and alleging rents and profits to be \$10 per month, and damages at \$50. The answer upon which the trial was had was a third amended answer, and consisted of the following de-

fenses: (1) An admission of possession and a denial of all other matters of the petition; (2) plea of the 10-year statute of limitation; (3) plea of the 24-year statute of limitation; (4) title in defendant by open, notorious, continuous, and adverse possession for a period of 10 years. Whilst there are some reiterations, the foregoing cover the defenses made. Reply was a general denial. Upon a trial before a jury the defendant had a verdict in his favor, and from the judgment entered upon such verdict the plaintiffs have appealed.

No formal assignments of error are made in the brief for appellants but under their heading of "Points and Authorities" it is said that the court committed "reversible error" in the following particulars: (1) In admitting the evidence to the effect that Alonzo B. Howell under whose will plaintiffs claim title stated in his lifetime that he had given the property to defendant; (2) in giving instructions Nos. 1, 2, and 3 for defendant; (3) in giving conflicting instructions; and (4) in refusing instruction No. 8 as asked by plaintiffs.

The plaintiffs in this case are trustees under the will of Alonzo B. Howell, by the terms of which he gave:

"All the rest, residue and remainder of my estate, both real, personal and mixed, I give, devise and bequeath to Wm. M. Stewart, Mike Sutton, John W. Coshow, Isaac N. Howell, and John Burton, as trustees, and to their successors in office and trust forever, for the purpose of organizing and incorporating themselves into a cemetery association under the laws of the state of Missouri, said trustees and their successors to set apart such of my real estate as in their judgment may be necessary, including the old family burial ground, where my father and mother and many of their descendants and relatives are buried, for cemetery purposes. And said trustees and their successors are hereby empowered to make such rules and regulations in reference to said cemetery as in their wisdom and judgment may be just and proper. And I hereby give and grant to said trustees authority and power to use the net income, rents and profits arising from my said estate for the purpose of improving, decorating, adorning and enlarging said cemetery grounds. And for all services rendered by them, or any of them, in their capacity as such, they are to be paid out of said income, so that no part of the principal of my estate shall be encroached upon at any time, unless the same be required for such improvements."

By a codicil this was later modified thus:

"Now, I, the said Alonzo B. Howell, do make this codicil to my said will, and I do hereby revoke said provision in reference to said cemetery association as a corporation under the laws of the state of Missouri and also as to Isaac N. Howell as one of the trustees, and I hereby appoint Wm. M. Stewart, John W. Coshow, Mike Sutton and John Burton as trustees for the care, improvement and such

maintenance of said cemetery as is directed in my said will, except that they shall not be required to organize as a cemetery association under the laws of the state of Missouri. And I direct that my executor shall, as soon as convenient after my decease, pay to said trustees, Wm. M. Stewart, Mike Sutton and John Burton, for their services as said trustees, fifty dollars each, and to John W. Coshow five hundred dollars for his services as such trustee."

The paper title to the land in dispute was in Alonzo B. Howell at the date of his death in January, 1902, and his estate was finally settled in May, 1904. The instant suit was brought May 4, 1916. There is no dispute as to the fact that the property described in the petition is in the possession of the defendant. On the other hand the proof for the defendant tends to show that defendant had been in the open, notorious, hostile, and adverse possession of the land for much more than 10 years. The defendant is a colored man, and the son of a former slave of the said Alonzo Howell, and whilst living upon the land in dispute worked more or less for Mr. Howell. There is much substantial evidence showing that defendant has had the land fenced for more than 25 years, and has lived upon, cultivated, and improved it during that time. He paid no rent during the lifetime of Howell, and none since although there was a slight attempt to show payment of rent a time or two since the death of Howell; but there is not much substance to this portion of the evidence. The evidence is ample to support the verdict of the jury and the judgment of the court in the cause should be affirmed, unless there is some substance in the assignments of error. These, and the pertinent facts pertaining thereto, we leave to the opinion.

[1] I. The plaintiffs in this case stand in the shoes of Alonzo B. Howell. The evidence to which plaintiffs objected, and of which complaint is now made, is in the nature of admissions by Howell that he had given the land to Otey. There is no question that Otey went into possession and made valuable improvements thereon in the lifetime of Howell. A sample of the testimony now complained of will serve a good purpose here. Witness Huning was on the stand for defendant, and said:

"Q. Now, Mr. Huning, I will ask you whether you had any conversation with Mr. Howell with reference to the property that was on the eastern side of this fence that ran along the west boundary of this in controversy.

"Mr. Bruere: Mr. Wilson takes the position as to adverse possession. It's clear that, if the ancestor disclaims any right to this property and makes the statement that the property does not belong to him, but belongs to the other man, and disclaims any right of ownership, that it is admissible.

"The Court: If that is what you propose to show, the court will overrule the objection.

"Mr. Bruere: That is what I want to show by this witness.

"Mr. Wilson: We except to the ruling of the court for the reasons indicated.

"The Court: Proceed.

"Q. Just state what that conversation was. A. My father was cutting board timber over there and only was to get the black oak.

"Mr. Wilson: That's not giving the statement or conversation with Mr. Howell. We object to it.

"The Court: Sustained. State what was said.

"A. Of course, on the west side of Uncle Alonzo's house, that was in the pasture, the black oak timber was without, and, of course, he had told him not to take anything but black oak, and—

"Mr. Wilson: We object to that.

"The Court: State what was said—what Mr. Howell said. A. He asked Mr. Howell whether he could get the black oak on the other side of the house—

"Q. What do you mean by that? A. Over across the fence.

"Q. That is where Otey was? A. Yes, sir; and he said not to take anything there; that belonged to Otey and wasn't his, and not to go over there to cut any.

"Q. Who said that? A. Mr. Howell."

And further the same witness said:

"Q. Now, you say, when you went to see Mr. Howell, to ask permission to cut board timber directly over across the fence, it was the fence as it existed at that time? A. There was a fence there at that time when I went there.

"Q. And he told you not to go across the fence that was Otey's? A. Yes, sir.

"Q. And that occurred Otey was living there on that place that time, was he? A. Yes, sir.

"Q. And that occurred how long ago; 25 or 30 years ago? A. That was the last year I was living there; that's about 27 or 28 years ago."

Another witness said:

"The Court: Just state the conversation, whatever it was. A. Well, I was trading with him on some corn there, and he made me a price, and I told him that I couldn't haul that corn at the price, unless he would take off enough to pay me to haul it, and he said he couldn't well do that; and I said, 'Haven't you got any one to haul it?' and he said, 'I have no one but a nigger, and he is busy now, and I couldn't get him;' and I said, 'What nigger?' and he said 'Orlaney Otey, that lives over here on a piece of land I gave him.' That was the conversation."

The foregoing has reference to a conversation with Mr. Howell at Howell's place.

A brother of the defendant testified:

"Q. Did you ever have a talk with Alonzo Howell with reference to this place—the ownership of this place? A. Yes, sir.

"Mr. Wilson: If the court please, we object to this testimony for the reasons already interposed.

"The Court: Overruled. (To which ruling of the court the plaintiffs, by counsel, then and

there duly excepted, and saved their exceptions.)

"A. I went over there to work on Orlaney's place one time. Orlaney couldn't go, and he sent me to work in his place, and when I started away 'Marse Alonzo,' as we always addressed him, told me, he says, 'Now,' he says, 'I have given Orlaney a home,' he says; 'that's his, and I have nothing to do with it.'"

The foregoing is the character of the testimony to which the appellants lodge their assignment of error. Evidence of this character was recognized as proper in the case of *Allen v. Mansfield*, 108 Mo. loc. cit. 348, 350, 18 S. W. 901. That was an action in ejectment, as here, and among other defenses was that of adverse possession. Black, J., in discussing the matter at page 348 of 108 Mo., at page 902 of 18 S. W., supra, said:

"It is to be observed in the first place that there is no evidence of improvements made by the alleged donee, or other circumstances to take the alleged parol gift out of the statute of frauds. As stated by counsel for the defendant, it is title by adverse possession, not by gift, which will defeat the plaintiff. Continuous adverse possession under a parol gift for the statutory period will not only constitute a perfect defense, as against the donor and those claiming under him, but it will confer title upon the donee. *Campbell v. Braden*, 96 Pa. St. 388; *Moore v. Webb*, 2 B. Mon. (Ky.) 282; *Outcalt v. Ludlow*, 32 N. J. L. 239; *Sumner v. Stevens*, 6 Metc. (Mass.) 337; *Clark v. Gilbert*, 39 Conn. 94."

In the *Allen Case* the judgment for the defendant was reversed and the cause remanded, but not upon the point involved here. And in that case at page 350 of 108 Mo., at page 903 of 18 S. W., this court quotes approvingly from the Supreme Court of Connecticut thus:

"As said in *Clark v. Gilbert*, supra: 'Much has been said about an open, notorious possession, but such expressions are not applicable to a case like this. Possession taken under a parol gift is adverse in the donee against the donor, and, if continued for 15 years, perfects the title of the donee as against the donor. The donor in such cases, not only knows that the possession is adverse, but intends it to be, and there is no occasion for any notoriety. Notoriety is only important where the adverse character of the possession is to be brought home to the owner by presumption. Of course, where it is shown that he had actual knowledge that the possession was under claim of title, and therefore adverse, openness and notoriety are unimportant, for no other person has any legal interest in the question or right to be informed by notoriety or otherwise.' See, also, *Sedg. & Wait on Trial of Land Titles* (2d Ed.) § 735. On these grounds the *Rannels Case* can stand without question or doubt, for there was, as against the donor, sufficient actual possession of the whole tract, and color of title was not necessary to a complete defense, and that case stands on no other grounds."

So in the case at bar. For long years before Howell's death, defendant had the land in question under fence and in his possession. Howell lived close by, and was advised of what defendant was doing. He saw defendant improve and use the property, and these admissions of the deceased characterized the possession of defendant, and were proper.

[2] II. To follow the question above discussed a little further: The defendant had the right to show the character of his possession by the admissions of the donor, if there was in fact a parol gift. These admissions were made in the very presence of the defendant's possession. The evidence fixes the time of the possession as being more than 10 years prior to the death of the alleged donor, and for more than 10 years after his death. In the case of *Int. Bank of St. Louis v. Fife*, 95 Mo. loc. cit. 126, 8 S. W. 244, it is said:

"Where an absolute and unqualified donee in fee takes possession of lands under a parol gift, his possession is thenceforth adverse to the donor. Authorities are numerous to that effect, and among others the case of *Rannells v. Rannells*, 52 Mo. 109, where it is said that the donee is to be regarded as holding adversely to the donor 'from the very inception of her entry under the parol gift.'"

So that in this case the admissions of deceased were certainly proper, under the pleadings before us, to characterize the possession of the defendant, as suggested, supra. These admissions tended to show adverse rather than permissive possession, because possession under a parol gift is adverse and not permissive.

III. The three instructions given for the defendant, which are complained of in this court read:

"Defendant's Instruction No. 1.—The court instructs the jury that one who holds the open, notorious, continued, uninterrupted, adverse, and actual possession of real estate for a period of 10 years or more acquires the legal title to the property as fully as if he had acquired the same by deed from the owner; therefore, if you believe from the evidence that the defendant has held the open, notorious, continuous, uninterrupted, adverse, and actual possession of the premises described in the petition prior to the death of Alonzo Howell, and that such possession continued, and the defendant was in the visible, notorious, continued, actual, and adverse possession of the premises described in the petition, for a period of more than 10 years preceding the institution of this action, you must find for the defendant.

"Defendant's Instruction No. 2.—If the jury believe from the evidence that Alonzo Howell gave the property in question to the defendant absolutely and unqualifiedly, and that the defendant, prior to the death of Alonzo Howell, took possession, pursuant to such gift, of the premises described in the petition, claiming title according to such gift, and that such possession was visible, notorious, continued, adverse and actual, and that such possession continued

for a period of 10 years next before the commencement of this suit, and that such possession was visible, notorious, continued, adverse, and actual for that period, then the jury should find for the defendant. (Given.)

"Defendant's Instruction No. 3.—If the jury believe from the evidence that the defendant had the exclusive, visible, notorious, continued, and actual adverse possession of the premises in controversy prior to the death of Alonzo Howell, and that the defendant, after the death of Alonzo Howell, continued in such possession, and had and held the visible, exclusive, notorious, continued, and actual adverse possession of the premises in controversy for a period of 10 years next before the commencement of this suit, they will find for the defendant. (Given.)"

[3, 4] Instructions 1 and 3, supra, are proper declarations of law, where there is evidence tending to show continuous adverse possession for the statutory period. As we have suggested there is such evidence: (1) To show continuous adverse possession for the statutory period prior to Howell's death; and (2) to show continuous adverse possession for the statutory period after his death. The death of Howell did not stop the running of the statute, and instruction No. 3 was intended to make that matter clear. These are stock instructions on adverse possession. The plaintiffs by their own instructions, Nos. 1, 2, 5, 6, and 7, recognized that the question of adverse possession was one for the jury, by the use of such clauses as:

"Unless the defendant has acquired title by adverse possession of the said tract of land, as explained in the instructions in this case, for a period of 10 years next before the commencement of this suit."

The argument before this court was not in criticism of these two instructions, but was directed to instruction No. 2, supra. There is a bit of testimony tending to show that the possession of the defendant was merely permissive, and that he held under the grantor of plaintiffs. This should be borne in mind in the discussion of this instruction. In fact, this permissive character of defendants' possession was submitted to the jury by plaintiff's instructions, and the fact found against them.

[5] The portion of this instruction 2, which is complained of here, is that part which authorizes the jury to consider the fact as to whether or not the deceased had given the land to defendant. As used in this instruction, this clause simply meant that the oral gift would make the possession taken thereunder adverse, and not permissive. The whole instruction, when read, so indicates. It is clear that the instruction did not authorize the jury to find title in defendant by and through the oral gift, but only authorized the jury to determine the matter of an oral gift, as bearing upon the questions of adverse or permissive possession. The instruction was

proper, as was the evidence as to a gift, and for the same reason, *supra*.

[6] IV. The refusal of instruction No. 8 for the plaintiffs was proper. It was fully and completely covered by their instruction No. 3, already given by the court. The two instructions have but to be read, to show that they cover the same questions.

[7] Nor is there substance in the charge that there was a conflict in the instructions. There were two lines of instructions, as there would be on conflicting proof; but they present fully the two theories of the case. Plaintiffs contended that defendant's possession was under the deceased, and not adverse. Defendant contended that the possession was adverse. The two lines of instructions properly presented the respective theories, and were not in any sense conflicting.

There was no error in the trial, and the judgment is affirmed.

All concur, except WOODSON, J., who is absent.

STEWART v. OMAHA LOAN & TRUST CO. et al. (No. 20879.)

(Supreme Court of Missouri, Division No. 2,
June 4, 1920. Rehearing Denied June 25,
1920.)

1. Judgment \S 248—Relief in suit to quiet title measured by pleadings.

In view of Rev. St. 1909, §§ 2535 and 2536, the rules of procedure in suits to quiet title are the same as in other civil actions, and the relief afforded is to be measured by the pleadings in each particular case.

2. Quietling title \S 43—Defense should have been limited to issues raised by pleading.

In an action to quiet title, where defendants' answer denies plaintiff's ownership and alleges deed of trust to secure defendants' note is a prior lien over plaintiff's claim, right, and title, and asks its foreclosure, the defense should have been limited to such issues which did not authorize the issue of the postponement of trust deed under foreclosure of which plaintiff claims title by purchase on foreclosure to that of defendant.

3. Appeal and error \S 232(1½)—Objection that pleadings did not warrant determination held not raised by objection to documentary evidence.

In suit to quiet title, objection that the pleadings did not warrant a determination as to the priority of trust deeds was not made by mere objection to documentary evidence which did not bear on such question.

4. Appeal and error \S 171(3)—Theory of case below adhered to.

Where parties proceeded as though pleadings in suit to quiet title warranted determination of priority of trust deeds, case on appeal will be tried on same theory.

5. Mortgages \S 151(2)—Of two trust deeds by same grantor that securing note maturing first had priority.

Where two mortgages or deeds of trust are simultaneously executed by the same grantor to secure different notes to the same grantee, the effect is the same as if one mortgage or deed of trust had been executed to secure the notes maturing at different times so that the trust deed securing the first maturing note has priority.

6. Mortgages \S 372(1)—Agreement as to which of two trust deeds shall be prior not binding upon purchaser on foreclosure.

Plaintiff, claiming under purchaser on foreclosure of trust deed, is not bound by any agreement between the original payee of the notes and grantee of such deeds as to priority, where neither purchaser at foreclosure nor any subsequent purchaser, including plaintiff, had knowledge of such agreement, and the burden was upon defendants to show notice.

7. Mortgages \S 275—Where purchaser upon foreclosure excepted from covenants in his deed another trust deed, his successor was not estopped thereby.

Where purchaser of land, upon foreclosure of one of two trust deeds simultaneously executed by grantor to same grantee, excepted in covenants of a warranty deed to another the other deed of trust, such act only operated to except it from such covenants, and did not estop plaintiff from contesting the lien of such excepted trust deed.

8. Evidence \S 383(7)—Plaintiff not bound by deeds to which he is not a party.

Plaintiff seeking to quiet title is not bound by recitals in deeds to which he was not a party and under which he does not claim.

9. Mortgages \S 171(1)—Mortgages whose note matures subsequent to that under trust deed of equal date has constructive notice of priority.

Where grantor granted the same grantee deeds of trust securing notes maturing at different times, the record of the trust deeds constituted notice of the matters recorded, and, where there was nothing to indicate which was given priority, the party purchasing the last maturing note took with constructive notice of the other's priority.

10. Quietling title \S 30(3)—Prior deed of trust holder not required to make owners of later trust deed parties.

Plaintiff, claiming through purchaser under foreclosure of prior deed of trust, was not required to make owners of subsequent deed of trust parties to action to quiet title.

Appeal from Circuit Court, Texas County;
L. B. Woodside, Judge.

Suit to quiet title by John D. Stewart against the Omaha Loan & Trust Company and others, in which a judgment was rendered by default, and within three years thereafter James Corbett, as administrator of the estate of Eliza J. Leverich, deceased, petitioned to set aside the judgment finding plain-

tiff the owner in fee, and alleged that deceased held a note secured by deed of trust on the land. On hearing the judgment was set aside, and the administrator permitted to plead to plaintiff's petition. Judgment for plaintiff, and defendants appeal. Affirmed.

Barton & Impey and Hielt & Scott, all of Houston, and H. H. Baldridge, for appellants.

Lamar, Lamar & Lamar, of Houston, for respondent.

WALKER, J. This is a suit to quiet title to certain land in Texas county. The plaintiff prevailed below, and the defendants have appealed. In April, 1901, Edwin McNinch and wife, the owners of the land in question, executed certain notes of even date to the Omaha Loan & Trust Company, three aggregating \$140, due respectively April 1, 1902, April 1, 1903, and April 1, 1904, and one other note for \$1,000 due April 1, 1908. To secure the payment of these notes the makers executed to the payee two separate deeds of trust, one to secure the payment of the three notes aggregating \$140, and the other to secure the payment of the note for \$1,000. The same person was named as trustee in each. These deeds were acknowledged on the same day, and subsequently they were simultaneously filed for record in the office of the recorder of deeds for Texas county. In neither is there any reference to the other, nor is there anything other than the respective dates of maturity of the notes therein described, if such can be so construed, to indicate a priority of lien of one over the other. On the 13th day of August, 1904, the deed of trust securing the payment of the three notes for \$140 was foreclosed, the land sold, and one W. F. Cunningham became the purchaser. Two years later he conveyed the land by deed of general warranty to Byron De Forrest and Frank Mautz. The grantor covenants in this deed "against all claims, etc., except a deed of trust to the Omaha Loan & Trust Company and to G. P. Rodgers and judgments in Houseden suits." In December, 1909, Frank Mautz and wife conveyed the land by quitclaim deed to Byron De Forrest. This deed contains no reference to any incumbrance. Some 10 or 12 days thereafter Byron De Forrest and wife conveyed the land by warranty deed to John D. Stewart, the plaintiff, who instituted the suit on which the appeal herein is based. After service by publication against unknown parties, a judgment by default was rendered, and within three years thereafter, under section 2103, R. S. 1909, the administrator of the estate of Eliza J. Leverich petitioned the court to set aside the judgment in which it had been found that the plaintiff was the owner in fee of the land in question for reasons, among others therein alleged, that Eliza J. Leverich was the owner of the note for \$1,000, and the deed

of trust on said land to secure the payment of same given April 25, 1901, by Edwin McNinch and wife to the trustee of the Omaha Loan & Trust Company; that said Eliza J. Leverich died testate in New York in February, 1907; that no service in the suit brought by John D. Stewart, the plaintiff herein, in any wise affecting her interest in said land, was ever had upon her or any one representing her other than the attempted service by publication upon unknown parties; that no knowledge concerning said proceeding was ever had by said Eliza J. Leverich; and that the petitioner, her administrator, was not apprised of said suit until a short time before the filing of this petition to set aside the judgment. In brief, the petition contained other allegations appropriate and proper to a pleading of this character, not necessary to be set out herein. The petition prayed in conclusion that all parties in interest, referring specifically to those who had acquired title to portions of said land through the plaintiff, be made parties to this suit, and that the judgment be set aside, and that the petitioner be permitted to plead to plaintiff's petition theretofore filed upon which the judgment of default had been entered. Upon a hearing the court set aside the judgment and permitted the administrator to plead to plaintiff's petition. He thereupon filed an answer and a cross-bill alleging that the note for \$1,000 was still due and unpaid, and that the deed of trust to secure the payment of same constituted a prior lien or claim upon said land to the right, title, and claim of plaintiff, and that the deed of trust to secure the payment of the \$1,000 note be foreclosed on account of its alleged priority as a lien. The sufficiency of the pleadings is not a matter at issue except in so far as plaintiff's contention is concerned that the answer does not plead any facts which would authorize a court of equity to subordinate the lien of the deed of trust under which plaintiff claims to that under which the defendant claims. Aside from this contention, the vexing question is as to which of the two deeds of trust is entitled to priority.

The appellant relies for a reversal upon the following errors:

(1) The court erred in finding the issues for the plaintiff and in rendering judgment accordingly.

(2) The court erred in excluding evidence offered by defendant to prove that the deed of trust under which defendant claims is a first deed of trust, and that the deed of trust under which plaintiff claims is a second deed of trust.

(3) The court erred in rejecting testimony to prove that when the deed of trust claimed by defendant was sold to Eliza J. Leverich it was represented to her to be a first mortgage.

[1] I. The rules of procedure in suits to quiet title are the same as in other civil actions. This is clearly contemplated by section 2535, R. S. 1909, and is expressly so provided in section 2536, R. S. 1909. This being true, the relief afforded in a proceeding under this statute is to be measured by the pleadings in each particular case. To rule otherwise, as Bond, J., tersely said in *Toler v. Edwards*, 249 Mo. loc. cit. 160, 155 S. W. 27, would be "to destroy the symmetry of the law." Confirmatory of this conclusion, Lamm, J., said in effect in *Wotz v. Venard*, 253 Mo. loc. cit. 86, 161 S. W. 765, that this statute is "to be administered in conformity to the code of civil procedure, that is, within the lines of scientific pleading and practice. * * * Any other view would make of that remedial act a fruitful womb of confusion and wrong." The ruling seemingly to the contrary in *Noble v. Cates*, 230 Mo. loc. cit. 202, 130 S. W. 304, "that defendants in an action based upon this statute may, under a general denial, show as a defense any title, legal or equitable, vested in themselves," does not therefore correctly state the law.

[2-4] The defendants' answer herein denies plaintiff's ownership of the land and alleges generally that the deed of trust thereon to secure the payment of the \$1,000 note is a prior lien over plaintiff's claim, right, and title. The remainder of the answer is descriptive of the deed of trust and prays for a foreclosure. The defense should have been limited to the issue thus made. This was not done, and it is now contended by the plaintiff that no facts were pleaded by the defendants which would authorize a court of equity to postpone the lien of the deed of trust under which plaintiff claims to that alleged to be held by defendant administrator, and that he should have been limited in his defense to that made by his answer. As an abstract statement of the rules of procedure this is correct. But the limitation now sought to be imposed is not timely, and was waived by the plaintiff in not objecting at the time to the claim of priority thus interposed. During the trial the plaintiff contented himself with technical objections to the introduction of certain evidence, principally documentary, but having no tendency to determine the question of priority between the two deeds of trust. The trial was conducted as though the answer had set up the equitable defense now objected to by the plaintiff. The case will be reviewed, therefore, upon the theory sanctioned by the parties and recognized by the trial court. *McMurray v. McMurray*, 258 Mo. loc. cit. 416, 167 S. W. 513; *Honea v. Railroad*, 245 Mo. loc. cit. 645, 151 S. W. 119; *Brier v. Bank*, 225 Mo. loc. cit. 684, 125 S. W. 469; *Williams v. Railroad*, 233 Mo. loc. cit. 675, 136 S. W. 304; *Degonia v. Railroad*, 224 Mo. loc. cit. 588, 123 S. W. 807; *Riggs v. Metro.*

Ry. Co., 216 Mo. loc. cit. 304, 115 S. W. 969; *Hof v. Transit Co.*, 213 Mo. loc. cit. 470, 111 S. W. 1106; *Taylor & Sons v. Railroad*, 213 Mo. loc. cit. 726, 112 S. W. 59; *Earls v. Earls* (App.) 182 S. W. 1020.

When a case has been tried without the objection that the pleadings did not raise a certain issue, this objection, when made for the first time in the appellate court, will not be entertained. But two exceptions may be noted to this rule, one that of the court's jurisdiction, and the other that a cause of action has not been stated. These cardinal defects are not affected by waiver, and may be raised at any time. *Williams v. Keef*, 241 Mo. loc. cit. 375, 145 S. W. 425; *Jackson v. Johnson*, 248 Mo. 692, 154 S. W. 759. In view of all of which we need not further concern ourselves with the limitations now sought by plaintiff to be placed upon the defendants' right to persist here in the attitude which, free from plaintiff's challenge, was maintained in the trial court. 3 C. J. § 621, p. 725.

[5] II. Under well-established principles of law there can be no controversy as to the purpose for which the deeds of trust were given, which was to secure the payment of the notes described in each. *Anderson v. Baumgartner*, 27 Mo. loc. cit. 87; *Potter v. Stevens*, 40 Mo. 229; *Allen v. Goodrich*, 111 Mo. App. 61, 85 S. W. 910; *Watson v. Hawkins*, 60 Mo. 550. To effect this purpose it was provided in each of these deeds in the conventional terms employed in instruments of this character that upon default in the payment of the notes therein described the land should be sold to satisfy same. These provisions, in the absence of prior equities or any express condition to the contrary, gave the deed of trust securing the notes first maturing priority. Otherwise the purpose for which the deeds were given would be rendered ineffectual. This for the reason that a note constitutes the obligation and defines its terms, while a deed of trust is merely collateral and is intended to secure the payment of the note. *Morgan v. Martien*, 32 Mo. 438; *Owings v. McKenzie*, 133 Mo. 323, 33 S. W. 802, 40 L. R. A. 154; *Frye v. Shepherd*, 173 Mo. App. loc. cit. 209, 158 S. W. 717; *Board of Trustees v. Pelsol*, 161 Mo. 270, 61 S. W. 811. This conclusion as to priority is based upon what is termed the earlier maturing rule, recognized as controlling in this state as contradistinguished from the pro rata and prior assignment rules which obtain in some other jurisdictions. The earlier maturing rule was first definitely promulgated in this state in *Mitchell v. Ladew*, 36 Mo. 526, 88 Am. Dec. 156, to the effect that notes secured by the same deed of trust have priority in the order in which they fall due. Subsequent rulings under which the minor facts are different conform to his rule. To illustrate: In *Thompson v. Field*, 38 Mo. 320, several notes, in the hands

of different assignees, were secured by the same mortgage and fell due at different times. They were held to be payable out of the proceeds of the sale of the property in the order in which they fell due. In *Hurck v. Erskine*, 45 Mo. 485, we held that the assignee of an earlier maturing note was entitled, as against the mortgagee holding other notes, to priority in the proceeds of the sale of trust property, even though the latter's notes had become due by their own terms before the action was commenced. *Ellis v. Lamme*, 42 Mo. 153, does not announce a contrary doctrine. In that case there was an express provision in the deed that a later maturing note should be first paid out of the proceeds of the sale of the property, thus showing that the primary object of the deed was to protect the independent sureties on the later maturing note. Following the earlier maturing rule, the Kansas City Court of Appeals, in *Freeman v. Elliott*, 48 Mo. App. 74, held that, where two notes secured by the same deed of trust are made payable to two separate payees, the rule of priority in the order of maturity will apply, despite the terms of the deed that both notes become due on default in the payment of either. The St. Louis Court of Appeals, in *Weary v. Wittmer*, 77 Mo. App. 548, held that priority of maturity authorized a presumption of priority of payment; and, to overthrow this presumption, the burden was on the appellant to show that the notes first maturing had been paid, or that the plaintiff was estopped to assert priority of payment.

In these cases a single mortgage or deed of trust was given to secure several notes. The rule of priority cannot, however, be held in reason to be different where, as here, separate deeds of trust were given, each to secure the notes therein described. We held in the early case of *Thayer v. Campbell*, 9 Mo. 280, where a mortgage was executed to secure three distinct debts, that although there was but a single deed of conveyance, yet, as it was executed to secure three several and distinct debts due to three several individuals, it must be regarded as clearly several in its nature, as if those several instruments had been simultaneously executed. The nature of the security afforded is the same whether one mortgage be given to secure each debt or one be given to secure several, if it be kept in mind that the terms of the obligation must be determined from the note, and that the mortgage or deed of trust is collateral and simply intended to secure payment.

The legal situation, therefore, in the instant case is exactly the same as if McNinch and wife had only executed one deed of trust securing all of these notes. Had the latter been done, it would scarcely be contended, in the face of our uniform rulings on the subject, that if the land described in the deed of trust had been sold after maturity of the

first note, the purchaser would have obtained a complete title. The case of *Isett v. Lucas*, 17 Iowa, 503, 85 Am. Dec. 572, is so nearly parallel in all its material features with the case at bar that a statement of the facts and the conclusions reached by the court in regard thereto are not inappropriate. The proceeding was to foreclose a mortgage. One Hall purchased of Patterson certain land, giving his two notes payable in one and two years and mortgages to secure each of same. Patterson assigned one of the notes to Tufts. Patterson subsequently obtained judgment of foreclosure against Hall, the maker, on the note first due, no other persons being parties to the proceeding. He assigned this judgment to Lucas. Tufts sold the note last due to Isett and Brewster, who brought this suit to foreclose against Hall and Lucas, claiming that the agreement between Hall and Patterson was that the two mortgages were to be equal liens, and that neither was to have priority over the other. The court, in ruling upon these facts, said:

"Independent of any legal and binding agreement, where a mortgage is executed to secure two or more notes maturing at different times, the proceeds arising from a foreclosure of the mortgaged premises should be applied to the payment of the notes in the order in which they fall due. The different installments in a mortgage securing such notes are regarded as so many successive mortgages, each having priority according to the time of its maturity; and where, instead of one mortgage being executed to secure several notes given for the same indebtedness, a separate mortgage is given to secure each note, the rights of the parties are identical. [Citing cases.] Whether the notes thus secured are retained by the payee and mortgagee, or are assigned to different parties, the right of priority of payment still attaches to them; nor does the time of or order in which they are assigned affect such right of priority.

"The legal effect, then, of executing two mortgages to secure installments of the same debt, being to give priority as to the proceeds of the mortgaged property to the installments first due, such legal effect cannot be altered or varied by parol testimony, any more than the language of the written instrument itself. [Citing cases.] The parol testimony of Hall, therefore, as to the agreement between him and Patterson in relation to the two mortgages being equal liens, neither to have priority over the other, which is contrary to the legal effect of the mortgages themselves, is incompetent, and cannot be considered for the purpose of altering or varying such legal effect and priority."

Under this ruling, which is in accord, in principle, with our own cases, the conclusion is authorized that, where two mortgages or deeds of trust are simultaneously executed by the same grantor to secure different notes to the same grantee, the legal effect is the same as if one mortgage or deed of trust had been executed to secure notes maturing at different times. *Schultz v. Plankinton Bank*, 141 Ill. 116, 30 N. E. 346, 38 Am. St. Rep. 290;

Alden v. White, 32 Ind. App. 671, 66 N. E. 509, 67 N. E. 949, 102 Am. St. Rep. 261; 1 Jones, Mortgages (5th Ed.) § 607.

[6] III. Granting, as we have on account of the manner in which the case was tried, the defendants' right to insist here upon the postponement of the lien of the deed of trust securing the notes first maturing to that securing the payment of the \$1,000 note, the plaintiff cannot be held to be bound by any agreement which may have been made between the original payee in all of said notes, the Omaha Loan & Trust Company, as to the priority of the deeds securing such notes. Neither the purchaser of the land at the foreclosure sale or any subsequent owner, including the plaintiff, had any knowledge of this agreement. Absent actual notice, the title of a purchaser at a foreclosure sale of land cannot be affected by secret equities between third parties. *Hume v. Hopkins*, 140 Mo. 65, 41 S. W. 784; *Powers v. Kueckhoff*, 41 Mo. loc. cit. 431, 97 Am. Dec. 281; *Beatie v. Butler*, 21 Mo. 313, 64 Am. Dec. 234. The agreement referred to seems to have been sedulously withheld from the knowledge of the public until March, 1913, or three years after the foreclosure sale, when its first pronouncement is made in the petition for review and the answer filed by the administrator of Eliza J. Leverich. At the time, therefore, of the foreclosure sale and the purchase of the land by Cunningham, no one other than the parties to the agreement having had any means of knowing that any other than the original payee in all of the notes, to wit: the Omaha Loan & Trust Company, was the owner of same, and the burden being upon the defendants to establish such notice (*Hendricks v. Calloway*, 211 Mo. loc. cit. 561, 111 S. W. 60; *McMurray v. McMurray*, 258 Mo. loc. cit. 417, 167 S. W. 513), which they have failed to do, no probative force, as affecting plaintiff's rights, is to be given the testimony in regard to said agreement (*Potts v. Smith*, 178 S. W. 881).

[7] IV. The excepting of the deed of trust securing the \$1,000 note from the covenants of warranty in the deed made by the purchaser, Cunningham, to the land only operated to except it from such covenants, and did not estop plaintiff from contesting the lien of the deed thus excepted. *Brooks v. Owen*, 112 Mo. loc. cit. 260, 19 S. W. 723, 20 S. W. 492, and cases; *Wood v. Broadley*, 76 Mo. 23, 43 Am. Rep. 754; *Livingstone v. Murphy*, 187 Mass. 315, 72 N. E. 1012, 105 Am. St. Rep. 400; *Weed Sewing Mach. Co. v. Emerson*, 115 Mass. 554; *Stough v. Badger Lbr. Co.*, 70 Kan. 713, 79 Pac. 737; *Gerdine v. Menage*, 41 Minn. 417, 43 N. W. 91; *Calhoun v. Copley*, 29 Minn. 471, 13 N. W. 904; *Boyer v. Price*, 45 Wash. 667, 88 Pac. 1106; *Bennett v. Keehn*, 67 Wis. 154, 29 N. W. 207, 30 N. W. 112.

[8] The exception in the covenants of war-

ranty to the deeds of trust made by Cunningham to G. P. Rodgers is subject to the same rule, so far as its application to the plaintiff is concerned, as that in regard to the exception in the covenant of warranty in the deed of trust securing the payment of the \$1,000 note. Furthermore, the plaintiff was not a party to these deeds, does not claim under them, and cannot be bound by their recitals, nor can the defendant, as the administrator of Eliza J. Leverich, not being a party to these instruments, set up these recitals in his favor. *Jones on Mortgages* (5th Ed.) § 746, and cases.

[9] The deed of trust given to secure the payment of the \$1,000 note upon being recorded, constituted constructive notice of its contents, but the rights of the parties were affected by such notice only to the extent disclosed by the record. There was nothing in the latter to indicate that this deed of trust was to be given priority over the deed under which the foreclosure was had and the land purchased by Cunningham. *Powers v. Laffler*, 73 Iowa, 283, 34 N. W. 859; *Robinson Bank v. Miller*, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, 46 Am. St. Rep. 883.

The two deeds of trust were of record when Eliza J. Leverich is alleged to have purchased the \$1,000 note, and she took the same with constructive notice of the priority of the deed securing the notes first maturing. *Smith v. Boyd*, 162 Mo. 146, 62 S. W. 439; *Patton v. Eberhart*, 52 Iowa, 67, 2 N. W. 954.

In *Patton v. Eberhart*, supra, the doctrine is explicitly announced that a mortgagee of real estate is a purchaser within the meaning of the recording laws, and his mortgage, when taken in good faith, is subject only to such prior liens as are of record at the time of the execution of the mortgage. The doctrine thus announced, so far as it relates to the character of the mortgagee's or trustee's interest in the land, is too broadly stated to accord with our rulings. Here a mortgage or a deed of trust, until entry by the mortgagee or trustee for condition broken, is a mere lien for the debt; the substantial ownership remaining in the mortgagor or trustor. *Jackson v. Johnson*, 248 Mo. 680, 154 S. W. 759; *Standard Leather Co. v. Mutual Ins. Co.*, 131 Mo. App. 701, 111 S. W. 631. When, therefore, the statement appears in our cases, and it is not infrequent, that the legal title after condition broken is vested in the mortgagee or trustee, we do not mean an unlimited investiture of title, but one for effectuating the purpose of the mortgage or trust. *Feller v. Lee*, 225 Mo. loc. cit. 332, 124 S. W. 1129; *Benton Land Co. v. Zeitler*, 182 Mo. 251, 81 S. W. 193, 70 L. R. A. 94. However, the latter part of the doctrine as announced in the *Patton-Eberhart Case*, supra, viz, that within the meaning of the recording laws when a mortgage or deed of trust is taken in good faith it is subject only to such

prior equities as are of record at the time, applies with full force in the instant case. There were no prior equities of record, nor did either the purchaser at the foreclosure sale or any subsequent owner of the land in the chain of title through which the plaintiff holds have any knowledge of such equities as were sought to be established at the trial. This conclusion, however, is but a reiteration of that before reached when reviewing the facts from another point of vantage.

[10] The plaintiff was not required to make the parties to the deed of trust to secure the \$1,000 note defendants. *Thayer v. Campbell*, 9 Mo. 280.

Defendants established no equities authorizing a decree in their favor. There were no errors authorizing a reversal, and the judgment of the trial court is therefore affirmed.

All concur.

SPRADLING v. SPRADLING. (No. 21271.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

1. Trusts \S 81(3)—Resulting trust in favor of wife on purchase by husband with her money.

Where a husband purchases land, and pays for it partly with his wife's money, title taken in his own name is held in resulting trust for her in proportion.

2. Trusts \S 89(5)—Resulting trust must be clearly proved.

To establish a resulting trust, the evidence of it must be clear, unequivocal, and so definite as to leave no room for doubt.

3. Trusts \S 89(1)—Evidence held to call for money decree for wife seeking to establish resulting trust.

In a wife's suit against her husband to establish resulting trust in lands in his name as purchased with her funds, evidence held to call for decree for the wife for \$220, in lieu of any interest in the realty.

Appeal from Circuit Court, Butler County;
J. P. Foard, Judge.

Suit by Marie Spradling against H. S. Spradling. From judgment for defendant, plaintiff appeals. Reversed and remanded, with directions.

This is a proceeding in equity, brought in the circuit court of Butler county, Mo., to establish a resulting trust in the real estate hereafter described. The petition alleges that on August 18, 1912, plaintiff and defendant were married, and ever since that time have been husband and wife; that for more than a year before the filing of this petition plaintiff and defendant have not lived together as husband and wife, and that a divorce suit is now

pending between them; that at the time of said marriage plaintiff was seized and possessed of 80 acres of land in Butler county, Mo., to wit, the north half of the southeast quarter of section 7, township 24 north, range 5 east, of the value of \$1,200; and was the owner of personal property in said county of the value of \$800; that immediately after said marriage defendant took charge of said property, and was permitted by plaintiff to use and handle the same for her; that on December 8, 1913, at the instance of defendant, said farm was sold, and defendant took charge of the proceeds thereof, amounting to \$1,200; that thereafter defendant purchased 80 acres of land in Butler county, Mo., to wit, the east half of the northeast quarter of section 11, township 24 north, range 4 east, and 80 acres of land in Ripley county, Mo., to wit, the east half of the southeast quarter of section 5, township 24, range 4 east; that he took title or bond for title to all of said land in his own name, without the knowledge or consent of plaintiff, when she was not present; that he disposed of plaintiff's property and paid for said land out of the proceeds thereof. It is further alleged that plaintiff never at any time gave defendant permission, either written or oral, to invest the proceeds of her said property in the land above described and take title thereto in his own name, but, on the contrary, all of said transactions were had without plaintiff's knowledge or consent; that defendant has never reimbursed plaintiff for any of her said property. The petition concludes with a prayer for a decree, declaring a resulting trust as to said land in favor of plaintiff, divesting defendant of the title thereto, vesting the same in plaintiff, and for general relief.

On April 10, 1918, defendant answered with a general denial.

On July 6, 1918, the court entered judgment for defendant. Plaintiff in due time filed her motion for a new trial, which was overruled, and the cause duly appealed by her to this court.

As this is a proceeding in equity, and we are required to pass upon the evidence, in order to avoid repetition, we will consider the testimony and rulings of the court in the opinion.

Henson & Woody, of Poplar Bluff, for appellant.

Hill & Phillips, of Poplar Bluff, for respondent.

RAILEY, C. (after stating the facts as above). 1. This is not a proceeding at law, in which plaintiff seeks to recover a judgment for the value of her property alleged to have been converted by defendant to his own use without her consent. It is not a proceeding in equity, calling for an accounting of trust

property belonging to plaintiff, and alleged to have been converted by defendant to his own use without her consent. On the contrary, under the pleadings, this is an action in equity, brought by plaintiff against her husband to establish a resulting trust in the two 80-acre tracts of land described in petition. It is asserted in the latter that defendant acquired possession of plaintiff's personal property and the proceeds of her Butler county real estate; that out of such assets he paid for said 160 acres of land sought to be charged herein. The answer of defendant is a general denial. The case was tried in the circuit court upon above theory, and must be disposed of here in the same manner.

[1] It may be conceded generally in passing that, where a husband purchases land and pays for it partly with the money of his wife, the title thereto, if taken in his own name, is held in trust for her in proportion as the amount of her separate money thus used by him bears to the whole of the purchase price. *Holman v. Holman*, 188 S. W. 623; *Haguewood v. Britain*, 273 Mo. loc. cit. 94, 199 S. W. 950; *Moss v. Ardrey*, 260 Mo. 595, 169 S. W. 6; *McLeod v. Venable*, 163 Mo. 536, 63 S. W. 847; *Jones v. Elkins*, 143 Mo. 647, 45 S. W. 261.

[2] 2. It is equally as well settled that, in order to establish a resulting trust in real estate, the evidence of such trust must be clear, unequivocal, and so definite and positive as to leave no room for doubt in the mind of the chancellor. *Davis v. Cummins*, 195 S. W. loc. cit. 754, 755; *Aeby v. Aeby*, 192 S. W. loc. cit. 99; *Hunnell v. Zinn*, 184 S. W. loc. cit. 1156; *Ferguson v. Robinson*, 258 Mo. 113, 167 S. W. 447; *Northrip v. Burge*, 255 Mo. loc. cit. 655, 164 S. W. 584; *Easter v. Easter*, 246 Mo. 409, 151 S. W. 413; *Waddle v. Frazier*, 245 Mo. 891, 394-396, 151 S. W. 87; *Williams v. Keef*, 241 Mo. 366, 145 S. W. 425; *Smith v. Smith*, 201 Mo. 533, 547, 100 S. W. 579; *Reed v. Sperry*, 193 Mo. loc. cit. 173, 174, 91 S. W. 62; *Viers v. Viers*, 175 Mo. 444, 75 S. W. 395; *Philpot v. Penn*, 91 Mo. 38, 3 S. W. 386; *Jackson v. Wood*, 88 Mo. 76; *Forrester v. Scoville*, 51 Mo. 268; *Johnson v. Quarles*, 46 Mo. 423.

3. Turning to the evidence, we find that plaintiff and defendant were married in 1912, and separated in 1916. She claims to have owned, at the time of their marriage, the 80 acres of land in Butler county, Mo., traded to O. J. Livingston, for a stock of goods; also seven or eight head of hogs, harness, some chickens, household goods, and kitchen furniture. Defendant testified that at the time of their marriage he owned a mule and a calf, and had \$50 or \$60 in his pocket. Plaintiff owned the 80 acres aforesaid, described in her petition, and, with the assistance of defendant, traded the same to O. J. Livingston for said goods, but not the building in which they were located. The land was taken at \$1,200. The goods invoiced \$2,327.96, and

were in a country store building in the western part of Butler county. The difference between the value of the farm and goods was \$1,127.96. Plaintiff and defendant executed and delivered to Livingston their joint note for said difference, and secured the same by chattel mortgage on the goods. Plaintiff testified that she bought the store and regarded it as belonging to herself and husband. When defendant was not making ties or engaged in other work, he assisted plaintiff at the store. She testified, that they ran the store for about two years, and that she lost money every month they operated it.

It appears from the evidence that there was paid on the Livingston note during said two years about \$500. Livingston then took the remnant of goods back on his indebtedness in March, 1916, at about \$900.

Plaintiff testified:

That they lived on part of the proceeds of said goods; that *"the money that was deposited in the Farmers' Savings Bank came from the sale of merchandise in the store and was deposited in the name of H. S. Spradling. He said he didn't have any money of his own deposited there at the time."* (Italics ours.)

The trade for the store was made in December, 1913. Defendant admits that after they acquired the store the money which he earned, as well as that which was derived from the sale of goods, was deposited in the bank in his name until August, 1915, when he then deposited his money separately. He further testified:

"I saw what was coming, and I had to look out for myself. That was in August [1915] before we separated in February [1916]. I had been depositing my money with hers, you know; just put the money in the bank and then wrote out a check for \$20 to the Munger people. * * * We put our money together until August, 1915, and then I didn't put any more in the bank for her. * * * Both accounts were in the name of H. S. Spradling, the store account and the one I opened later. The account at the bank was run in my name. These checks that were charged were charged in my name."

The evidence shows that Sidney Spradling and defendant bought the 160 acres in controversy from Munger Securities Company of Kansas City, Mo., on the installment plan; that after Sidney had paid \$70, defendant took the contract off his hands, and became the owner of his interest. The contract price of the 160 acres in controversy was \$1,200. Defendant testified that he paid on said land for the years 1914 and 1915 about \$440. This amount was evidently paid out of the funds in the bank belonging to plaintiff and defendant jointly.

The contracts for sale of land to defendant were not recorded.

The defendant testified as follows:

"The contract says that, if I should die, the deed would be made to her; would be made to

my heirs. *The deed was to be made to me and her; in case I died before it was paid out, it was to be made to her.*"

Plaintiff testified that:

"At the direction of defendant, I drew checks on the bank to make these payments on the land. The account in the bank was in his name." (Italics ours.)

Defendant further testified that:

"At the time we separated I still owed something like \$760 on this land."

We are of the opinion that the evidence shows the above sum of \$760 has been paid out of the separate earnings of defendant, in which plaintiff had no interest.

[3] While it is a difficult matter to determine what ought to be done in a case of this character, we have, after reading the records and briefs carefully, reached the conclusion that the lower court should enter a decree in favor of plaintiff for the sum of \$220, with interest thereon at the rate of 6 per cent. per annum from March 1, 1916, in lieu of any interest in the real estate in controversy.

It appearing from defendant's brief that he has finished paying for said land and has a deed therefor, we reverse and remand the cause, with directions to the trial court to set aside its decree and to enter a new decree in favor of plaintiff for the amount and interest aforesaid, to be paid within a reasonable time, and declaring therein that said decree shall be a first lien on said 160 acres in controversy.

WHITE, C., concurs.
MOZLEY, C., absent.

PER CURIAM. The foregoing opinion of RAILLEY, C., is hereby adopted as the opinion of the court.

All concur.

WOODARD v. STOWELL et al. (No. 20871.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1920.)

1. Specific performance §39—Court of equity may enforce oral contract to convey land.

In order to prevent the statute of frauds from accomplishing or being used to accomplish the very purpose which it was enacted to prevent, courts of equity may, under certain circumstances, permit specific performance of oral contracts to convey land, though made with one since deceased.

2. Specific performance §121(11)—Evidence insufficient to show that plaintiff complied with contract.

In an action against the estate of a decedent for specific performance of an agreement

to will land and a certain income in return for personal services, evidence held insufficient to show that plaintiff complied with the contract as alleged in her petition.

3. Specific performance §121(7)—Contract to convey land not proven.

In an action against the estate of a decedent for specific performance of an agreement to will land and a certain income in return for personal services, evidence held not to satisfactorily prove the existence of such contract.

4. Specific performance §121(2)—Oral contract to will land must be proven beyond reasonable doubt.

In an action against the estate of a decedent for specific performance of an oral contract to will land, the existence of the contract must be proven beyond a reasonable doubt.

5. Wills §58(1)—Mere intent to will not enforceable.

Proof that a decedent intended to will property to reward one for services rendered, independent of any contractual obligation, gives the intended beneficiary no rights, even though it be shown that the decedent would have carried out such disposition and made a will if he had not died suddenly.

6. Appeal and error §1048(6)—Error in cross-examination harmless in equity case.

If it was error for counsel on cross-examination of witnesses to inquire as to their testimony in depositions without showing them the depositions, such was not reversible error in an equity case, since the appellate court will simply disregard the alleged testimony in the deposition.

7. Appeal and error §1047(3)—Striking evidence in equity case harmless.

Errors, if any, in striking testimony in an equity case is not reversible error, as the appellate court will read it as if not stricken out.

8. Appeal and error §205—Excluding testimony not reviewable in absence of statement of nature of evidence.

Objection that lower court erred in refusing to allow plaintiff to testify as to conversations had with defendant did not show reversible error, where no statement was made to show the nature of the conversation nor with which of several defendants it was had.

Appeal from Circuit Court, Jackson County; Thomas B. Buckner, Judge.

Suit by Alice Woodard against Albert Stowell, administrator of the estate of George W. Main, deceased, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Edwin S. McCrary and L. A. Laughlin, both of Kansas City, for appellant.

Francis M. Hayward, of Kansas City, for respondents.

SMALL, C. I. This is a suit for specific performance of an oral contract alleged to have been made by George W. Main, deceased, in his lifetime, to will the plaintiff certain real estate in Kansas City, Mo., and an annuity of \$400. The defendant Albert C. Stowell is administrator of the estate of George W. Main, deceased, and defendant Carrie Byram is the sister and sole heir of said Main.

The allegations in the petition as to the contract and the performance thereof by the plaintiff are as follows:

"That in the year 1906 plaintiff resided in Kansas City, Mo., and said George W. Main came to her house and shared a room with another man. That at the time he had some employment which paid him small wages, but stated to plaintiff that he would inherit a considerable sum of money some day, and meanwhile, if plaintiff would give him his board and take care of him, he would repay plaintiff when he came into his inheritance by giving her a home with enough to live on besides to compensate her for caring for him and making a home for him. That plaintiff accepted such offer and made said agreement with said George W. Main, and, relying upon said promise, plaintiff furnished board to said George W. Main, and also did his washing, ironing, and mending, all without compensation, during all the time that he lived with her; that said George W. Main, with the exception of one year, lived at plaintiff's house from 1906 until his death in 1916.

"That in the year 1911 the father of said George W. Main came to Kansas City from Illinois and purchased and gave to said George W. Main the following described real estate in Jackson county, Mo., to wit: The south 4.39 feet of lot 92 and the north 21 feet of lot 93, Oglesbay's First addition to the city of Kansas, now Kansas City.

"That, immediately after said real estate was purchased for him by his father, said George W. Main reiterated his promises to plaintiff and specifically agreed verbally with plaintiff at her home in Kansas City that in consideration of what she had done and was doing for him he would will her said real estate at his death, and the sum of \$400 per year as long as she should live; that in January, 1913, the father of said George W. Main died, and in January, 1914, his mother died intestate, leaving real and personal property to said George W. Main of the value of \$35,000.

"That from that time until his death said George W. Main remained at the home of plaintiff, doing nothing but consuming inordinate quantities of intoxicating liquors; that he finally became blind and utterly helpless, and was confined to his bed for months before his death, during all of which time he required the attention of plaintiff day and night.

"That, relying upon the promises of said George W. Main to will her said real estate and to further provide for her as above stated, plaintiff provided a home for him and furnished him board and did his washing, ironing, and mending, and when he was sick plaintiff waited upon him and nursed him day and night until his death, all without compensation.

"That, though plaintiff has fully kept and performed said agreement on her part, said George W. Main died without specifically performing the said contract on his part and without conveying said real estate or otherwise vesting the title to the same in her and without bequeathing to her by will the sum of \$400 per year as long as she should live, and neither of said contract promises have been performed either wholly or in part, though said George W. Main died possessed of said real estate and of personal property of the value of \$30,000.

"That the defendant Carrie Byram is a sister of said George W. Main and his only heir at law, and said Claude Byram is the husband of said Carrie Byram. * * *

"Wherefore plaintiff prays judgment," etc.

The answer put the allegations of the petition in issue. It also alleged that the contract sued on was not in writing, as required by the statute of frauds, and that said real estate was mortgaged by said Main in his lifetime for \$500 to the knowledge of the plaintiff, and after his death the defendant Carrie Byram, believing she was the sole heir of said Main and entitled to said real estate, paid off said note for \$500, and that the plaintiff stood by and permitted her to do so without any claim to said property.

The reply admitted the execution of said deed of trust, but denied that plaintiff had knowledge thereof, and alleged that the deed of trust was paid off by said defendant with the money received from her brother's estate as his heir.

After hearing the plaintiff's evidence, the lower court found for the defendants, and dismissed the petition. Plaintiff appealed to this court.

Plaintiff's testimony was substantially as follows:

Mrs. Todd Mason, the daughter of the plaintiff, testified on direct examination:

That she knew said Main in his lifetime. That in 1906 she and her mother, the plaintiff, were living at 1522 Lydia avenue, and that said Main came to their house to room. He was out of work at the time. He continued to room there until March 27, 1916, when he died. That he did not come there to board, but only to room, but "we fed him; he was out of work." He paid for his room a short time.

"Q. Just tell, as near as you can recollect, what he did say to your mother in regard to paying for the room and board after he became unable to pay for it. A. He said that some day he would pay up for this. He would give mother a home, if she would take care of him, and feed him, and let him room there, and be one of the family. He said some day he would have some money. He continued to live at our home and take his meals there. He got his money when his mother died. He just said some day he would have some money. He continued to live at our home and take his meals there. He actually came in possession of his money. He said that Mother should have a good home and money besides, about a year after he first came there. His

father and mother were then living. His father died first. He was at our house two or three times. Mr. and Mrs. Main came to make him a visit, and he liked it so well and was so pleased to think that George was so happy with us and we took such good care of him (stricken out by court on objection of defendants). Mr. Main bought a home at 1516 Lydia avenue and gave it to George and Mamma (the words "and Mamma" stricken out on defendants' motion).

"Q. Now, after this house or this piece of property was bought by George Main's father and given to him, state what, if any, conversation that you heard between your mother and George Main in regard to that particular piece of property, about what would be done with it. A. He said, 'Old lady, that home is yours, or a better one, with all the taxes and everything kept up; not an old house, but a new house with the insurance paid and kept in repair, and \$400 a year. He said, 'You ought to get along nicely on \$400 a year.'

"Q. What length of time elapsed after the death of George Main's father before his mother died? A. I think about a year and a half.

"Q. And when was it that George Main came into the possession of his property; was it after the death of his mother?

"Mr. Hayward: I object to leading questions.

"Q. When, with reference to the death of his mother? A. Yes, sir; after the mother died he came in direct possession.

"Q. Now, what conversation, if any, did you hear between George Main and your mother in regard to this amount of money that he would leave her, if any, for her support? A. Oh, I have heard him say lots of times, I can't just name the date or anything like that, but he said it a good many times.

"The Court: Said what?

"A. He said that Mamma should have the home, that home or one better, with \$400 a year.

"Q. What was the condition of his health at that time? A. At that time his health was good, only he was a man that drank an awful lot.

"Q. But did his health change after that? A. Yes, sir; he went blind; he was pretty near totally blind for six or eight months, something like that.

"Q. Now, during that time what services did your mother render him? A. Everything.

"Q. What did she do for him? A. She waited on him and washed his hair and neck and ears and gave him a bath and washed his feet; he was unable to do anything; she had to lead him from one chair to another, and to the bathroom, and in fact she waited on him like he was a baby.

"Q. Was he confined to his bed at any time? A. No, sir; he sat mostly in a chair.

"Q. Now, what, if anything, was said about this extra service that your mother was rendering for him, as to how that would be paid? A. He said Mamma would be well taken care of.

"Q. And did he say when or how much or in any particular? A. Only he thought \$400 a year and a good home.

"Q. At the time, or after the father bought this home, where was this number? A. 1516 Lydia.

"Q. And did you and your mother and George Main live in that home for a while? A. Yes, sir.

"Q. For about how long? A. Four or five years.

"Q. And from there where did you go? A. To 1206 Virginia.

"Q. Did George Main continue to own that home at 1516 Lydia? A. Yes, sir; he collected the rents there.

"Q. What was the reason for leaving 1516 Lydia? A. There were negroes all around us, and we were the only white family left in the block [except another family across the street].

"Q. And after you moved to 1206 Virginia who collected the rent at 1516 Lydia? A. George Main.

"Q. What did he do with the money? A. Well, he spent it; we didn't see any of it.

"Q. Did he pay the rent at 1206 Virginia? A. He did; yes, sir.

"The Court: Paid the rent at the place you moved to. A. Yes, sir.

"Q. (Mr. Laughlin): Previous to his death, how long a time was he confined to the house? A. About six or eight months.

"Q. And did he have any one else to look after him and nurse him except your mother? A. When my mother got down—she had waited on him until she couldn't do it any more, and she got down in bed, and we had Dave Reinhardt; he was there at the house about six weeks.

"Q. Did he get out on the street any during that time? A. Oh, yes.

"Q. How long before his death was he confined continuously to his room? A. He was not confined to his room, but to the house; he would go out and come back; he would be out a short time at a time.

"Q. Now, what were his habits about drinking? A. Well, that was all he seemed to care for, was drink.

"Q. How many drinks a day would he take? Well, that is hard to say. Pretty near every day at our house it was a quart to a quart and a half a day, and what he drank on the outside.

"Q. Did he do any work at all after he got his money? A. No, sir."

On cross-examination Mrs. Mason testified:

He did not have the money and did not work for two or three months after he went to our house to live, and when he did get work he paid a dollar and a quarter for his room, but no board. After the first two or three weeks he boarded as well as lodged with us all the time. He paid room rent to Mother; he did not pay me. He did not pay room rent all the time. Cannot remember when he ceased to pay room rent. He told Mother, if she would take care of him, he would see she was taken care of. It was not a year, I doubt if it was six months, that he paid room rent. In 1911 the father and mother of said Main visited him at plaintiff's house, at which time the father purchased for him the property in question. It was known as No. 1516 Lydia avenue. The plaintiff, her daughter, and Main moved into this property at the time it was purchased. The father died in January, 1912, when Main went back to Illinois and lived

with his mother until some time in March, 1914. The plaintiff and her daughter continued to reside in the house, 1516 Lydia avenue, during this time without paying any rent. The house was an old-fashioned brick house and contained nine or ten rooms. Plaintiff and her daughter paid the taxes and kept the place in repair. After they moved to 1516 Lydia avenue, they kept no lodgers besides said Main, as they did at the old place, 1522 Lydia avenue. While living at 1516 Lydia avenue, plaintiff had no income except the salary which the witness earned, which was \$25 per month. Main was absent at his mother's two years, after which time he returned and lived in the house with the plaintiff. During his absence plaintiff and her daughter were the only people who occupied the house. They lived together in this house, 1516 Lydia avenue, four or five years, and then moved to 1206 Virginia avenue, because the neighborhood began to be occupied by negroes. Main then rented out the house at 1516 Lydia avenue for \$37.50 a month and paid the rent on the house they occupied at 1206 Virginia avenue, which was \$30 a month.

Q. He paid that instead of board? A. Yes, sir.

Q. And you didn't charge him any board? A. No, sir; we never charged him any board, except the first two or three months that he was with us. He said, "I will take care of you, old lady, you have been good to me," lots of times. He first said this shortly after he came to live with us. We would have company, and he would say, "Never mind, old lady, you'll get paid for this," when he asked for and Mother gave him a drink. He did not have any property at the time. Said he was going to have some. I heard him tell his mother he was perfectly happy with us. He told Mother, "We have a fine home here if the neighbors don't run us out, and, if they do, we will get a better one." That was the first week we moved in at 1516 Lydia avenue. We did not like the neighborhood on account of the negroes, and he told mother he would get a better one. He did not fix any other place; he wanted to see what the negroes would do to know what to do with the home. He said he would give mother \$400 or more a year. He did not say how much more. Mother did not tell him he ought to do that.

Q. When he made those statements, what did your mother say? A. She said, "George, that'll be awful nice of you."

Q. Did she say what she was going to do? A. She did not. Mother had no independent means of support except what I gave her. He paid the rent all the time at 1206 Virginia avenue until he died.

The witness got the money on two checks of Main, for \$50 each, one March 1, 1916, and the other March 20, 1916. She got the money on those checks, but gave it to him. While they lived on Lydia avenue Main gave the witness \$40 to make a payment on her piano. When we were living at 1516 Lydia avenue Mother had no one to support the family except myself. Never had. George Main was not continually giving me and my mother money to support the family. Whatever I made, I gave to my mother. That was the only resource she had. He did not pay a cent of

my hospital bill. That \$20 is for his own bill, not mine. He was there a week. He was working continuously from 1906 until he went back to live with his mother, for \$10 or \$20 per week, for North-Mehornay, Keiths' and Duff & Repp. He died March 28, 1916. Mother found him dead in bed. He was sick a little over a year, some trouble with his eyes; it might have been six months that he was blind. Think he had a doctor longer than three months. He did not pay up all back room rent when he got his money. He might have paid room rent for three weeks or a month.

Witness then in answer to questions said she had testified as follows when her deposition was taken:

He paid a dollar and a quarter a week for his room. He paid it in cash out of his salary. Bert Parker, his roommate, paid the same. Could not remember having testified in her deposition that he always paid that for his room until we moved into the house at 1516 Lydia avenue. Mother charged other people the same price for room, did not know that he was out of work longer than six weeks, but "kinda" think he was; did not remember; cannot say positively.

On redirect examination, the witness said:

That she worked for 11 years at the Savoy Hotel, as telephone operator for the Bell Telephone Company, and those checks were cashed at the Savoy Hotel. She took the money home and gave it to Main. He never paid any board after the first two or three months after he came to our house.

Clyde Russell testified:

That he had been in the saloon business at 1400 East Fourteenth street, and knew George Main for 12 years before his death pretty intimately. Saw him pretty nearly every day at his (Russell's) place of business. He also knew Mrs. Woodard. Main told the witness that he wanted to see that the "old lady," if he should happen to "drop off" first, was provided for. He said she would have the home, and he calculated on her having \$400 a year, which he calculated was enough to keep her during her lifetime. That was all he cared to see about. The rest of the folks could take care of themselves. No one was present when he had this conversation. He told me this one night about a year before his death. He drank quite a bit, but never seemed to be what you would call drunk. When this conversation took place, he was not what you would say under the influence of liquor out of the way. He was not drunk, but he was just feeling in high spirits; nothing out of the way. He said in that conversation that he intended to see that the "old lady," Mrs. Woodard, would have a home, and he would provide for her \$400. That is just what he said.

David C. Reinhardt testified:

That he had lived in Kansas City for 41 years. Knew George Main 5 or 6 years prior to his death. Lived about a block and a half from him; at several times, for a month or two, roomed with him; had a conversation with him in which he said he intended to provide for

Mrs. Woodard; had several conversations. He wanted me to go down with him to make a will. He said he was going to provide for Mrs. Woodard. He was going to take care of her while he was living, and, if he went before she did, he would provide for her, so that she would not want for anything. He was going to leave her the home, and enough to live on, he said \$30 or \$40 a month, besides the home, and she would have no rent to pay. The first conversation was in November, a year before he died; did not go down with him to have the will drawn. We started down, but we never got to the lawyer. He seemed to be in good health for some weeks before his death, only he was kind of nervous, is all. His eyesight failed him awful. He was not exactly blind, but about the same as blind. When he was sick, Mrs. Woodard waited on him the same as a mother. I visited him. I was not staying there. Mrs. Woodard fixed his meals and waited on him the same as a nurse would.

On cross-examination this witness testified:

Am doing nothing now. Worked for the Silver Laundry about a year and a half ago for about four months. I was in business for myself at 14th and Virginia avenue for 12 years as a groceryman. Have not been in business for four or five years. It was my father's business. I was clerk in the grocery store. Main made the statement about making a will in his room. He was in bed. The first time he made it was in November. His eyesight failed him about three years before the trial. He had good health up to that time. Then he recovered his eyesight, and a few weeks before he died his health failed him again, but up to that time was good.

Witness was here shown check signed by George Main, payable to the order of George Main for \$100, and indorsed by George Main and D. C. Reinhardt, which witness said he went to the bank and had cashed for Main, December 16, 1915. Continuing, witness said:

I gave him all the money. I helped around the house, and waited on Main, while Mrs. Woodard was sick. He paid me nothing. I cashed several checks for him, one for \$50, around the last of November or December. Do not know what he did with this \$50. The only conversation I had with him about leaving his property was two or three months before he died.

The real estate in question was conveyed February 1, 1911, by James A. Fry and wife to Harriet M. Main, the mother of George Main, and afterwards by Mrs. Main and her husband, on the 30th of December, 1911, to George W. Main. The consideration mentioned in each deed was \$4,000.

Andrew J. Davis testified:

That he had lived in Kansas City for five years. That his last permanent occupation was that of postmaster of St. Paul, Minnesota. He knew George Main for about a year before his death. Lived within two blocks of him. Saw him nearly every day. Went to see him

while he was sick and in the hospital. For quite a while I was with him for most every day. Went to see him at Mrs. Woodard's, where he lived. Had conversations with him at different times as to what he intended to do with his property after his death. He said he intended to give Mrs. Woodard that home, and provide for her while she lived, and the rest of his estate he intended to give to his sister's children. He said he intended to provide for Mrs. Woodard after his death; that she had been a mother to him, and wholly a mother. He did not mention any specific amount to me. He did not say that he had made a will. But he told me he was going to town one day to attend to some business. I had more than one talk with him.

Q. Did he say anything in those conversations about whether or not he was providing a living at that time before his death? A. I asked him the question, and he said he was not furnishing the living.

Q. Asked him what question? A. I asked him the question if he kept house, and he said, "No; I am not."

Mr. Hayward: I move to strike that out.

The Court: Motion sustained. (To which action and ruling of the court the plaintiff then and there duly excepted and still excepts.)

Q. What did he say he was doing at that time? A. Mr. Hayward: I object to that for the same reason.

The Court: Objection sustained. (To which action of the court plaintiff then and there duly excepted at the time and still excepts.)

Mr. Laughlin: That is all.

Mr. Hayward: No cross-examination. Witness excused.

Arthur Russell testified:

That he was a brother of Clyde Russell. Lived in Kansas City 20 years. Knew George Main for 10 years before his death. Saw him every week, sometimes oftener. Had conversation with him in which the subject of his property was mentioned, or what he intended to do with it. He said, if anything happened, in case he went first, he was going to leave his home and \$400 a year to Mrs. Woodard. He told me that once, more than once, a couple of times, something like three years before his death.

On cross-examination witness said:

He was a bartender at 1400 East Fourteenth street. Main was a frequent attendant. No one was present when he had these conversations. His deposition had been taken. Nobody ever talked to him as to what he would testify to. At the time of these conversations Main was feeling in good spirits. He had had a few drinks.

In his deposition he testified:

That Main said that in case he went first he intended to leave the home and leave enough so that she could live on \$400; that he told me that, and then I have heard him say that to others; and that he had never talked to anybody about the case since Main's death, until he gave his deposition.

Julius Bruehl testified:

That he was a practicing physician in Kansas City, and had been since 1883. Knew George Main. First met him January 16, 1915, when he attended him professionally. Attended him until April 2d, same year. His fundamental trouble was liquor, and symptoms of that trouble were neuritis of the optic nerve and great heart weakness. It made him blind. Had several conversations with him about what he intended to do with his property at his death. Not that I asked him about it, but he always, when he came to me, when he was in this pitiable condition, he would tell me how much Mrs. Woodard had done for him, and told me then that he would do something for her, too. He wanted especially, he said, these are the words I remember, that he wanted the house on Lydia avenue to go into possession of Mrs. Woodard, then he said, "She never will lack again." That is what he told me several times. He told me this during the period I attended him. He only told me, I repeat it, "She will not lack again."

Mr. Hayward: No cross-examination.

C. L. Gill testified:

Knew George Main perhaps a year and a half before he died. Saw him almost every day. That Main told him he was treated nicely, and that he intended to see that Mrs. Woodard was taken care of. That he didn't expect to be hanging on very long.

Frank A. Newcomb testified:

That he was cashier of the New York Life Insurance Company. Was familiar with the rates charged by insurance companies for annuities. That to purchase an annuity at that time of \$400 a year for a person born November 18, 1858, would be \$5,528.80. His testimony was stricken out on objection of defendant, to which plaintiff excepted.

Mrs. Mason, recalled, testified that her mother was born November 15, 1858.

Reed Younger Campbell in his deposition testified:

He was cashier of the First National Bank of Abington, Ill. Knew George Main about 13 years. At the time of Main's death had possession of money and property of George Main of the value of about \$27,000.

Defendants thereupon admitted that deceased had \$27,000 in personal property.

[1] II. In this class of cases the courts have firmly established certain definite rules relating to the pleadings and proofs within which the plaintiff must bring himself. Otherwise the judgment must be for the defendant. The statute of frauds requiring contracts to convey real estate to be in writing is of very ancient origin in English and American jurisprudence, and was wisely enacted, so that in suits upon contracts for real estate, which human beings, and especially Anglo-Saxons, have such a strong desire to possess and own, the parties should not be "led into temptation," but should be delivered from the evil of perjury by making

all oral contracts concerning lands absolutely void and unenforceable. Especially is this temptation great in suits against the voiceless and defenseless dead. But, in order to prevent the statute of frauds from accomplishing or being used to accomplish fraud, the very purpose which it was enacted to prevent, courts of equity have, under certain circumstances, permitted the specific performance of oral contracts to convey lands, even when made with the dead. In such cases, however, they have established certain stringent rules as to the pleading and the proof of the consideration and other matters relating to the contract. Those rules are nowhere more definitely and distinctly marked out than by the decisions of this court. In *Walker v. Bohannon*, 243 Mo. loc. cit. 136 et seq., 147 S. W. 1028, opinion by Graves, J., they are stated as follows:

"The rules cover many phases; i. e.: (1) The alleged oral contract must be clear, explicit, and definite; (2) it must be proven as pleaded; (3) such contract cannot be established by conversations either too ancient, on the one hand, or too loose or casual, upon the other; (4) the alleged oral contract must itself be fair and not unconscionable; (5) the proof of the contract as pleaded must be such as to leave no reasonable doubt in the mind of the chancellor that the contract as alleged was in fact made and that the full performance, so far as lies in the hands of the parties to perform, has been had; (6) the work constituting performance must be such as is referable solely to the contract sought to be enforced, and not such as might be reasonably referable to some other and different contract; (7) the contract must be one based upon an adequate and legal consideration, so that its performance, upon the one hand but not upon the other would bespeak an unconscionable advantage and wrong, demanding in good conscience relief in equity; and (8) proof of mere disposition to devise by will or convey by deed by way of gift, or as a reward for services, is not sufficient, but there must be shown a real contract to devise by will or convey by deed, made before the acts of performance relied upon were had.

"There may be other phases of the rule adhered to by the courts in cases of this character, but the foregoing are clearly within a long line of Missouri cases. The more recent ones are *Forrister v. Sullivan*, 231 Mo. 345; *Collins v. Harrell*, 219 Mo. 279; *Wales v. Holden*, 209 Mo. 552; *Kirk v. Middlebrook*, 201 Mo. 245. Other cases of like tenor are found cited and discussed in the foregoing. Suffice it to say that they all indicate that the courts are slow to enforce contracts of the character we have here.

"* * * It should therefore be with discerning eye and ear that the chancellor appealed to should proceed. * * *"

The substance of the allegations of the petition as to the contract between the plaintiff and George W. Main is that he lived at plaintiff's house from the year 1906 to the year 1911 under an agreement in 1906

that she was to board and care for him and make a home for him until he should come into his inheritance, when he would give her a home and money enough to live on besides to compensate her for caring for him and giving him a home during that time; that his father gave him a house, the property in question, in 1911, whereupon, in consideration of what plaintiff had done for him and was doing for him, under the contract made in 1906, the time for plaintiff to receive her home and money was extended until the death of said George W. Main, until which time she was to continue to board and care for him and furnish him a home, for all of which she was to be paid by receiving the property and annuity sued for under his will. In the meantime she was to receive and did receive no compensation whatever from said George W. Main.

"With the foregoing as the contract, let us, as with a yardstick, measure the evidence." *Walker v. Bohannon*, supra, 243 Mo. loc. cit. 138, 147 S. W. 1029.

[2-4] In our judgment, the evidence falls far short of showing that the plaintiff was wholly uncompensated for her services during the long period alleged in the petition. On the other hand, it affirmatively shows that for five years, more than half of the time said Main resided with the plaintiff, and the contract alleged in the petition required the plaintiff to furnish him with room, board, care, and a home, he furnished the plaintiff with a home in which she and her daughter dwelt, rent free, of the rental value of from \$30 to \$37.50 a month, which would practically offset plaintiff's reasonable charges against him for that time, if he paid nothing else to the plaintiff. But, owing to the meager funds of the plaintiff, which consisted of what her daughter gave her out of her wages of \$25 per month, after they moved into the Main home in 1911, when plaintiff ceased taking in lodgers, it is unreasonable to believe that said Main did not also contribute towards the expenses of the household. It could not otherwise have been reasonably maintained. He had some means, earned \$10 to \$12 per week, not a large sum, still nearly twice as large as the earnings of plaintiff's daughter, and he worked nearly all the time until he came into his inheritance in 1914, when he had ample funds not only to pay his way thereafter, but also any belated board bills he may have been owing to the plaintiff. He told one of the plaintiff's witnesses that he would take care of plaintiff while he was alive. Others testify that his anxiety seemed to be for the plaintiff's personal welfare, in effect, after his death only; that he wanted to make a will, so that, "if he went first," she would have a home and support when he was gone; "that was all he cared about;" "the others could take care of themselves." It is reasonable to

infer from these expressions, in view of plaintiff's circumstances and his circumstances, that he was then providing and intended to continue during his life to provide a home and support for the plaintiff, or at least contribute sufficiently for that purpose, so that she would have a home and support as long as he lived and resided with her. His reply to the witness Davis, who asked him if he kept house, "I am not," is far from stating that he had not paid and was not paying his way. Under the facts and circumstances, therefore, shown in evidence by the plaintiff, we cannot find that she complied with the contract alleged in her petition and in accordance therewith furnished said Main with room, board, and a home during the entire time he lived at her house, and she lived at his house, without any remuneration. Nor does the evidence prove the existence of such contract to our satisfaction, much less to our satisfaction beyond a reasonable doubt, as required in such cases. We must hold that plaintiff failed to make out a case.

[5] III. We are also satisfied, in view of all the facts and circumstances shown in evidence, that the statements by George W. Main to the various witnesses of his purpose to give the property sued for to the plaintiff by his will were not based upon any legal obligation or contract with reference to the services the plaintiff rendered to him in his lifetime, but such statements were simply the expression of a testamentary disposition to make a devise to her, as an extra reward for such services, and to show his appreciation thereof, not based upon, but independent of, any contractual obligation. Such being the case, no cause of action arose to the plaintiff. *Walker v. Bohannon*, supra.

No doubt, Main would have carried out such disposition and made a will in plaintiff's favor, but death came to him suddenly and slew him in the night while asleep in his bed, and it was then too late for him to make a will. But the law, to which all must bow in obedience does not enable us to make a will for said Main which he did not make, although, probably would have made, had not death thus suddenly cut him off.

[6, 7] IV. The error of defendants' counsel, if any error there was, in inquiring of witnesses upon cross-examination as to their testimony in their depositions without showing them the depositions, is not reversible error. This being a suit in equity, the court will simply disregard the alleged testimony in the depositions. So of the errors, if any, in striking testimony, the court will read it as if not stricken out. *Rinkel v. Lubke*, 246 Mo. 377, 152 S. W. 81; *Waddington v. Lane*, 202 Mo. loc. cit. 415, 100 S. W. 1139.

[8] It is also objected that the lower court erred in refusing to allow plaintiff to testify as to conversations had with the defendant

There is no reversible error in this assignment, as no statement was made to show the nature of such conversations, nor with which defendant they were had. *Williams v. Williams*, 259 Mo. 242, 168 S. W. 616; *Forrister v. Sullivan*, 231 Mo. loc. cit. 378, 132 S. W. 722.

Finding no reversible error in the record, the judgment and decree of the learned chancellor below is affirmed.

BROWN, C., not sitting.
RAGLAND, C., concurs.

PER CURIAM. The foregoing opinion of SMALL, C., is adopted as the opinion of the court.

All concur, except WOODSON, J., absent.

STATE v. KRAMER. (No. 21949.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

1. Courts \S 231(23)—Appellant to give Supreme Court jurisdiction on constitutional grounds must have designated specific section violated.

When it is sought to fix jurisdiction of an appeal in the Supreme Court on the ground of a constitutional question involved, it must appear that appellant in a timely manner designated a specific section of the Constitution alleged to have been violated.

2. Courts \S 231(6) — Unless constitutional question involved jurisdiction of appeal not in Supreme Court.

Unless the constitutional question is so involved as to be necessary to the determination of the case, it cannot be successfully invoked to fix jurisdiction in the Supreme Court.

3. Criminal law \S 1152(2)—Jury \S 72(6)—Overruling motion for elisor discretionary with court.

In the absence of evidence of irregularity or unfairness on the part of the sheriff in summoning talesmen, or showing of the fact he had any knowledge of the prosecution when he summoned the jurors, the overruling of defendant's motion for appointment of an elisor to summon a jury should not be disturbed, being discretionary with the trial court.

4. Criminal law \S 918(10, 11)—Complaint as to summoning of talesmen first set up in motion for new trial untimely.

Defendant's complaint with regard to summoning of talesmen finding its first setting in the record in the motion for new trial is untimely and need not be considered.

5. Constitutional law \S 42 — Person cannot question constitutionality of any law not directly affecting him.

Before a person can question the constitutionality of any law, he must be in such posi-

tion with regard to it as to be directly affected.

6. Courts \S 231(18)—No constitutional right denied defendant to give jurisdiction to Supreme Court.

In a prosecution for violation of the local option law regulating sale of intoxicating liquors, *held*, that no constitutional right was denied defendant, so that jurisdiction of his appeal was in a Court of Appeals, and not the Supreme Court.

Appeal from Circuit Court, Adair County;
J. A. Cooley, Judge.

J. G. Kramer was convicted of violation of the local option law, and he appeals. Case transferred to the Kansas City Court of Appeals.

Lew R. Thomason, of St. Louis (Greensfelder & Levi, of St. Louis, of counsel), for appellant.

Frank W. McAllister, Atty. Gen., and Henry B. Hunt, Asst. Atty. Gen., for the State.

WALKER, J. The appellant was charged in the circuit court of Adair county in an information which at the trial contained seven counts, with a violation of the local option law regulating the sale of intoxicating liquors. Upon a trial before a jury he was convicted, and his punishment assessed on each count at a fine of \$750 and six months' imprisonment in the county jail.

The offenses charged are misdemeanors. The prosecution was instituted under article 3, c. 63, R. S. 1906; the punishment prescribed for violations of the statute (section 7246) being limited to a fine or imprisonment in the county jail or both. The case was transferred to this court from the Kansas City Court of Appeals on the ground that a constitutional question was involved. At the threshold, therefore, we are confronted with the question of jurisdiction. If determined adversely to the ruling of the Kansas City Court of Appeals, a statement of facts, except as bearing upon the matter of jurisdiction, is unnecessary.

The information as originally drawn contained 16 counts. In the count numbered 11 it was charged that the sale of the liquor was made to Marion Shoop, and in count numbered 12 that liquor was stored by appellant for delivery to said Shoop. The latter was at the time the sheriff of Adair county, and his name was indorsed on the information as a witness for the state. On the 8th day of April, 1919, when the case was called for trial, counsel for appellant filed a motion for the appointment of an elisor to summon the jury, alleging as a reason therefor that the sheriff was interested in the result of the prosecution and was a witness for the state. The court thereupon overruled this

motion and entered of record the following order:

"It appearing that the jury was selected partly by the county court and partly by the sheriff, and all of said jury being selected before the charges in this case were filed and before the defendant was arrested, the motion will be overruled."

Counsel for the appellant excepted to the ruling of the court, and his exception was entered of record as follows:

"Defendant excepts to the ruling of the court in denying his motion and application for the appointment of an elisor to summon a jury for the trial of this cause for the following reasons: First, because a part of said jury, eight or nine in number, was selected and summoned by Marion Shoop, the sheriff of Adair county, Mo., said Marion Shoop being a witness for and on behalf of the state of Missouri in said cause, and being incompetent by reason of his interest in the result of said prosecution to select or summon any jurors to sit in the trial of said cause, *whereby defendant is deprived of a fair and impartial trial as guaranteed by the Constitution of the state of Missouri.*"

Counsel for the state in open court then announced that said Shoop would not be a witness for the state, and that counts numbered 11 and 12 of the information, in which it was charged that the unlawful transactions were had with Shoop by the appellant, were dismissed. Seven other counts were dismissed at the same time for reasons not pertinent to the matter here under consideration, leaving seven upon which the appellant was prosecuted. Thereafter counsel for appellant challenged a juror named James H. Shoop on voir dire examination on the ground that "he was related to the sheriff, one of the witnesses for the state, and for the further reason that said juror declined to state whether he would acquit if he had a reasonable doubt of appellant's guilt." Upon inquiry by the court the said James H. Shoop stated that he would acquit if he had a reasonable doubt of appellant's guilt, whereupon the court caused to be entered of record this order:

"In view of the witness' answer and in view of the fact that the state has dismissed the two counts in which Marion Shoop was named as the party to whom the delivery was made, the challenge for cause is overruled."

Thereupon the appellant waived a jury, and upon the state declining so to do the appellant interposed the following objection thereto, which was entered to record:

"Defendant declines to interrogate the jurors summoned to-day by the sheriff for the reason that the defendant insists that the sheriff under the facts in this case is disqualified to summon any jurors, and in so doing deprives the defendant of the right to a fair and impartial trial guaranteed him under the laws and Constitution of the state."

The foregoing italicized exceptions and record entries made at the behest of the appellant exemplify the manner in which constitutional questions were invoked in this case. In the motion for a new trial they were preserved as made in the following manner:

"Second. Because the court erred in directing Marion Shoop to summon bystanders as talesmen to sit upon the jury which was to try the defendant after the attention of the court had been called to the fact that the said Marion Shoop, sheriff of Adair county, Mo., was witness on behalf of the state, and against the defendant, thereby depriving the defendant of a fair and impartial trial before a fair and impartial jury guaranteed to him by the Constitution of the state of Missouri and laws made in pursuance thereof."

"Tenth. Because the verdict of the jury is in violation of the Constitution of the United States and of the state of Missouri, in this, to wit, that said verdict is cruel and unusual."

[1] When it is sought to fix the jurisdiction of an appeal in this court on the ground of the existence of a constitutional question necessarily involved in the determination of the matter at issue, it must appear from the record that the appellant in a timely manner designated the specific section of the Constitution alleged to have been violated by the adverse ruling or as was said in *Lohmeyer v. Cordage Co.*, 214 Mo. loc. cit. 688, 113 S. W. 1109, the party asserting the jurisdiction "must come into the open and put his finger on the specific provision of the Constitution touched by the adverse ruling" of which he complains. This was not done in the instant case. *State v. Swift*, 270 Mo. 694, 195 S. W. 996; *City of Lancaster v. Reed*, 201 S. W. 95; *Street v. School Dist.*, 221 Mo. 663, 120 S. W. 1159.

[2, 3] The record presents another phase of this case more completely determinative of the question of the jurisdiction than the foregoing. We have repeatedly held, and with reason, that unless the constitutional question was so involved as to be necessary to the determination of the case, it could not be successfully invoked to fix the jurisdiction. At the time the array of jurors was summoned no charges were pending against the appellant, and the court so found in overruling appellant's motion for the appointment of an elisor. Furthermore, when said motion was filed, counsel for the state dismissed the counts of the information charging that sales had been made by appellant to the sheriff, and announced that the latter would not be used as a witness. Under this state of facts there remained no basis for a substantial charge that appellant was being deprived of any right to which he was entitled under the law. It will be noted that the motion for the appointment of the elisor was not made until after the beginning of the trial. It is reasonable to conclude that the appellant knew of any connection which the sheriff may

have had with the case from the time of the filing of the information, or at least from the time of his arrest. Under such circumstances, there being no evidence of irregularity or unfairness on the part of the sheriff or in fact that he had any knowledge of the prosecution at the time he summoned the jurors, the overruling of the motion should not be disturbed, but should be left to the discretion of the trial court. *State v. Stewart*, 274 Mo. 649, 204 S. W. 10. In harmony with this conclusion, it was held by the Supreme Court of Arkansas, where an affidavit was filed by the accused charging a sheriff with prejudice and bias, but no proof was offered to support the charge, that the court did not abuse its discretion in refusing to disqualify the sheriff from selecting talesmen, although the sheriff was a witness at the trial and testified that he had watched the accused's premises and had arrested him for making intoxicating liquors. *Shuffield v. State* (Ark.) 216 S. W. 695.

The facts in that case, it will be seen, are much stronger and more indicative of the possible presence of prejudice than those in the case at bar.

[4] Appellant's motion the overruling of which he urges as error as affecting his constitutional rights was directed against the summoning of the array of jurors. His complaint with regard to the summoning of talesmen finds its first setting in the record in the motion for a new trial. It will suffice to say that this latter objection is untimely, and hence need not be considered. *Strother v. Railroad*, 274 Mo. 282, 203 S. W. 207; *Littlefield v. Littlefield*, 272 Mo. 163, 197 S. W. 1057.

[5] Repetition has almost rendered it axiomatic or at least elementary in our jurisprudence that before a person can question the constitutionality of any law he must be in such a position with regard to the law as to be directly affected by it. This is not his status here. *Ex parte Tarter*, 213 S. W. 94; *State v. Christopher*, 212 Mo. 244, 110 S. W. 697.

[6] No constitutional right having been denied the appellant, and this fact appearing from the record, the jurisdiction of this case is in the Kansas City Court of Appeals, to which it is ordered to be transferred.

All concur.

FREIE v. ST. LOUIS-SAN FRANCISCO RY. CO. (No. 21266.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920. Rehearing Denied June 25,
1920.)

Death \Leftrightarrow 29—Husband's administrator cannot maintain action for wife's death.

Where a wife was killed and husband injured by a train, and the husband subsequently

died from the injury without bringing action for her death, his administrator could not maintain such action under Rev. St. 1909, §§ 105, 106, 5425, on the theory that the husband's right of action for her death survived.

Appeal from Circuit Court, Franklin County; R. A. Breuer, Judge.

Action by Henry F. Freie, as administrator of Herman Freie, deceased, against the St. Louis-San Francisco Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The amended petition upon which the case was disposed of in the trial court is stated by counsel for appellant as follows:

After the usual allegations of defendant's incorporation as a railway company, it charges that defendant, while operating its train in said county, negligently ran through the town of Catawissa, at a high and dangerous rate of speed, over a public road or street crossing, without signal by bell or whistle, where the view of travelers on the road was obstructed, in consequence of which negligence Mrs. Elizabeth Freie was killed by one of defendant's trains at said crossing; that Herman Freie, her husband, was also injured on the same occasion, but survived his wife some time. Plaintiff is his administrator, since duly appointed by the probate court, duly qualified, and in charge of the estate of Herman Freie; that the latter, by defendant's said wrongful acts, was deprived of the "society, comfort, aid, companionship, services, and consortium" of his said wife, and of his beneficial interest as her husband in her estate; and that, because of said negligence and injuries, various items of expense (detailed) were incurred by said Herman Freie, including medical and nursing expenses, and the funeral expenses of his said wife—concluding with a demand for \$10,000 damages.

Respondent demurred to above petition upon the following grounds:

"(1) Said amended petition fails to state facts sufficient to constitute a cause of action against defendant.

"(2) It appears from the face of said amended petition that no cause of action against defendant survives in favor of plaintiff against defendant on account of the matters and things in said petition alleged."

The trial court sustained said demurrer. Plaintiff declined to plead further. Final judgment was entered for defendant, and plaintiff duly appealed the cause to this court.

Leonard & Sibley, of St. Louis, Jesse H. Schaper, of Washington, Mo., and Shepard Barclay, of St. Louis, for appellant.

W. F. Evans and Edw. T. Miller, both of St. Louis, and James Booth, of Pacific, for respondent.

RAILEY, C. (after stating the facts as above). 1. As a matter of convenience in considering the questions involved, we herewith set out the origin and legislative history of sections 105, 106, R. S. 1909. They were first enacted in 1835, appear in the revision of said date, at page 48, and were known therein as sections 24 and 25. In the revision of 1855, at page 133, they were sections 26 and 27. In the General Statutes of 1865, page 491, they were sections 29 and 30. In the revision of 1879 they were sections 96 and 97. In the revision of 1889 they continued as sections 96 and 97. In the revision of 1899 they were still known as sections 96 and 97. These sections were never amended after their enactment in 1835, and during all of this period, they have remained as a part of the administration statute of our state. These sections read as follows:

"Sec. 105. *Actions for Torts by and against Administrators, What may be Maintained.*—For all wrongs done to property, rights or interest of another, for which an action might be maintained against the wrongdoer, such action may be brought by the person injured, or, after his death, by his executor or administrator, against such wrongdoer, and, after his death, against his executor or administrator, in the same manner and with like effect, in all respects, as actions founded upon contract."

"Sec. 106. *Last Section not to Extend to What Actions.*—The preceding section shall not extend to actions for slander, libel, assault and battery or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator."

We likewise set out the origin and history of section 5425, R. S. 1909, as amended by the Acts of 1911, page 203 and following. This section was first enacted in 1855. It appears in the revision of 1855, at page 647, as section 2 of the Damage Act. In General Statutes of 1865, p. 601, it was continued, without change, as section 2. In the revision of 1879, it was continued, without change, as section 2121. Section 2121 was amended in 1885 (Session Acts 1885, pp. 153, 154) and, as amended, was carried into the revision of 1889, and there known as section 4425. The latter was carried into the revision of 1899 as section 2864 without change. The last-named section was amended in 1905 (Acts of 1905, pp. 135-137). The law, as amended in 1905, supra, was carried into the revision of 1909, without change, and is there known as section 5425. The latter was amended in 1911 (Acts 1911, p. 203). The common law was adopted in this state on January 19, 1816.

It is well to keep in mind the foregoing history of sections 105, 106, and 5425, R. S. 1909, in order to correctly understand which of the sections are referred to in the various opinions cited by the courts and in the briefs of counsel.

2. Appellant's theory of this case is clearly

stated under proposition 1, page 6, of his reply brief, as follows:

"The death damage act (section 5425) creates a right of action in the husband; and in case of his death that right survives to his administrator under section 105, those laws being in *pari materia*."

Under the common law adopted in this state in 1816, a personal right of action died with the person. In 1855, Lord Campbell's Act was adopted in this state, as shown by section 2, chapter 51, R. S. 1855, p. 647. This section has continued up to the present time, with the amendments thereto, heretofore pointed out. It gives a right of action, where none existed at common law. It points out the persons who may sue, and they alone must sue within the time prescribed by the statute. *Gibbs v. City of Hannibal*, 82 Mo. loc. cit. 149; *Barker v. Railway Co.*, 91 Mo. 86, 14 S. W. 280; *McIntosh v. Railway Co.*, 103 Mo. 131, 15 S. W. 80; *Packard v. Railroad*, 181 Mo. loc. cit. 427, 80 S. W. 951, 103 Am. St. Rep. 607; *Bates v. Sylvester*, 205 Mo. 493, 104 S. W. 73, 11 L. R. A. (N. S.) 1157, 120 Am. St. Rep. 761, 12 Ann. Cas. 457; *Elliott v. Kansas City*, 210 Mo. 576, 109 S. W. 627, and following; *Clark v. Railroad*, 219 Mo. loc. cit. 538, 539, 118 S. W. 40; *Gilkeson v. Railroad*, 222 Mo. 173, 121 S. W. 138, 24 L. R. A. (N. S.) 844, 17 Ann. Cas. 763, and cases cited; *Chandler v. Railroad*, 251 Mo. loc. cit. 600, 601, 158 S. W. 35.

These cases, and many others referred to therein, conclusively hold that in an action of this character, where no common-law liability existed, the party suing must, in order to state a cause of action, show that he is the person authorized by said section 5425 to maintain the same. In the case at bar the petition alleges that Elizabeth Freie was killed; that her husband, Herman Freie, was injured in the same accident, and afterwards died from the effect of said injuries. It is further alleged that Henry F. Freie was appointed administrator of the estate of said Herman Freie, deceased. The latter, by the terms of section 5425, supra, was authorized to sue for the death of his wife at any time within the year, as there were no minor children. He died without suing, and his administrator claims the right to take his place under said section. The legal representative is not named as a party who might maintain the action under said section. Unless, therefore, he is authorized to prosecute the suit under some other provision of the law, he is precluded from doing so by the foregoing authorities.

3. It is contended, however, by counsel for appellant, that sections 5425 and 105, supra, should be construed in *pari materia*, and, when thus construed, they authorize the administrator of the husband to maintain an action for the death of the wife.

Turning to sections 105, 106, R. S. 1909, we find that they were enacted in 1885, or practically 85 years ago. They have remained a part of the administration statute during all this period. Although innumerable deaths have resulted in this state from violence during said period, and many of which found their way into this court, we are not cited to a single case, in this jurisdiction, which ever held that an administrator, on the facts presented by this record, could, by virtue of sections 5425 and 105, supra, maintain such an action. On the contrary, at least two cases, which were ably and exhaustively reviewed by this court, were brought here on the theory that an administrator, under such facts as are presented here, could, under the sections 105, 106, and 5425, when construed together successfully, maintain such an action. In both cases the right to maintain same by an administrator was denied. We refer to *Gibbs, Adm'r, v. City of Hannibal*, 82 Mo. 143, and *Gilkeson, Adm'r, v. Railway Co.*, 222 Mo. 173, 121 S. W. 138, 24 L. R. A. (N. S.) 844, 17 Ann. Cas. 763.

It appears from the record in the *Gibbs* Case that George L. Crosby, while driving with his wife and two infant children in a vehicle, crossing a bridge over a stream in the city of Hannibal, was precipitated into the stream by the fall of the bridge, alleged to have been caused by the negligence of the city. By reason of the casualty, the father, mother, and two infant children perished. It was alleged in petition that Mrs. Crosby, the wife, survived her husband and two children, and that while so surviving, a cause of action accrued to her for the death of each of them. The plaintiff therein was appointed administrator of Mrs. Crosby's estate, and, on December 24, 1877, instituted suit in the Hannibal court of common pleas. The petition consisted of three counts: The first, asking \$5,000, for the death of her husband, and the second and third asking \$5,000, respectively, for the death of each of her two children. To the above petition, a demurrer was filed, and sustained by the court. On appeal to this court, the judgment below was unanimously affirmed. Judge Ray, after reviewing the authorities, and sections 96 and 2121, R. S. 1879, which were practically the same as sections 105 and 5425, R. S. 1909, among other things, said:

"These are the only beneficiaries who can maintain such an action. If in any case there be no such person, no suit can be brought by any other person. By the statute the action survives only to the parties named. They alone are the beneficiaries of the statute, and it was never intended that such action should survive to the executor or administrator of any one of the beneficiaries named. It is a right personal to the beneficiary, and does not survive to his personal representatives. In the case at bar all the beneficiaries within the purview of the statute perished together in one

common disaster, and there was no person left to whom the action could survive. It follows that this action cannot be maintained by the present plaintiff, who is the administrator of the wife. Under the statute he has no standing in court.

"As to the other question, we think it quite manifest that the damage act, or sections 2122, 2123, supra, have no reference to injuries or damages to property of the deceased, but only to personal injuries, and such as the injured party, if living, might have recovered, and such as the jury may deem fair and just with reference to the injury necessarily resulting to such survivor from such death. Injury or damage to property, as such, is not within the contemplation of the damage act, and consequently no recovery can be had in such an action for such injury or damage. Section 96 of the administration law has reference exclusively to wrongs done to the property rights or interest of another, and by section 97 of same law do not extend to actions for slander, libel, assault and battery, or false imprisonment, nor to actions on the case for injuries done to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator. If any injury or damage was occasioned to the property of the husband in this case by the fall of the bridge occasioned by the negligence of the defendant corporation, the action therefor, if any, by operation of section 96 of the administration law, supra, survived to the administrator of the husband, if to anybody, and not to that of the wife. Such is the express import of section 96, supra. That section does not contemplate the injuries and damages, or the actions provided for by the damage act.

"The latter survives by special statute, contrary to the common law, and only to the parties or beneficiaries named in the special statute. Various other questions have been discussed, and numerous cases cited, but we deem them unnecessary to the disposition of the case.

"It follows, therefore, that there was no error in the ruling of the circuit court in sustaining the demurrer of defendant, and its judgment is therefore affirmed. All concur."

The opinion in the *Gibbs* Case was rendered in 1884, and the court was then composed of Judges Hough, Henry, Norton, Ray, and Sherwood. The bar, judiciary, and General Assembly were informed by the publication of above opinion in 1884 that an administrator could not successfully maintain an action on facts exactly like the case before us. The above opinion has withstood the test of judicial criticism during the last 35 years, and, although the Legislature has been in session many times during said period, the law has never been changed so as to confer upon an administrator the right to maintain an action under the circumstances of this case.

The personnel of the court having changed since the decision in the *Gibbs* Case, industrious counsel representing the plaintiff in *Gilkeson, Adm'r, v. Railway Co.*, 222 Mo. 173, 121 S. W. 138, 24 L. R. A. (N. S.) 844, 17 Ann. Cas. 763, conceived the idea of urg-

ing this court to change its ruling in respect to the principles of law declared in the Gibbs Case. In the Gilkeson Case, it appears from the record that the father and mother of plaintiff's intestate were passengers on defendant's train, and were killed on October 10, 1904, through the negligence of defendant in operating the same. Clifford Ragel, their son, 14 years of age, was injured in the same wreck, and died in Pettis county, Mo., on October 14, 1904. The plaintiff, George C. Gilkeson, was appointed administrator of the estate of Clifford Ragel, deceased, by the probate court of Johnson county, Mo., duly qualified as such, and commenced above suit in Johnson county aforesaid, in two counts. The first was for \$5,000, based upon the death of the father, and the second count, based upon the death of the mother. In other words, the administrator of the son's estate sued in two counts for \$5,000 each, based upon the respective deaths of the father and mother. The administrator recovered in the court below a judgment upon each count for \$5,000. This court, in a unanimous opinion, reversed the cause, and entered judgment here for defendant.

We have before us the record and briefs of counsel in the Gilkeson Case. The cause was elaborately briefed upon each suit, and fully argued orally. Practically all the leading authorities cited by appellant's counsel in this case were presented to the court, and many authorities from other states cited in support of plaintiff's theory. Sections 105, 106, and 5425, supra, were fully discussed upon each side. Judge Woodson, in behalf of Division 1, before whom said cause was pending, delivered an able and exhaustive opinion upon the questions involved, in which all the members of that division concurred. This opinion was rendered in 1909. The court at that time was composed of Judges Lamm, Valliant, Woodson, and Graves.

In passing, it will be observed that the obiter dictum of Judge Valliant in Behen v. Transit Co., 186 Mo. loc. cit. 445, 85 S. W. 346, so strongly relied on by counsel for appellant here, was not only overruled in terms by Judge Gantt, speaking for this division in Bates v. Sylvester, 205 Mo. loc. cit. 501, 104 S. W. 73, 11 L. R. A. (N. S.) 1157, 120 Am. St. Rep. 761, 12 Ann. Cas. 457, but in the Gilkeson Case, 222 Mo. at pages 196, 197, 121 S. W. 138, 24 L. R. A. (N. S.) 844, 17 Ann. Cas. 763, the obiter dictum of Judge Valliant in the Behen Case was again overruled, and Judge Valliant concurred in the opinion overruling same.

With the published ruling in the Gilkeson Case, following that in Gibbs v. City of Hannibal, supra, the Legislature has never taken any action to overturn the above cases, and have, apparently at least, acquiesced in the construction placed by this court upon said

sections 105, 106, and 5425 of the Revised Statutes of 1909.

It is to the interest of the republic that there be an end to litigation. This division, having ruled adversely to appellant's contention in Bates v. Sylvester, 205 Mo. 493, 104 S. W. 73, 11 L. R. A. (N. S.) 1157, 120 Am. St. Rep. 761, 12 Ann. Cas. 457, where the statutes aforesaid and authorities are reviewed, and the same result having been reached in the Gibbs and Gilkeson Cases, supra, we do not deem it necessary to either cite or further consider the array of authorities in respondent's brief, sustaining the views heretofore expressed.

Without considering this question further, we are of the opinion that the trial court reached a correct conclusion in behalf of respondent. The judgment below is accordingly affirmed.

WHITE, C., concurs.

MOZLEY, C., absent.

PER CURIAM. The foregoing opinion of RAILEY, C., is hereby adopted as the opinion of the court.

All concur.

GOTT v. KANSAS CITY RYS. CO.

(Supreme Court of Missouri, Division No. 2.
June 4, 1920. Motion for Rehearing
Denied June 25, 1920.)

1. Carriers \S 321(16)—Instruction in suit for injuries to passenger carried past destination held erroneous as equivalent to charge of ordinary care.

In an action for injuries to a passenger resulting after being carried past her station, an instruction to find for plaintiff only if conductor could have reasonably anticipated the possibility of such accident as befell plaintiff was erroneous, as being equivalent to charge that only ordinary care was required.

2. Carriers \S 272—Passenger entitled to be discharged at safe place.

A carrier's contract safely to transport passenger to her destination is not performed until she has been discharged from car at a reasonably safe place.

3. Carriers \S 271—Utmost care required in carrying passenger safely to destination.

In performance of contract to carry passenger safely to destination, carrier must use the utmost care that very prudent men employ in performing the contract of carriage with like means of transportation.

4. Carriers \S 303(13)—Passenger entitled to high degree of care, though not injured immediately on alighting.

A carrier in carrying passenger safely to destination is not absolved of the high degree of care required merely because the passen-

ger, on being carried past her station, is not injured in the very act of alighting, nor at the very spot or moment where and when she alighted.

5. Trial \Rightarrow 253(9)—Instruction that conductor did not direct passenger on alighting to go the way she did held contrary to the evidence.

In action for injuries to passenger carried past her station and struck by another car on a trestle in going back to her destination, an instruction that there was no evidence that conductor directed her to go back by way of the track as she did was erroneous, in view of evidence that conductor pointed out the lights at place of her destination, and waived his hands in that direction.

6. Carriers \Rightarrow 347(12)—Instruction in suit by passenger, discharged beyond destination, as to choice of ways back, held erroneous.

In action for injuries to passenger carried past her destination and struck by another car in going back to destination by way of the tracks, an instruction that there could be no finding for plaintiff without a finding that a reasonably prudent person could not have discovered any other route was erroneous, as requiring plaintiff to take any route other than the tracks, whether safe or not.

7. Trial \Rightarrow 191(9)—Instruction in action for injuries to passenger carried past her station, assuming that a road was safe, was erroneous.

In action for injuries to passenger carried past her station and struck by another car in going back to her destination by way of the tracks, an instruction that if conductor pointed out the road as a way to go back she could not recover was erroneous, as assuming that such road was safe; there being evidence to the contrary.

8. Trial \Rightarrow 244(4)—Instruction, in action for injuries to passenger carried past her station, held erroneous, as unduly singling out the evidence.

In action for injuries to passenger carried past her station and struck by another car in going back to her destination, an instruction that plaintiff could not recover if conductor called out distinctly her station, unless conductor stopped at place beyond and she was led to believe by conductor's silence that she had to get off there, though she objected, was erroneous, as unduly singling out certain portions of the evidence.

9. Carriers \Rightarrow 317(7)—Evidence that conductor pointed out to passenger carried past station the lights at place of destination held admissible under the petition.

In action for injuries to passenger carried past her station and struck by another car in going back to her destination, evidence that conductor stopped the car at place beyond station and pointed out lights at place of destination was admissible under petition alleging that conductor directed plaintiff to alight at that place.

10. Carriers \Rightarrow 305(5)—Discharging passenger at place beyond station held proximate cause of injury from another car.

If carrier discharged passenger at a place beyond her station, whereby she was compelled to walk the track back to destination, the act of discharging was the proximate cause of her injury from being struck by another car.

11. Carriers \Rightarrow 320(27) — Evidence in action for injuries to passenger carried past her station held to take case to jury.

In action for injuries to passenger carried past her station, resulting from being struck by another car on a trestle on going back to her destination by way of the track, evidence held sufficient to take case to jury.

Appeal from Circuit Court, Jackson County; Willard P. Hall, Judge.

Action by Mary E. Gott against the Kansas City Railways Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Plaintiff, suing to recover damages for personal injuries alleged to have been sustained by reason of the negligence of the defendant, was, by the verdict of a jury, denied a recovery, and duly appeals. The petition was formal. The answer was a general denial and a plea of contributory negligence. No questions are made as to the pleadings, evidence, or aught else save the instructions. It is necessary, therefore, to state only such facts as bear upon the propriety of the action of the trial court in giving and refusing instructions.

Plaintiff, a woman of 55 years and a stranger in Kansas City, took passage upon one of defendant's cars in that city, for the purpose of going to Sheffield, a regular stopping place on defendant's street car line between Kansas City, Mo., and Independence, Mo. She testified that she duly paid her fare, notified the conductor that she was a stranger in the city, and that she desired to alight at Sheffield, and was told by him that he would let her off of the car when that point was reached. Shortly after the car had passed Sheffield, plaintiff though unacquainted in the vicinity, suspected that she had been carried past her destination, and upon inquiry of the conductor learned that her surmise was correct. Plaintiff reiterated her statement that she desired to get off at Sheffield, and the conductor thereupon rang the bell and stopped the car. Plaintiff proceeded to alight. It was night, however, and she protested against having to get off, at such a time and place, on account of her age and weight. The conductor made no response, but as she was descending the steps he pointed back in the direction from which the car had come, and told plaintiff that some lights which were visible in the direction indicated were at Sheffield. The car then proceeded on its way,

and plaintiff started back up the track toward the lights which had been pointed out to her. The distance from where plaintiff left the car to Sheffield was apparently about the length of an ordinary city block. After plaintiff had gone about 10 steps, she looked up and saw a street car approaching from the west, the direction in which she was going, and upon the same tracks upon which she was walking. Defendant maintained a double track upon its lines between the points in question. Upon observing the approaching car, plaintiff stepped over upon the north track, to escape the on-coming car, and very shortly after doing so discovered that she was walking upon a trestle, and, looking downward, saw the gleam of water beneath her feet. She had then gone 12 or 15 steps from the place where she alighted. At about the same time, she was enveloped in the glare of the headlight of another street car coming from the east, and upon the tracks between which she was then walking, and in dangerously close proximity. Plaintiff endeavored to signal the last-mentioned car, failed to attract the motorman's attention, and was struck and injured.

The point where plaintiff alighted from defendant's car was at the intersection of Bristol avenue with defendant's right of way, in the eastern suburbs of Kansas City. According to the testimony of the conductor, this was a regular stopping place. It was unlighted. The hour was about midnight. Bristol avenue runs north and south. The street car line runs east and west. Independence road, another street, practically parallels the street car line at this place. Bristol avenue runs north to Independence road. The distance between the point where plaintiff alighted and Independence road is described as a "short block." Independence road runs west to Ewing avenue, a distance of about two blocks. Ewing avenue runs south to Sheffield, a distance of about a block. The trestle upon which plaintiff was walking when she was struck crosses Goose-neck creek. Between that creek and Sheffield three railroad tracks cross the defendant's right of way. There was no practicable way by which plaintiff could have gone south from the point where she alighted on Bristol avenue, and thus have reached Sheffield avenue. Bristol avenue was an ungraded street with a wagon road down the center, and a board sidewalk on the east side. As stated, plaintiff was not acquainted with the locality. The gravamen of her petition is that defendant was negligent in directing her to alight in an unsafe place. There was evidence in behalf of defendant that the conductor offered to take plaintiff on to Independence, a distance of a few miles, and bring her back, without charge, and also that he directed her to return to Sheffield by way of Bristol avenue and Independence road. This testimony was contradicted by plaintiff. She also tes-

tified that she did not see or know of either Bristol avenue or Independence road, although she looked about for some other route to take to Sheffield. The instructions will be discussed later.

A. R. McClanahan, of Kansas City, E. O. Hamilton, of Independence, and Reed & Harvey, of Kansas City, for appellant.

R. J. Higgins, of Kansas City, Kan., and L. T. Dryden, of Independence, for respondent.

WILLIAMSON, J. (after stating the facts as above). [1-3] I. Appellant complains of the action of the trial court in giving instruction No. 1 to the jury. This instruction is as follows:

"The court instructs the jury that if they believe from the evidence that plaintiff, after the car in evidence passed Sheffield, inquired of the conductor if Sheffield had been passed, and that the conductor in charge of the car upon which plaintiff was a passenger stopped said car for the purpose of permitting plaintiff to alight therefrom at or about Bristol avenue, in order that plaintiff might return to Sheffield, and that plaintiff in the exercise of ordinary care and intelligence did understand and believe that the conductor desired her to alight at said point, and that said point was dark, and that plaintiff was a stranger to the place and in the exercise of reasonable care and intelligence did not see, and could not have seen, any route over which she could proceed to Sheffield except the route over the tracks of defendant back to Sheffield, and that it was necessary for her in passing along that route back to Sheffield to cross over the trestle in evidence, and that the time and place of alighting were dangerous and unsafe, and that plaintiff did pass over said route in an attempt to go back to Sheffield, and in so doing used the care and prudence of an ordinarily prudent person under like circumstances, and while so doing was struck by one of defendant's cars while she was still upon said trestle, and was injured, *and if the jury further find that defendant's conductor in charge of the car upon which plaintiff had been a passenger could have reasonably anticipated the possibility of such an accident, as explained in other instructions given by the court, and if the jury further find that at said time and place plaintiff was exercising the care and prudence of an ordinarily prudent person, then the jury should find a verdict for the plaintiff.*"

The error is said to lie in the portion of the instruction which we have italicized, and more particularly in that portion which directed the jury to find in appellant's favor only in the event that the jury found that respondent's servant, the conductor, "*could have reasonably anticipated the possibility*" of the occurrence of such an accident as befell appellant as a result of permitting her to alight from respondent's car at an unsafe place. Or, to rephrase the thought, the jury was told that respondent was not liable unless the event which occurred could rea-

sonably have been anticipated as a possible result of putting appellant down at an unsafe place. This is simply equivalent to saying that respondent was bound to use ordinary care only. But was ordinary care sufficient? The carrier's contract safely to transport appellant to her destination was not performed until she had been discharged from respondent's car at a reasonably safe place. Until that end had been attained, the respondent was bound to use that high degree of care which the law imposes on common carriers of passengers, namely, the utmost care that very prudent men employ in performing the contract of carriage with like means of transportation. *Stauffer v. Railroad*, 243 Mo. 305, loc. cit. 316, 147 S. W. 1032. It is a rule, often reiterated in this jurisdiction, that it is the duty of carriers of passengers to carry them safely to their destinations, and to put them off at safe places only. *McGee v. Railroad*, 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706; *Griffith v. Railroad*, 98 Mo. 174, 11 S. W. 559; *Cossitt v. Railroad*, 224 Mo. 97, loc. cit. 107, 123 S. W. 569. The rule with reference to the degree of care required of carriers of passengers with respect to discharging passengers at safe places is well stated by Goode, J., in *Fillingham v. Railroad*, 102 Mo. App. 573, loc. cit. 581, 77 S. W. 314, 817, as follows:

"The degree of care required of the carrier for a passenger's safety while he is leaving the vehicle is as high as that required while he is in transit; that is to say, the extraordinary care imposed by law on carriers of passengers begins when the contract of carriage takes effect on the rights of the parties and continues unimpaired until the contract ends with deposit at destination, thus protecting passengers as they get on and off conveyances. * * * Part of this duty to safeguard passengers while leaving a car or other vehicle consists in *taking care to put them off at a reasonably safe place.*"

See, also, *Rearden v. Railroad*, 215 Mo. 105, loc. cit. 132, 114 S. W. 961.

[4] The carrier is not absolved from liability, nor from this high degree of care, merely because the passenger is not injured while in the very act of alighting nor at the very spot or moment where and when he alighted (*Cossitt v. Railroad*, supra; *Atkinson v. Railroad*, 90 Mo. App. 489, loc. cit. 497), and the carrier is, of course—as has been repeatedly held—charged with notice of the conditions at and immediately adjacent to the spot where it discharges passengers from its conveyances. If a passenger is put off at an unsafe place and is injured in consequence, the negligence of the carrier is considered to be the proximate cause of the injury. *Cossitt v. Railroad*, supra. As given, the instruction only required respondent to use ordinary care to deposit appellant in a reasonably safe place. The law requires a higher degree of care, and the jury should have been

so instructed. We think this instruction was erroneous. Since instruction 4A is practically but the converse of the thought expressed in the italicized portion of instruction No. 1, what we have here said applies with like force to instruction 4A.

[5, 6] II. Instruction No. 3 is said to be erroneous. This instruction is as follows:

"The court instructs the jury that there is no evidence in this case that defendant's conductor in charge of the car upon which plaintiff was a passenger directed plaintiff to walk from the place at which she alighted from said car back to Sheffield over defendant's tracks, and the jury should not find for the plaintiff upon the hypothesis that there is any such evidence; but, if the jury believe from the evidence that at the time and place of plaintiff's alighting from said car it was dark and the locality was strange to her, and that a reasonably prudent and intelligent person could not have discovered any other route than the route over defendant's railroad tracks back to Sheffield, and that plaintiff did not know of any other route, then plaintiff was justified in attempting to pass over said route."

In this contention we are persuaded that appellant is correct. The petition, it is true, alleges that appellant started back to Sheffield over respondent's tracks "in reliance upon the direction of the conductor," but, fairly construed, the word "direction" so used was used in its secondary meaning of guidance or suggestion, rather than as meaning an order. This is a very sweeping instruction. The surroundings and all attendant circumstances must be taken into consideration in determining the propriety of giving it. Appellant was an elderly, and apparently a heavy, woman, and therefore presumptively lacking in the physical agility which might facilitate escape from imminent and impending danger. The hour was midnight. The place was a lonely suburb. The way was dark. Between Sheffield and the place where appellant alighted from respondent's car, Gooseneck creek and three railroad tracks crossed respondent's right of way. Upon this route, the trestle afforded the only means of crossing the creek. Street cars frequently passed to and fro over this trestle. Three street cars appeared upon the scene during the short time here involved. Respondent was familiar with the locus in quo and with all of the dangers incident thereto. Appellant was a stranger to all of these things, and respondent's conductor knew that fact. By stopping the car and permitting appellant to alight, respondent impliedly represented that the place was reasonably safe for that purpose, and by pointing out to her the lights of Sheffield and by informing her that those lights marked the place to which she desired to go, it might reasonably be inferred that respondent assured her that she might, with reasonably safety, attempt to return to Sheffield over its tracks. *Cossitt v.*

Railway Co., 224 Mo. 97, loc. cit. 106, 123 S. W. 569. If these words and acts did not mean this, what did they mean? The instruction excluded this evidence from the consideration of the jury. The evidence was properly admitted, but if it was not to be considered by the jury upon this question, for what purpose was it to be considered? Furthermore the instruction also informed the jury that it could not find for appellant without first finding that "a reasonably prudent and intelligent person *could not have discovered any other route* * * * back to Sheffield." Unqualified as it was, this instruction amounted to saying that if a reasonably prudent and intelligent person could have discovered any other route whether long or short, safe or unsafe, back to Sheffield, then appellant could not recover. We think this instruction is erroneous in the particulars mentioned.

[7] III. Instruction No. 4, given by the court, is also assailed as erroneous. It is as follows:

"The court instructs the jury that if they believe and find from the evidence in this case that the conductor either offered to bring the plaintiff to Independence and back to Sheffield, or that he pointed out to plaintiff Bristol avenue, and told her to go up Bristol avenue to Independence road, and pointed to lights thereon, then plaintiff cannot recover in this case, and your verdict should be for the defendant."

There was evidence tending to show that the route to Sheffield, thus indicated by the conductor, as respondent claims, was subject to many of the dangers to be encountered upon the route over respondent's tracks. Apparently the same stream and the same railroad tracks were to be crossed. So far as this record shows, there may or may not have been a bridge on Independence road across this stream. Its existence and condition are left to surmise and conjecture. So also, is the size of Gooseneck creek. The evidence discloses that Bristol avenue was at that time an ungraded street, and traveling upon it was, in the language of a witness, "just like going across a vacant lot," although "There was a kind of roadway that wagons used to drive in around the car tracks." Yet the jury was told by this instruction, in substance, that if this way had been pointed out to appellant and she failed to use it, then she could not recover, notwithstanding the fact that the jury might have believed that the dangers to be encountered upon this route were as great as those to be met in using the route back over respondent's tracks. We think the instruction should have been modified, at least to the extent of requiring the jury to find that the way so claimed to have been pointed out to appellant was reasonably safe for her use under the existing conditions. As the instruction

stands, it assumes that the route by way of Bristol avenue and Independence road was reasonably safe. Whether that was true or not, was, we think, under the evidence a question of fact which should have been left to the determination of the jury.

[8] IV. Instruction No. 5 is said to be erroneous because it told the jury that if the "conductor called out clearly and distinctly, 'Sheffield,' and stopped a sufficient length of time to have enabled plaintiff to alight from said car at said point," then appellant could not recover, unless respondent thereafter stopped the car at Bristol avenue for the purpose of having appellant alight there, and that she objected to alighting at that point, and did alight only because she was, by the conductor's silence, led to believe that she had to get off there. We think that this instruction is subject to criticism, in that it unduly singles out and makes prominent certain portions of the evidence. It could well have been couched in more general terms touching the sufficiency of the notice to alight, although this defect is, perhaps, not one which, alone, would warrant reversal. It is mentioned only that it may be avoided upon a retrial of the case.

[9-11] V. Respondent insists that the judgment should be affirmed, regardless of error in the instructions (which, however, it does not concede), upon the theory that its demurrer to the evidence should have been sustained. We agree with the learned trial judge that the contrary is true. The testimony concerning the act of the conductor in stopping the car and pointing out the lights of Sheffield to appellant was, under the circumstances, properly admitted in evidence under the allegation of the petition to the effect that respondent's conductor directed appellant to alight at that place. The act of the respondent in discharging appellant from its car was the proximate cause of the injuries shortly thereafter sustained by appellant when she was run down by another of respondent's cars on the adjacent track. *Coslett v. Railroad*, supra. There was sufficient evidence to carry to case to the jury, on both of these matters. Furthermore, it may well be questioned whether respondent, not having prosecuted a cross-appeal, is in position to allege error in this case in any event. *Westminster College v. Piersol*, 161 Mo. 270, loc. cit. 285, 61 S. W. 811; *Kansas City v. Railway Co.*, 187 Mo. 146, loc. cit. 156, 86 S. W. 190. We do not now pass on this question, but, having reached the conclusions above announced, it seems proper to indicate our views upon respondent's contention, so as to set that matter at rest in the event of another trial of this suit.

It follows that this cause should be reversed and remanded for further proceedings consistent with this opinion. It is so ordered.

All concur.

**FIRST NAT. BANK OF BEEVILLE, TEX., v.
SECURITY MUT. LIFE INS. CO. OF
BINGHAMTON, N. Y. (No. 20852.)**

(Supreme Court of Missouri, Division No. 2.
June 4, 1920. Motion for Rehearing
Denied June 25, 1920.)

1. Pleading ⚡428(4)—Petition held sufficient as against objection to evidence for failure to state cause of action.

In action on insurance policy, petition, averring that "plaintiff has kept and performed all of the terms and conditions * * * required to be kept and performed * * * both before and after the maturity of the claim herein sued for," was not open to the objection that it failed to state a cause of action, in that it failed to allege a demand for payment prior to suit, where defendant did not demur to the petition, but objected to the introduction of any evidence upon the ground that the petition failed to state a cause of action, as this practice is not to be commended.

2. Insurance ⚡205—Insurer cannot urge lack of beneficiary's consent to assignment.

Defendant insurance company, in suit on policy by assignee thereof, could not object that the policy was assigned without the consent of insured's wife, the original beneficiary; there being no privity between her and defendant.

3. Insurance ⚡203—Reservation of right to change beneficiary makes policy freely assignable.

Where the right to change the beneficiary is reserved, insured may assign the policy at will.

4. Limitation of actions ⚡173—Right to plead personal to debtor.

Defendant insurance company, in suit on policy by bank to which the policy was assigned as security, could not defend on the ground that the debt for which the policy was pledged was barred, thereby releasing the pledge, as the right to plead limitations is personal to the debtor or his privies.

5. Limitation of actions ⚡46(1), 167(1)—Runs from maturity of policy; bar of debt for which policy is pledged not barring pledgee's action on policy.

Limitations do not begin to run against action on an insurance policy until the policy matures, so that defendant insurance company, in suit on policy by bank to which the policy was pledged, could not defend on the ground that the debt secured by the pledged policy was barred; the action being on the policy, not on the debt.

6. Insurance ⚡122—Assignment of policy as security for debt not void on ground of no insurable interest.

An assignment of a life insurance policy to a creditor as security for his debt is not void on the ground of his having no insurable interest, but is valid to the extent, at least, to which the policy becomes security for the debt and for advances thereafter made by the as-

signee upon the policy, the balance, if any, upon the maturity of the policy becoming payable to beneficiaries originally designated, and, in any event, the insurer cannot raise the objection of lack of insurable interest in assignee; its remedy, in case of fear that it may not pay the proper parties, being by interpleader.

7. Insurance ⚡613—Suit on policy sufficient demand.

Suit upon an insurance policy was a demand.

8. Insurance ⚡669(1)—Pleading ⚡433(7)—Reply held sufficient after verdict.

In assignee's suit on insurance policy, defended on ground of superior lien of defendant insurance company by virtue of a prior loan agreement executed by insured, allegations of the reply, denying that insured ever executed the agreement, and pleading that his signature thereto was obtained, if at all, "by fraud and misrepresentation," that he "did not know or intend to sign any such paper, and did not know that any charge, such as is set forth in said paper, was made against him," not being assailed by motion to make more definite and certain, or otherwise, in the trial court, were sufficient after verdict, and sufficiently definite to support an instruction on fraudulent concealment; such concealment being, by reasonable inference, within the scope of such allegations.

9. Appeal and error ⚡1026—Error must be material to be reversible.

Error, to justify reversal, must be material.

10. Appeal and error ⚡1033(5)—Error in instructions favorable to appellant not ground for reversal.

Defendant insurance company, in suit on a policy, could not complain that an instruction, stating it had a right to make a deduction by virtue of a loan agreement by insured unless the agreement was obtained by fraudulent representations, but making no reference to fraudulent concealments, was inconsistent with another instruction, mentioning fraudulent concealment as well as representations; the fact that fraudulent concealment was not mentioned in one instruction, if error at all, being error in favor of appellant.

11. Insurance ⚡179½—Evidence showed loan agreement was obtained from insured by insurer by fraud.

In action on life insurance policy, where defendant insurance company defended on the ground that it had a right to make a deduction from the maturity value of the policy by virtue of a loan agreement by insured, evidence held to support jury's finding that the loan agreement was obtained by fraud.

12. Insurance ⚡675—Attorney's fee not allowable in suit on foreign state policy, where no statute authorizing shown.

No attorney's fee should have been allowed in suit on an insurance policy, which was a contract made in another state, where no statute of that state authorizing such a fee was pleaded and proved, for the allowance of such fee relates to the right, and not to the remedy.

13. Evidence \Leftarrow 35—No judicial notice taken of sister state statutes.

Courts do not take judicial notice of the statutes of a sister state.

Error to Circuit Court, Jackson County; Allen C. Southern, Judge.

Action by the First National Bank of Beeville, Tex., against the Security Mutual Life Insurance Company of Binghamton, N. Y. Judgment for plaintiff, and defendant brings error. Affirmed on condition of remittitur.

The First National Bank of Beeville, Tex. (hereinafter called the bank), brought suit in the circuit court of Jackson county, Mo., against the Security Mutual Life Insurance Company of Binghamton, N. Y. (hereinafter called the insurance company), to recover an amount claimed to be due upon a life insurance policy issued by the company upon the life of Albert G. Kennedy. Plaintiff recovered a judgment in the sum of \$7,315.14 and \$750 for attorney's fees. The company has duly brought the cause to this court upon a writ of error.

The suit grew out of the following facts: Albert G. Kennedy held a life insurance policy, 9 years old, amount not stated and cash-surrender value not disclosed, issued by the defendant. He was indebted to plaintiff in the sum of \$1,032.65. The policy was pledged for the payment of this debt. In August, 1905, at the solicitation of defendant, Kennedy took out the policy here in suit for \$8,000 on the 20-payment plan. For the new policy, he surrendered the old one, and, so defendant says, gave his written promise to pay to defendant \$3,301.52, with interest at 6 per cent. per annum, secured by a lien upon the new policy. The plaintiff, at defendant's request, consented to surrender the old policy and accept the new one in lieu thereof, and for 11 years paid the annual premium of \$488.96. But plaintiff for 9 years after the new policy was issued did not know of the agreement that the new policy should stand subject to defendant's lien for \$3,301.52. Neither did Kennedy, as he says.

In the end plaintiff had advanced, in loans, interest, and premiums, a sum in excess of \$7,160 on the new policy, when it matured. Its maturity value was \$7,160. But defendant claimed the right to deduct \$3,301.52, together with interest at 6 per cent. per annum from August 9, 1905, amounting in all to \$5,480.51, leaving as defendant claimed, \$1,200, which it was willing to pay to the legal holder of the policy. Plaintiff declined to accept this offer, and brought this suit. This is a bird's-eye view of the case. Further facts follow.

The plaintiff, after the usual formal allegations, averred that the defendant on the 9th day of August, 1904, insured the life of Al-

bert G. Kennedy in the sum of \$8,000, to be paid upon his death to his wife, Agnes Kennedy; that it was provided in the policy that if the insured were living on the 9th day of August, 1915, the defendant would then pay to the legal holder or beneficiary of the policy the sum of \$5,960, plus such profits as the defendant might have apportioned to this policy; that on the 14th day of September, 1905, said Kennedy and his wife, in consideration of an indebtedness in the sum of \$1,865.65 then due from said Kennedy to plaintiff, assigned the policy in writing to plaintiff, including in the assignment all rights which had accrued, or which might accrue, under the policy; that defendant was duly notified of the assignment, and consented thereto, and on the 25th day of September, 1905, the defendant, by a writing indorsed on the policy, substituted plaintiff as the beneficiary in lieu of Mrs. Kennedy, and that thereby plaintiff became and had ever since remained the owner thereof; that plaintiff had paid all premiums subsequently accruing upon this policy, and that the total amount of the premiums so paid was \$4,888.96; that on the 9th day of August, 1915, the insured was still living, and was then indebted to plaintiff in the sum of \$5,212.12, for money loaned and premiums paid as aforesaid; that on said date the profits which had been apportioned to this policy by defendant amounted to \$1,200, and that defendant thereupon became liable to plaintiff in the total sum of said profits, plus the guaranteed value of the policy on said date, amounting to the total sum of \$7,160; that payment of said liability had been demanded, but that defendant had vexatiously refused to pay. Plaintiff prayed judgment in the sum of \$7,160, and for attorney's fees in the sum of \$750, and costs.

The pertinent portions of defendant's answer are, in effect, as follows: Except for formal admissions as to the corporate existence of plaintiff and defendant, and an admission that defendant had issued the policy in question, the answer contained, first, a general denial. This was followed by averments to the effect that the promise to pay the holder or beneficiary of the policy the sum of \$5,960 and accrued profits was conditional, in this, that out of said sums should first be deducted all indebtedness of the insured to the defendant; that on August 9, 1904, the insured had executed and delivered to defendant a writing acknowledging the receipt of a loan from defendant in the sum of \$3,301.52, and agreeing that said sum, together with any additional loans upon the policy, with 6 per cent. interest on such loan or loans, should become due at the end of the distribution period or prior thereto upon the death of the insured, or upon his failure to make any payment due to defendant, and the total should be paid out of the proceeds of

the policy; that the policy was issued in consideration of the execution and delivery of said writing by said Kennedy; that the policy was dated back 9 years, thus giving Kennedy the benefit of a lower premium rate; that the policy called for the payment of 20 annual premiums in order to entitle the holder to the benefits specified in the policy, but that the premiums for the preceding 9 years above mentioned were paid only by the loan agreement above mentioned, and in fact only 11 premiums had been paid upon the policy; that the profits apportioned to the policy on August 9, 1915, amounted only to \$720.51, so that its value on that date was only \$6,680.51; that the loan above mentioned then amounted to \$5,480.51, and that the cash-surrender value of the policy, after deducting the amount of the loan, was therefore only \$1,200, which sum defendant had offered to pay upon the delivery of the policy. For another defense, defendant stated that the policy was executed and delivered in Texas and was a Texas contract; the debt of the insured to plaintiff was an individual obligation; that Mrs. Kennedy joined in the assignment only to secure her husband's debt to plaintiff, and that after the payment of such indebtedness the remainder should be paid to Mrs. Kennedy; that after the payment of three annual premiums the insured was entitled to borrow on the policy, and that in lieu of said three payments the insured executed the loan agreement above mentioned; that both when the policy and loan agreement were executed and now it was provided by the laws of Texas (quoting the statute) that nonnegotiable instruments were subject, when in the hands of an assignee, to every defense, that might have been pleaded against the assignor, and that therefore defendant had a right to credit the indebtedness claimed to be due it as aforesaid upon the amount due on the policy.

As another defense, the defendant affirmed that plaintiff, being a national bank, could not lawfully purchase the policy, but could only take it as security for a pre-existing debt; that at the date when the insured assigned the policy to plaintiff, plaintiff's debt against him was past due, and "became and was barred" by the 4-year statute of limitations of Texas (quoting it); that the plaintiff's debt against the insured was barred long before this suit was brought, and that thereby plaintiff became merely a bailee of the policy for Mrs. Kennedy, and had no right to maintain an action thereon against defendant; that after plaintiff's debt became barred as aforesaid, plaintiff and insured, by agreement between themselves, but without Mrs. Kennedy's consent, extended the time for the payment of such indebtedness, and that thereby plaintiff's lien upon said policy lapsed.

For a further defense, defendant asserted that the policy was not pledged to secure the plaintiff in the payment of the annual pre-

miums; that each premium paid by plaintiff became a debt due it from Kennedy as soon as plaintiff paid it, and that all of them except the last were barred by the 2-year statute of limitations of Texas (quoting it); and that all except the last five premium payments were barred by the 5-year statute of limitations of Missouri.

Defendant for a further defense sets up the fact, as claimed by it, that long before the maturity of the policy plaintiff was informed of defendant's debt and claim against said policy, and thereafter continued to pay premiums thereon, and is therefore now estopped to deny defendant's right to deduct its debt from the amount due on the policy.

Having thus set up some 10 defenses, the insurance company asserted that it had fully answered, and prayed to be dismissed. The reply, after a general denial, in substance averred that Kennedy never executed the loan agreement; that if he did sign it his signature was procured by fraud; that said agreement was without consideration and void as against public policy; that at the time the policy above named was issued, Kennedy was the holder of another policy in defendant company, which was held by plaintiff as security for Kennedy's indebtedness to it, as defendant well knew; that defendant informed plaintiff that said original policy had lapsed for nonpayment of a premium note given by the insured, but that if plaintiff would pay that note and an annual premium of \$488, a total of \$800, defendant would reinstate the policy; that defendant made no mention of the loan agreement above mentioned; that plaintiff was thereby induced to pay said \$800, and took an assignment of the policy and paid defendant over \$4,000 in premiums before defendant informed plaintiff of defendant's alleged claim against said policy; that as soon as plaintiff learned of defendant's claim plaintiff denied its validity, but made the two remaining premium payments, in order to protect itself for premiums and money already paid by it, by keeping said policy in force until maturity; and that by its silence defendant was estopped now to assert its pretended claim.

Plaintiff's evidence tended to support its pleadings, and defendant introduced or offered evidence tending to support its answer, except as otherwise hereinafter indicated. So far as necessary, the instructions will be mentioned in the opinion proper. The verdict and judgment were in plaintiff's favor.

Roland Hughes, of Kansas City, for plaintiff in error.

C. N. Sadler, of Kansas City, for defendant in error.

WILLIAMSON, J. (after stating the facts as above). Appellant has not favored us with an assignment of errors, but has set out under the heading of Points and Authorities 13

paragraphs, which we will treat as in lieu or assignments of error. *Mugan v. Wheeler*, 241 Mo. 376; 145 S. W. 462. We will dispose of these questions in the order in which they are argued.

[1] I. Appellant first suggests that the petition fails to state a cause of action, in that it fails to allege a demand for payment by respondent prior to the filing of the suit. This contention is based upon the claim that by the terms of the policy, appellant agreed upon the maturity of the policy to do one of five things named in the policy "at the option or demand of the person entitled to exercise the option." We find no such provision in the policy. Furthermore, the petition contains an averment that—

"The plaintiff has kept and performed all of the terms and conditions of said policy of life insurance required to be kept and performed by the plaintiff both before and after the maturity of the claim herein sued for."

Appellant did not demur to the petition, but did object to the introduction of any evidence, upon the ground that the petition failed to state a cause of action. This practice is not to be commended. The allegations of the petition are sufficient as against such an objection.

[2, 3] II. Appellant next argues that Mrs. Kennedy was the beneficiary of the policy; that the only consent she ever gave to the assignment was to the effect that the policy might be pledged to secure her husband's indebtedness to respondent in the sum of \$1,034.65, and that all subsequent arrangements were between the respondent and the insured only, and without her knowledge or consent, and were void as to her; that when the insured assigned the policy outright to appellant, this arrangement was a cancellation of the debt for which Mrs. Kennedy pledged the policy, and the pledge was thereby released, and respondent's lien upon the policy was thereby destroyed.

This argument fails to take into account several important matters. There is no privity between Mrs. Kennedy and appellant, and on what theory appellant undertakes in this action to assert her rights is not apparent. Furthermore, the insured had the right under the terms of the policy to change the beneficiary, and exercised that right in favor of the respondent. Appellant consented to this change. Again, Mrs. Kennedy's rights were conditioned upon her remaining the beneficiary in the policy and surviving her husband, and the evidence shows that she died about 1907 or 1909, during her husband's lifetime and several years before the maturity of the policy, and that prior to her death, respondent had been made the beneficiary in the policy. By an express provision of the policy, any payments becoming due under it were to be made to the estate of the insured, or to his assigns,

in the event of the death of Mrs. Kennedy prior to the maturity of the policy. Where, as here, the right to change the beneficiary is reserved, the insured may assign the policy at will. *Fuos v. Dietrich* (Tex. Civ. App.) 101 S. W. 291; *Cooley's Briefs on Ins.*, vol. 6, page 424; *Splawn v. Chew*, 60 Tex. 532, loc. cit. 534. Under the option clause of the policy, the appellant agreed to pay upon August 9, 1915, upon the surrender of the policy by the insured or his assigns, the full sum of \$5,960, plus accrued profits, subject to existing indebtedness, provided the insured was then living and all premiums had been paid. The insured was living upon that date, and all premiums had been paid. Mrs. Kennedy was then dead, and respondent was then the holder of this policy by assignment. We rule this point against the appellant.

[4, 5] III. Appellant's next contention is that the respondent's debt became barred by the 4-year statute of limitations of Texas, and for that reason respondent cannot recover. This statute was offered in evidence, and excluded by the court. The debt to which appellant here refers is Kennedy's original indebtedness to respondent, to secure which the policy was pledged. As to this debt, appellant contends that Mrs. Kennedy held the relation of surety, and that the pledge of the policy was released by operation of law when the claim became barred by the statute of limitations. This record discloses numerous pertinent answers to this contention, but two will suffice. The right to plead the statute of limitations is a privilege personal to the debtor or to those standing in privity with him by inheritance or estate, such as personal representatives, heirs, grantees, or mortgagees. *Wood on Limitations*, vol. 1, p. 142 (4th Ed.) and cases there cited. Appellant occupies no such relation either to the insured or to Mrs. Kennedy, except, perhaps, as to the so-called loan agreement, to which further reference will be made. Furthermore, this is not an action on the debt, but on the policy. Limitation did not begin to run until the policy matured. *Harde v. Germania Life Ins. Co.* (Tex. Civ. App.), 153 S. W. 666, loc. cit. 669; *Bush v. Kansas City Life Ins. Co.* (Mo.) 214 S. W. 175, loc. cit. 179. We decide this contention against appellant.

[6] IV. Appellant asserts that the contract for the purchase of this policy by respondent is void as against public policy. The reason is said to lie in the fact that in such case the purchaser has an interest in the death of the insured. *Price v. Supreme Lodge*, 68 Tex. 361, is cited in support of this contention. The plaintiff in that case had no insurable interest in the life of the insured, nor did the relation of debtor and creditor exist between them. The *Price Case* expressly recognizes an exception to the rule therein announced when the relation of debtor and

creditor does exist. In such cases, practically all of the authorities, including the Price Case, hold that the assignment is not void, but is at least valid to the extent to which the policy becomes security for the existing debt and for all advances thereafter made by the assignee upon the policy. The balance, if any, upon the maturity of the policy becomes payable to beneficiaries originally designated. This is the rule in this state, as shown by the following cases, which, with commendable frankness, appellant cites: *Tripp v. Jordan*, 177 Mo. App. 339, loc. cit. 343, 164 S. W. 158; *Jenkins v. Morrow*, 131 Mo. App. 288, loc. cit. 296, 109 S. W. 1051; *Bruer v. Kansas Mut. Life Ins. Co.*, 100 Mo. App. 540, loc. cit. 544, 75 S. W. 380. This is also the rule in the United States Supreme Court. *Cammack v. Lewis*, 15 Wall. 643, loc. cit. 648, 21 L. Ed. 244; *Warnock v. Davis*, 104 U. S. 775, loc. cit. 779, 26 L. Ed. 924. See, also, *Peoria Life Ins. Co. v. Hines*, 132 Ill. App. 642, loc. cit. 647; *Reed v. Provident Sav. Life Assurance Soc.*, 190 N. Y. 111, loc. cit. 119, 82 N. E. 734. If, therefore, appellant feared that some one other than respondent might set up a claim to any balance due upon this policy in excess of the amount of respondent's claims, it was its duty to bring such parties into court and require them to interplead. It could easily have relieved itself of any burden in the matter by paying the fund into court. This course is pointed out as a proper one in *Cheeves v. Anders*, 87 Tex. 287, loc. cit. 292, 28 S. W. 274, 275 (47 Am. St. Rep. 107), also cited by appellant in the following language:

"When an insurance company has issued a policy upon the life of a person payable to one who has no insurable interest in the life insured, or when a policy has been assigned to one having no such interest, the insurance company must nevertheless pay the full amount of the policy, if otherwise liable, because it has so contracted, and it is no concern of the insurer as to who gets the proceeds, except to see that it is paid to the proper parties under its agreement. It is simply required to perform its contract, and the law will dispose of the money according to the rights of the parties. *Ins. Co. v. Williams*, 79 Tex. 637, and authorities cited."

In the instant case, respondent's demand is made up of its original claim against the insured, amounting to \$1,865.65 on September 14, 1905, and premiums thereafter paid by it amounting to \$4,888.96, which sums, with interest at 6 per cent. per annum from the maturity of the policy, amount to the sum for which the verdict was returned, exclusive of attorney's fees. The total consumed the entire amount of respondent's liability under the policy. It had contracted to pay this amount to the holder of the policy at maturity. Respondent held the policy at maturity. Hence respondent was entitled to

recover. There is no merit in appellant's contention on this point.

[7] V. Appellant avers that instruction No. 1, given for respondent, is erroneous. This instruction told the jury to find for plaintiff if the jury believed that the insured, on or about September 14, 1905, assigned the policy to the bank; that the bank was still the holder of the policy and that the insured was living at the date of the trial. There was substantial evidence to support a verdict in respondent's favor upon all of those facts. The instruction did not purport to cover the whole case. The evidence also showed that appellant had admitted its liability to the legal holder of the policy in the sum of \$1,200, and indeed liability to the legal holder of the policy to that extent is admitted in the answer. The instruction required the jury to find that respondent was the assignee, and on that point was sufficient. Appellant claims that the instruction was erroneous in not requiring the jury to find that Mrs. Kennedy had executed an assignment of the policy, because the ownership was in her. Her only interest at any time was that of contingent beneficiary. The beneficiary had been changed, by consent of appellant. The insured had the absolute right under the policy to change the beneficiary. The wife's consent was unnecessary. Mrs. Kennedy was dead, and thus the only contingencies upon which she might have had a beneficial interest had been extinguished, both by the substitution of a new beneficiary and by her death prior to the death of the insured. It is said that the instruction did not require the jury to find that a demand had been made. The evidence shows that under date of August 13, 1915, respondent, referring to its claims against this policy, wrote appellant saying:

"We propose to have every dollar coming to us in this settlement, want nothing more and will accept nothing less. Advise us promptly your intentions, that we may know your attitude. We do not wish to resort to drastic action till you have had ample opportunity to settle this contract in accordance with the terms of your policy."

We think this was a demand. The evidence also shows a flat statement by one of respondent's witnesses, referring to payment, that "of course we demanded it." As we have shown, no demand was necessary, demand had been made, and the suit was a demand, in any event. Not only so, but during the trial respondent, upon a suggestion that no demand had been made, offered to dismiss its suit and pay the costs if appellant would pay the claim, and appellant refused to do so. There was no reversible error here.

But it is said that the instruction authorizes a verdict for respondent without regard to the validity or invalidity of the so-called loan agreement asserted by appellant. This

is true, but appellant admitted liability to the legal holder of the policy to the extent of \$1,200, and the jury, by this instruction, was required to find respondent to be the legal holder of that document, before finding a verdict in respondent's favor. The instruction did not fix the amount for which the jury should find for plaintiff, but left that for another instruction. These criticisms are groundless.

[8-10] VI. Instruction No. 2, given in behalf of respondent, is assailed on the ground that it is inconsistent with instruction No. 4 asked by appellant, and modified and given by the court. This instruction, in effect, told the jury that if the insured did not sign the loan agreement, or if his signature thereto was secured by "fraudulent representations or concealments" on the part of respondent, and that "he did not know or understand that it was an agreement to pay respondent \$3,301.52, and that he did not in fact make any such agreement," then appellant was not entitled to deduct that sum, or any part thereof, from the maturity value of the policy.

Instruction No. 4, above mentioned, informed the jury that appellant was entitled to deduct the amount designated in the loan agreement, unless it was "obtained by false and fraudulent representations," thus making no reference to fraudulent "concealments" mentioned in instruction No. 2. The reply denied that the insured ever executed the loan agreement, and then pleaded that his signature thereto was obtained, if at all, "by fraud and misrepresentation; that said Kennedy did not know or intend to sign any such paper, and did not know that any charge, such as [is] set forth in said paper, was made against him." These allegations were not assailed by motion to make more definite and certain, or otherwise, in the trial court, and are, we think, sufficient after verdict. *Rutledge v. Swinney*, 261 Mo. 128, loc. cit. 141, 169 S. W. 17. We also think that under these circumstances they are sufficiently definite to support an instruction on fraudulent concealment, such as is contained in instruction 2. Such concealment is, by reasonable inference, within the scope of the allegations of the reply. Error, to justify reversal, must be material. *Shinn v. Railroad*, 248 Mo. 173, loc. cit. 180, 154 S. W. 103. The fact that such fraudulent concealment is not mentioned in instruction No. 4, if error at all, is error in favor of appellant and of this it cannot complain. Hence appellant's contention on this point is overruled.

[11] VII. Appellant contends that there is no evidence to support the finding of the jury that the loan agreement was obtained by fraud. The evidence on this point is confined to the deposition of A. G. Kennedy, the insured. It covers several pages of the ab-

stract, and for that reason we will state its substance rather than incur this opinion by setting it out in full.

Kennedy had no pecuniary interest, other than the payment of his indebtedness to respondent, in denying the execution of the loan agreement, but he emphatically and repeatedly did deny having signed it. He admitted having signed other papers connected with the policy at the time the loan agreement was said to have been signed, but says that the loan agreement was not so much as mentioned to him. The agreement admitted an indebtedness of \$3,301.52 on the part of the insured to appellant. It is called a "loan" in the agreement, but appellant claims it was to evidence the difference in the annual premiums for 9 years between a policy formerly held by Kennedy and the policy here in suit. The former policy was surrendered at the time the present policy was issued, and this loan agreement is claimed to have been executed at that time. The evidence shows that at that time Kennedy was hard pressed financially, in debt, and seeking to borrow money. The cash-surrender value of the old policy was apparently much less than \$3,300, and by entering into this loan agreement Kennedy would have been increasing his indebtedness with no corresponding benefit. Furthermore, the agent representing the appellant, with whom Kennedy transacted this business, was not produced as a witness, nor was any reason given for a failure to produce him. It is worthy of remark, also, that when Kennedy's deposition was taken, this loan agreement was not presented for his inspection, although appellant then had possession of the document; appellant's whole claim is based upon this agreement, and the genuineness of Kennedy's signature was disputed. Appellant, by counsel, attended the taking of the deposition and cross-examined the witness. From these and various other circumstances appearing in evidence, the jury was, we think, warranted in finding that the loan agreement was never in fact signed by Kennedy, or, if signed by him, that his signature was fraudulently obtained. Appellant's evidence on this point consisted solely of the testimony of an expert on handwriting, who compared the signature on the loan agreement with various signatures admittedly made by Kennedy. The expert witness expressed the opinion that the signature to the loan agreement was in Kennedy's handwriting. The weight of this evidence was, of course, for the jury. We think there was sufficient evidence on this point to support the verdict.

[12,13] VIII. The appellant claims that error was committed in allowing an attorney's fee in behalf of respondent, for the reason that this is a Texas contract, and no statute of that state authorizing such an allowance was pleaded. In this contention appellant is

clearly right. This contract was made in Texas. Respondent is a resident of Texas, paid the premiums there, and demanded performance of the contract in that state. The Texas statute, if any there is on this proposition, is not pleaded. We do not take judicial notice of the statutes of a sister state, and if such a statute as would authorize the allowance of an attorney's fee exists in that state, it should have been pleaded and proven in the same manner as any other fact. *Fidelity Loan Securities Co. v. Moore* (Mo.) 217 S. W. 286, loc. cit. 289. The allowance of an attorney's fee relates to the right, and not to the remedy. No attorney's fee should have been allowed. *Thompson v. Traders' Ins. Co.*, 169 Mo. 12, loc. cit. 29, 69 S. W. 889; *Ayers v. Continental Ins. Co.* (Mo. App.) 217 S. W. 550, loc. cit. 551.

Appellant's contention that the reply admits the execution of the loan agreement by the insured is not borne out by the record. The reply plainly denies it. Various other complaints of appellant are also without foundation, and for that reason will not be discussed, although we have considered all of them. We have passed upon all questions that appellant thought sufficiently important to dignify with an argument, and upon some that it did not argue. Except as to the allowance of the attorney's fee as above noted, the decision of the trial court was right. Its essential justice commends it to our consideration.

Appellant's conduct, as revealed by this record, is not such as to enlist our sympathies. At the time it took the old benefit certificate—for that, apparently, is what it was—and issued the policy here in suit to Kennedy, the respondent held the old policy in pledge to secure a debt of a little more than \$1,000. Appellant knew this fact. Without revealing the fact to respondent, it obtained from Kennedy (by fraud, if Kennedy is to be believed), an agreement to pay appellant \$3,300. This sum was to be a lien upon the new policy, but no suggestion of that fact appeared upon the policy itself. For 9 years thereafter, while respondent held the new policy in pledge for its debt and the premiums it was paying, appellant accepted the annual payments of \$488 from respondent in silence, and thereby created the fund out of which it now seeks to pay its claim of \$3,300 and interest, leaving only \$1,200 to be paid to respondent as its return on an investment of approximately \$6,000, extending over a period of 11 years. It is too plain for argument that respondent never would have entered into such an arrangement with knowledge of appellant's claim. It is speaking mildly to say that appellant's conduct savors strongly of intentional overreaching. Business acumen may become too acute to be consistent with fair dealing. Had appellant dealt openly and

fairly with the insured and with respondent, there would have been no occasion for this litigation. We are not disposed, in view of these facts, to strain a point to aid appellant. So far as we are concerned, the tree may lie where it has fallen.

The error in allowing the attorney's fee can easily be cured. If the respondent will, within ten days, file a remittitur of the amount of the attorney's fee, \$750, as of date of the date of the judgment, March 16, 1917, the judgment will be affirmed. Otherwise it will be reversed and remanded for further proceedings consistent with this opinion. It is so ordered.

All concur.

DUNBAR et al. v. SIMS et al. (No. 20817.)

(Supreme Court of Missouri, Division No. 2
June 4, 1920. Rehearing Denied
June 25, 1920.)

Wills §634(4)—Will devising life estate to widow with power of disposition held to vest remainders in children.

A devise to testator's widow for life, with full power to sell and convey during her life, "and at her death, I will and devise that all my real estate shall go and vest absolutely in fee, in my seven children," naming them, *held* to vest in the children, upon testator's death, an equitable estate in remainder, subject to the widow's life estate and power of disposition, the quoted clause, in its reference to the widow's death, relating only to the time when the children should have possession, not to the time of vesting of their estate; and deeds from certain of the children to certain other children, conveying all of the respective grantors' right, title, and interest in the land devised, conveyed to the grantees all the respective interests owned by the grantors in such land, although such deeds were executed and delivered before the widow's death.

Appeal from Circuit Court, Ralls County; W. T. Ragland, Judge.

Action by Fannie Dunbar and others against Charles T. Sims and others. From judgment for defendants, plaintiffs appeal. Affirmed.

This action was brought in the circuit court of Ralls county, Mo., for the partition of the real estate described in petition, and for an accounting of the rents, profits, and money alleged to have been received by defendants.

Silas E. Sims died in Ralls county, Mo., in 1907, the owner of above-mentioned real estate, leaving a will. He left surviving him his widow, Mary E. Sims, and his children, Charles T. Sims, Enoch Sims, Luther Sims, George Edward Sims, Lee Roy Sims, Arch Sims, and Fannie Dunbar. Fannie Dunbar,

Lee Roy Sims, and George Edward Sims are plaintiffs herein, and Charles T. Sims, Enoch Sims, Luther Sims, and Arch Sims are defendants.

On March 25, 1909, plaintiff George E. Sims and wife executed and delivered to defendant Archie Sims their warranty deed for the expressed consideration of \$800, conveying all their right, title, and interest in and to the real estate described in petition.

On February 10, 1909, plaintiff Lee Roy Sims and wife executed and delivered to defendant Charles T. Sims their quitclaim deed for the expressed consideration of \$625 conveying all their right, title, and interest in said land.

On October 18, 1909, plaintiff Fannie Dunbar executed and delivered her warranty deed to defendant Archie Sims for the expressed consideration of \$1,500, conveying to him all of her right, title, and interest in said land.

Afterwards, on July 2, 1910, said Mary E. Sims, under the power vested in her by the will of her husband, sold, by deed duly executed, a right of way 50 feet wide across said land for \$3,500 to the Atlas Portland Cement Company, a corporation.

It appears from the evidence that neither of the plaintiffs herein received any part of said \$3,500.

The widow, Mary E. Sims, died April 24, 1917.

The will of Silas E. Sims, was executed on the ——— day of February, 1907. It was offered in evidence, and contains five separate paragraphs. No. 1 provides for the payment of his debts, etc. Paragraph 2 gave to the widow absolutely all of his personal property, subject to the payment of his debts. Paragraph 4 named his wife, Mary E. Sims, as executrix, with the direction and request that she be not required to give bond. The third and fifth paragraphs read as follows:

"Item Third. I will and devise all of my real estate to my wife, Mary E. Sims, for and during her natural life, and at her death, I will and devise that all my real estate shall go and vest absolutely in fee, in my seven children, namely, Charles T. Sims, Enoch Sims, George Edward Sims, Luther Sims, Lee Roy Sims, Arch Sims, and Fannie Dunbar, equally share and share alike."

"Item Fifth. I will and direct that my said executrix, Mary E. Sims, shall have power, and I hereby give her power and authority to sell and convey any or all of my real estate as she may see fit and proper, and make good and perfect title to the same in fee simple to the purchaser and to make distribution of the proceeds of such sale among my said children and herself," etc.

The deeds heretofore mentioned from plaintiffs to Archie Sims and Charles T. Sims were duly recorded in Ralls county, Mo.

On March 5, 1918, the trial court found the issues in favor of defendants, and entered its

decree accordingly. Plaintiffs in due time filed motions for a new trial and in arrest of judgment. Both motions were overruled, and the cause duly appealed by them to this court.

Mahan, Smith & Mahan and M. L. Farres, all of Hannibal, for appellants.

J. O. Allison and T. E. Allison, both of New London, for respondents.

RAILEY, C. (after stating the facts as above). 1. There is practically no dispute over the facts in this case, as heretofore set out. It is contended by appellants that the children of testator acquired no vested interest as remaindermen in the real estate aforesaid prior to the death of the widow, Mary E. Sims, on April 24, 1917, and that, by reason thereof, the plaintiffs had no interest in their father's estate, which was the subject of conveyance, at the time they executed their respective deeds to Archie and Charles T. Sims. This contention does not appeal to us as being sound. On the contrary, we are decidedly of the opinion that upon the death of testator in 1907 his widow, Mary E. Sims, by virtue of paragraphs 3 and 5 of the will aforesaid, became vested with a life estate in the real estate in controversy, with full power of disposition during her life, and that upon the death of testator in 1907 his seven children heretofore named became vested with an equitable estate and remainder subject to the life estate and power of disposition given to the widow aforesaid. *Huntington Real Estate Co. v. Megaree*, 217 S. W. 301 and following; *Trigg v. Trigg*, 192 S. W. loc. cit. 1014, and cases cited; *Schneider v. Kloepple*, 270 Mo. 389, 390, 193 S. W. 834; *Priest v. McFarland*, 262 Mo. 229, 171 S. W. 62; *Tallent v. Fitzpatrick & Kaiser*, 253 Mo. loc. cit. 13, 15, 161 S. W. 689; *Burnet v. Burnet*, 244 Mo. 491, 505-507, 148 S. W. 872; *Gibson v. Gibson*, 239 Mo. 490, 144 S. W. 770; *Edgar v. Emerson*, 235 Mo. 553, 560-562, 139 S. W. 122; *Grace v. Perry*, 197 Mo. loc. cit. 562, 95 S. W. 878, 7 Ann. Cas. 948.

In the absence of any provision in the will calling for a different construction, the foregoing authorities are conclusive against appellants as to the merits of this controversy.

2. It is insisted, however, by appellants, that the will as clearly expressed on its face shows a definite intention by the testator that the title was not to be vested in the children until the death of the executrix, for he says:

"And at her death I will and devise that all my real estate shall go and vest absolutely in fee, in my seven children, * * * equally share and share alike."

Such expressions as are found in the above quotation have frequently come before the courts for consideration, and have uniformly been construed, when considered in the light of foregoing facts, to relate to the times when

the devisees shall have possession, and have nothing to do with the vesting of the estate. *Jones v. Waters*, 17 Mo. 587; *Collier's Will*, 40 Mo. 288; *Chew v. Keller*, 100 Mo. loc. cit. 368, 13 S. W. 395; *Byrne v. France*, 131 Mo. 639, 646, 647, 33 S. W. 178; *Tindall v. Tindall*, 187 Mo. 218, 226, 66 S. W. 1092; *Heady v. Hollman*, 251 Mo. 632, 638, 158 S. W. 19; *Henderson v. Calhoun*, 183 S. W. 584; *Huntington Real Estate Co. v. Megaree*, 217 S. W. loc. cit. 304; 2 *Underhill on the Law of Wills*, § 861; 2 *Jarman on Wills* (6th Ed.) p. 1357; *Anderson v. Menefee* (Tex. Civ. App.) 174 S. W. loc. cit. 908; *Rhode Island Hospital Trust Co. v. Noyes*, 26 R. I. loc. cit. 334, 58 Atl. 999.

A single quotation is sufficient to indicate the trend of judicial opinion in respect to this matter. In *Chew v. Keller*, 100 Mo. loc. cit. 368, 13 S. W. 396, Judge Black said:

"The law favors vested estates, and, where there is a doubt as to whether the remainder is vested or contingent, the courts will construe it as a vested estate. * * * The expressions that they, Levin Baker and others, are not to take possession of the property devised 'until the death of Jemina Lindell,' and that 'upon her death' the devisees shall take the parts as tenants in common, all relate to the times when the devisees shall have possession, and have nothing to do with the vesting of the estate."

Aside from the other authorities cited, the conclusion reached by this court in the recent case of *Huntington Real Estate Co. v. Megaree*, 217 S. W. loc. cit. 304, 305, settles the above controversy adversely to appellants. Testator, having given to his wife a life estate in said land, which carried with it the right of possession during her life, and having also given her the right to sell and convey said property, if she saw fit to do so, why should the title not vest, upon the death of testator, in his children, subject to the widow's life estate and right of disposition under the terms of the will? As the remaindermen could not interfere with the widow's rights thereunder, we discover nothing upon the face of said instrument which discloses any reason for testator withholding the title of the remaindermen under the circumstances aforesaid until the death of testatrix, rather than have the same become effective at his own death.

In our opinion, the foregoing contention of appellants, is supported by neither reason nor authority.

3. Having heretofore reached the conclusion that upon the death of testator in 1907 George E. Sims, Lee Roy Sims, and Fannie Dunbar each became vested with the equitable title, as remaindermen, to the undivided one-seventh of the real estate owned by testator at that time, subject to the life estate and power of disposition given the widow, it necessarily follows that the deeds from

appellants to their brothers heretofore mentioned conveyed to the grantees therein named all the respective interests which said grantors owned in the real estate aforesaid, and that by reason of the foregoing they have no valid claim or title to the property in controversy. *Oldaker v. Spiking*, 210 S. W. 62, 63.

The judgment of the trial court in favor of respondents is accordingly affirmed.

WHITE and MOZLEY, CC., concur.

PER CURIAM. The foregoing opinion of RAILEY, C., is hereby adopted as the opinion of the court.

All concur.

COLLINS v. WHITMAN et al. (SIDDENS, Intervener). (No. 21397.)

(Supreme Court of Missouri, Division No. 2
June 4, 1920. Rehearing Denied
June 25, 1920.)

1. Wills ⇐629—Law favors vesting of estates at testator's death.

The law favors the vesting of estates, in the absence of an expressed intent to the contrary, at the earliest possible time, and immediately upon the testator's death.

2. Wills ⇐866—Will without residuary clause held to vest remainder in son on testator's death, subject to be divested by birth of children.

Where father's will left his estate to his wife and son for life, and on the death of both to any child or children of the son except any child or children of the son by H., the son's wife at the time of the making of the will, and the son, who, after divorce from H., married again and died after his father without children by his second wife, left by will his estate to his second wife, she took the property in which the son had a life estate under his father's will, for, as the father's will contained no residuary clause, the son, who was the father's only heir at law under the statute of descents, became vested at his father's death with the estate in remainder in the property, subject to be divested by the birth of children as provided in the will, which vested remainder passed by the son's will to his second wife.

Appeal from Circuit Court, Gentry County; John M. Dawson, Judge.

Suit by Hattie Collins against Walter Whitman and others, in which Alverda Siddens intervened. From judgment for plaintiff, the intervener appeals. Reversed and remanded, with directions.

This suit was instituted in the circuit court of Gentry county, Mo., on July 7, 1917. It is an action in ejectment to recover possession of the undivided one-half of certain

lands located in said county and described in petition. The date of ouster is named as December 8, 1916. The monthly value of the rents and profits of said premises is \$60, etc.

Defendants Walter Whitman and Fred Whitman answered, and admitted therein that they are in possession of said land. They deny every other allegation in plaintiff's petition.

Appellant, Alverda Siddens, filed in said cause, an application to become a party defendant, alleging therein that she was the owner of said real estate, and that defendants had no interest therein except as tenants, etc. Said application was sustained, and Alverda Siddens filed herein her answer and cross-bill, denying each and every allegation of petition. For further answer and cross-bill, she alleged therein that she is the owner in fee of the real estate described in petition; that the plaintiff herein claims some title, estate, and interest in said real estate, the nature and character of which is unknown to this defendant, but the latter alleges that said claim of plaintiff is adverse and prejudicial to this defendant. Thereupon the court is asked to try, ascertain, and determine, the estate, title, and interest of the parties plaintiff and defendant herein severally in and to said real estate, and to grant this defendant general relief, etc.

Other parties, upon their own application, were permitted to be joined as defendants herein. They filed an answer similar to that of defendant Alverda Siddens.

On December 19, 1917, said cause was reached for trial, a jury was waived, and the cause submitted to the court upon an agreed statement of facts. It appears from the latter that James M. Siddens, of the county aforesaid, is the common source of title, and died on June 6, 1911, the owner of the land in controversy, with other land. He left, as his only heir, a son, James Harvey Siddens. The will of James M. Siddens was probated in Gentry county, Mo., on June 15, 1911, and reads as follows:

"I, James Siddens of Gentry County, Missouri, do make and publish this my last will and testament.

"1st. I give, bequeath and devise to my beloved wife, Mary E. Siddens, and my son, James Harvey Siddens, all property, real, personal and mixed of which I may die seized or possessed, to have and to hold for and during their natural life, or so long as they or either of them may live, and at the death of either one of the said parties the whole of said estate shall pass to and vest in the survivor, whichever that may be, who shall have, hold and enjoy the same, for and during his or her natural life, and upon the death, of both my said wife and my said son, it is my will that said property shall pass to and vest absolutely in such child or children and heirs of my said son, James Harvey Siddens, as shall be born to him by any woman, save and except any child or children born of his present wife, Hattie Siddens. It is

my will that neither the said Hattie Siddens or any child or children of which she may be or become the mother shall have or receive any interests whatever, of, in or to my said estate, or any part or parcel thereof.

"I hereby appoint my wife Mary E. Siddens and my son James Harvey Siddens, my executors, without bond, of this my last will and testament.

"In witness whereof, I have hereunto set my hand this July 9, 1898. James M. Siddens."

Thereafter Mary E. Siddens, wife of above testator, filed her renunciation of the provisions of said will in her favor, and elected to take a child's part.

James Harvey Siddens was married to defendant Alverda Siddens on October 17, 1900, and no children were born to James Harvey Siddens except Opal Siddens Morrow, hereafter mentioned. James Harvey Siddens died testate in Gentry county, Mo., on March 17, 1916, and thereafter his will was admitted to probate, March 23, 1916, in which he devised and bequeathed \$5 to his daughter, Opal Siddens (now Opal Siddens Morrow), and gave all the remainder of his property, real, personal and mixed, to his wife, the appellant, Alverda Siddens. James Harvey Siddens was previously married to Hattie Bare (now Hattie Collins, the plaintiff herein), on June 21, 1898, but they never lived together as husband and wife. Opal Siddens Morrow is the only child of James Harvey Siddens and Hattie Siddens (now Hattie Collins), and was born after their marriage. On September 17, 1900, James Harvey Siddens and Hattie Siddens were divorced.

On November 14, 1916, Opal Siddens Morrow conveyed to the plaintiff, Hattie Collins, the land in controversy, with other land heretofore mentioned.

The other defendants named in this record, save and except Alverda Siddens, constitute all of the collateral heirs of James M. Siddens, they being his brother, nephews, nieces, etc.

On June 21, 1898, and prior to the divorce of James Harvey Siddens, his father, James M. Siddens, and his mother, Mary E. Siddens, made a settlement upon said Hattie Siddens, who was then his wife, by conveying to her certain real estate, and she executed a written instrument releasing the said James Harvey Siddens and his estate, and agreed therein to support and maintain the child to be born.

The defendant Alverda Siddens asked, and the court refused, four instructions, numbered 1 to 4, inclusive, which will be considered later.

On September 17, 1918, the court found the issues in favor of plaintiff, and rendered its judgment accordingly. The defendant Alverda Siddens on the date last aforesaid filed herein her motions for a new trial and in arrest of judgment. Both motions were on above date overruled, and the cause duly ap-

pealed by her to this court. None of the other defendants appeared.

D. D. Reeves, of Albany, and J. W. Perry, of Kansas City, Kan., for appellant.

Charles E. Gibbany, of Albany, and Lucian J. Eastin, of St. Joseph, for respondent.

RAILEY, C. After stating the facts as above. I. In passing upon the merits of this controversy, we must not lose sight of section 583, R. S. 1909, which reads as follows:

"All courts and officers concerned in the execution of last wills shall have due regard to the directions of the will, and the true intent and meaning of the testator, in all matters brought before them."

It is perfectly manifest, from reading the will of James M. Siddens, heretofore set out, that he intended by said instrument to dispose of all his property, real, personal, and mixed, as there is no residuary clause therein. It is equally as clear from said instrument that he did not intend thus plaintiff, or any child of hers, should take any part of his estate, which he was attempting to dispose of by his will. It is no less certain that, if the decree of the lower court in favor of plaintiff is permitted to stand, it passes the estate in controversy to the very individuals whom James M. Siddens, by the above instrument, declared should not take it. He had already made a settlement upon plaintiff for the benefit of herself and daughter, Opal Siddens Morrow, and hence provided in said will:

"That said property shall pass to and vest absolutely in such child or children and heirs of my said son, James Harvey Siddens, as shall be born to him by any woman, save and except any child or children born of his present wife, Hattie Siddens. It is my will that neither the said Hattie Siddens or any child or children of which she may be or become the mother shall have or receive any interests whatever, of, in or to my said estate, or any part or parcel thereof."

On the other hand, testator attempted to bestow upon his son, James Harvey Siddens, and his child or children, if any were born capable of receiving it, the entire estate sought to be conveyed. The mere fact that James Harvey Siddens was given a life estate by the will under the circumstances aforesaid is no indication that testator was averse to said son taking the estate in remainder at testator's death, subject to be divested should a child or children of the son be born capable of receiving the property under the will.

Keeping in mind these general observations, which should be considered in determining the merits of this controversy, we pass to other questions involved.

[1] 2. It is well settled, upon both principle and authority, that the law favors the vesting of estates, in the absence of an ex-

pressed intent to the contrary, at the earliest possible time, and immediately upon the testator's death. Jones v. Waters et al., 17 Mo. loc. cit. 589, 590; Collier's Will, 40 Mo. loc. cit. 321; Chew v. Keller, 100 Mo. loc. cit. 368, 13 S. W. 396; Byrne v. France, 131 Mo. loc. cit. 646, 647, 33 S. W. 178; Tindall v. Tindall, 167 Mo. 218, 66 S. W. 1092; O'Day v. Meadows, 194 Mo. 588, 92 S. W. 637, 112 Am. St. Rep. 542; Heady v. Hollman, 251 Mo. loc. cit. 638, 158 S. W. 19; Deacon v. Trust Co., 271 Mo. loc. cit. 687, 688, 197 S. W. 261; Henderson v. Calhoun, 183 S. W. loc. cit. 596; Huntington Real Estate Co. v. Megaree, 217 S. W. loc. cit. 303, 304; Dunbar et al. v. Sims et al., 222 S. W. 838, not yet [officially] reported; 23 Ruling Case Law, § 67, pp. 525, 526; 2 Underhill on Wills, § 861.

In Collier's Will, 40 Mo. loc. cit. 321, Judge Wagner said:

"As wills are generally dissimilar, and one can hardly be found precisely like another, cases are rarely to be met with which are directly apposite, so as to be controlling authority in any new case which may arise. But there are certain rules of law which have grown up and become firmly fixed in the interpretation of wills, which no court is at liberty to disregard, unless the language of the testator, in making the devise, plainly requires it; and one of these rules is 'but all estates shall be considered vested rather than contingent. The law is said to favor the vesting of estates, the effect of which principle seems to be that property which is the subject of any disposition, whether testamentary or otherwise, will belong to the object of the gift immediately on the instrument taking effect, or so soon afterwards as such object comes into existence, or the terms thereof will permit.' (Italics ours.)"

In the later case of Chew v. Keller, 100 Mo. loc. cit. 368, 13 S. W. 396, Judge Black, speaking for the court, said:

"The law favors vested estates, and, where there is a doubt as to whether the remainder is vested or contingent, the courts will construe it as a vested estate. * * * The expressions that they, Levin Baker and others, are not to take possession of the property devised 'until the death of Jemima Lindell,' and that 'upon her death' the devisees shall take the parts as tenants in common, all relate to the times when the devisees shall have possession, and have nothing to do with the vesting of the estate." (Italics ours.)

The other cases cited under this proposition are in full accord with the views above expressed.

(a) It is admitted that testator's wife, Mary E. Siddens, upon the death of her husband, renounced the provisions of his will giving her a life estate in said land, elected to and did take a child's part, and hence became the owner of the undivided one-half of the real estate in controversy. It is likewise admitted that testator, James M. Siddens, died in Gentry county, Mo., on June 6,

1911, leaving as his only heirs said James Harvey Siddens and Mary E. Siddens, the widow of testator. Said will was duly probated June 15, 1911. Said Mary E. Siddens and James Harvey Siddens were appointed executors without bond.

James Harvey Siddens was married to defendant Alverda Siddens on October 17, 1900. No children were ever born to said James Harvey Siddens except Opal Siddens Morrow, the daughter of plaintiff herein. James Harvey Siddens died in Gentry county, Mo., on March 17, 1916, and left a will which was duly probated, March 23, 1916. He gave his daughter, Opal Siddens Morrow, \$5 by said instrument, and conveyed all the remainder of his estate to his wife, Alverda Siddens, the appellant in this cause.

Said Opal Siddens Morrow conveyed the real estate in controversy to plaintiff by quitclaim deed on November 14, 1916.

Keeping in mind the foregoing facts and principles of law, we will proceed to a consideration of the merits involved herein.

3. According to our conception of the law which should govern this case, it is not necessary for us to enter into any extended consideration of the common law relating to estates tail nor the statutes referred to by counsel in their respective briefs; for it is conceded in the foregoing record that James Harvey Siddens simply acquired a life estate in the real estate aforesaid by the terms of his father's will.

[2] We understand respondent to contend that James Harvey Siddens, upon the death of his father, was simply a life tenant under the will of the latter; that he never acquired any other or different interest in the property here involved; that upon the death of said James Harvey Siddens, his daughter, Opal Siddens Morrow, became the owner of the undivided one-half of said real estate, as heir of her grandfather, as intestate property, under the statute, without any reference to the wills of her father and testator, and that she conveyed the interest thus inherited to this plaintiff. On the other hand, we understand appellant contends that James Harvey Siddens was given a life estate in said property by his father's will, which contains no residuary clause; that upon the death of testator James M. Siddens, the life tenant aforesaid, who was his only heir at law, under the statute of descents, became vested with the estate in remainder in said land, as intestate property, subject to be divested of same if a child or children were born thereafter, as provided in testator's will, and that said estate in remainder was never divested by the birth of any child or children by any other woman than this plaintiff, as provided in said will; that by reason of the facts aforesaid appellant became the owner of the undivided half interest in said real estate by virtue of the

will of her husband, James Harvey Siddens.

The fee-simple title to the real estate in question remained in testator up to the time of his death. Upon the happening of the last event, the son became vested with a life estate in said property. What became of the estate in remainder held by testator at the time of his death? It was known as a matter of law at that time that, if the remainder should become inoperative for want of a taker, it would still remain in existence, but become intestate property, and as such would pass to James Harvey Siddens, as the only heir at law of testator. The son did not take the remainder by virtue of the will, but took the place of his father, as heir of the latter, under the statute of descents, and continued to hold said remainder as intestate property subject to be divested on the birth of a child or children by some other woman than plaintiff. This view of the situation is clearly warranted by the authorities cited under proposition 2, supra, as it vested in James Harvey Siddens, the life tenant, as heir of his father, the remainder in said property immediately upon the death of testator, subject to be divested as aforesaid. We are of the opinion that the conclusions above announced are correct in principle, and are sustained by the decided weight of authority, some of which are as follows: *Gillilan v. Gillilan*, 212 S. W. loc. cit. 351, 352; *Peugnet v. Berthold*, 183 Mo. loc. cit. 64, 65, 81 S. W. 874; *Fearne on Remainders*, pp. 350, 354, 361, 363; 2 *Underhill on Wills*, etc., § 874, p. 1330; 23 *Ruling Case Law*, p. 518, §§ 56, 57; 23 *Ruling Case Law*, pp. 525, 526, § 67; *Bigley v. Watson*, 98 Tenn. 353, 39 S. W. 525, 38 L. R. A. 679; *Gilpin v. Williams et al.*, 25 Ohio St. 295; *Harrison v. Weatherby*, 180 Ill. 418, 54 N. E. 237; *Bond v. Moore*, 236 Ill. 576, 86 N. E. 386, 19 L. R. A. (N. S.) 540; *Messer v. Baldwin*, 262 Ill. 48, 104 N. E. 195; *Bell's Estate*, 147 Pa. 389, 23 Atl. 577; *In re Kenyon*, 17 R. I. 149, 20 Atl. 294; *Rand v. Butler*, 48 Conn. 293; *Gilman v. Stone*, 123 Ky. 137, 94 S. W. 28; *Coots v. Yewell*, etc., 95 Ky. 367, 25 S. W. 597, 26 S. W. 179; *Stokes et al. v. Van Wyck et al.*, 83 Va. 724, 3 S. E. 387; *Loring v. Elliot et al.*, 16 Gray (Mass.) 568, 574; *Craig v. Warner*, 5 Mackey (D. C.) 460, 60 Am. Rep. 381.

We have read with a great deal of interest all the authorities cited in the respective briefs, as well as numerous others referred to in those cited, and feel satisfied with the conclusions heretofore stated. In *Gillilan v. Gillilan*, 212 S. W. pp. 351, 352, Judge Bond, speaking for the court in banc, said:

"The only remaining question presented by this appeal is: What became of the estate remaining in Nathan Gillilan (which he had specifically devised in clause 5 of his will) upon defeat of that devise for lack of heirs thereafter born to George Gillilan, thereby causing a

lapse of the contingent remainder to such heirs? In the solution of this question only two views are possible: First, that such a reversion in Nathan Gillilan passed to his descendants as in case of intestacy; second, that it was conveyed by the residuary clause of the will *supra*. The latter is the view taken by the learned trial court, and is the view taken as a *dernier resort* by appellant Gratia Gillilan (as shown in her brief) in case this court should take, as it does, the view that clause 5 of the will created an estate tail special at common law, which was changed by the statute into a life estate in the tenant in tail with a contingent remainder in fee in certain subsequent heirs of the body of the life tenant. In considering this question it must be realized that Nathan Gillilan had a right, not a mere possibility, of reversion after carving out so much of his estate as was devised through the instrumentality of clause 5 of the will. The reversion so inhering in him was the proper subject of a grant by clause 9 of his will if he so desired; otherwise it would descend to his heirs at law under the statute of descents and distribution as in case of intestacy."

Respondent contends that the above case is not in point, because Nathan Gillilan did not in terms create a life estate in his son George, but it was placed there by the statute. This distinction does not impress us as being sound. The court disposed of the case on the theory that George simply took a life estate, as did James Harvey Siddens in this case. If there had been no residuary clause in the Gillilan will, it is plain from what is said *supra* that the court, in construing said will, would have arrived at the same conclusion reached by us in the present case.

Whether considered upon principle or authority, we are satisfied that the trial court reached an erroneous conclusion in its disposition of this case. We accordingly reverse and remand the cause, with directions to the trial court to set aside its decree, and to enter a judgment in behalf of appellant, declaring her to be the absolute owner of the real estate in controversy.

WHITE and MOZLEY, CO., concur.

PER CURIAM. The foregoing opinion of RAILEY, C., is hereby adopted as the opinion of the court. All concur.

STATE ex rel. MOBERLY SPECIAL ROAD DIST. OF RANDOLPH COUNTY v. BURTON et al., Judges. (No. 21169.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

1. Mandamus \Rightarrow 187(7)—Mode of presentation on appeal of error in overruling demurrer to return stated.

On appeal in a proceeding for mandamus, wherein a demurrer to the writ has been inter-

posed, the alternative writ, the return thereto, the demurrer to the return, and the judgment constitutes the record proper, and neither motion for new trial, motion in arrest, nor bill of exceptions is necessary to present errors in overruling such a demurrer.

2. Mandamus \Rightarrow 121—Mandamus held to lie to compel county to pay to special road district taxes collected therein.

Under Acts 1917, pp. 457, 458, §§ 36, 37, relating to the levy and apportionment of road taxes where the county court has levied 10 cents on the \$100 valuation of all taxable property for road purposes, mandamus will lie to compel them to pay over the fund so collected to the special road district upon the property of which the tax has been levied, since under first proviso of section 37 all taxes collected by virtue of Const. art. 10, § 11, under section 36 of the act on the property of a special road district must be applied to its credit, although such proviso does not apply to special road and bridge taxes levied under section 37 and Const. art. 10, § 22.

Williams, P. J., dissenting.

Appeal from Circuit Court, Randolph County; A. W. Walker, Judge.

Mandamus by the State, on the relation of Moberly Special Road District of Randolph county, against G. B. Burton and others, Judges of the County Court, to pay over certain road and bridge taxes. Judgment for defendants, and petitioner appeals. Reversed and remanded, with directions.

On April 24, 1918, there was filed in the circuit court of Randolph county, Mo., by the Moberly special road district of said county, a petition for mandamus against respondents, G. B. Burton, A. B. McCoy, and C. P. Fullington, qualified and acting judges of the county court of said county. The petition alleges that it was the duty of said county court, at its regular May term, 1917, held on the fourth Monday in May, 1917, to fix and determine the amount of the various tax levies on all property, both real and personal, subject to state, county, school, and road taxes, within the limits of said Randolph county Mo.; that, in compliance with their said duties, the judges of the county court aforesaid, at its May term, 1917, levied, among other things, 10 cents on the \$100 valuation, on all property in Randolph county aforesaid, for road and bridge purposes, in addition to the levy for special road and bridge purposes. The petition avers that it was the duty of said county court to cause all that portion of said levy of 10 cents on the \$100 valuation collected for general road and bridge purposes within the territorial boundaries and limits of said Moberly special road district to be turned over to the officers of the Moberly special road district of Randolph county, Mo.

It is further averred that there had been

collected in the way of taxes on said levy of 10 cents on the \$100 valuation, on property lying within the territorial limits of said special road district, for the year 1917, and paid into the county treasury, the sum of \$4,066.40; that the same is now in said treasury of Randolph county, Mo.; that it was paid on real and personal property within said special road district, as road and bridge taxes, under the provisions of section 36 of article 2, Session Acts of Missouri, of 1917, p. 457.

The petition avers that on February 25, 1918, said special road district requested said county court to issue to it and its officers a warrant to the amount of \$4,066.40 so collected on all property lying within the territorial limits of said special road district as road and bridge taxes; that requests and demands were made before said moneys were distributed or paid out by said county court.

It is further alleged that said county court refused to turn over or pay to said special road district, or to its officers, the said \$4,066.40, or any part thereof, but said judges of the county court aforesaid have refused to pay over, or cause to be paid, any of said road and bridge taxes, etc.

The petition concludes with a prayer for a writ of mandamus against the county court judges aforesaid, requiring them and said county court to issue proper warrants, and pay over to said special road district the said levy of road and bridge taxes collected on property within said special road district in Randolph county, Mo., for the year 1917, amounting to \$4,066.40, etc.

Respondents filed their return, and denied all the allegations of petition except such as are specifically admitted to be true. They admit that the Moberly special road district of Randolph county, Mo., is organized and exists according to law; that said respondents, Burton, McCoy, and Fullington, are the duly elected, qualified, and acting judges of the county court of said county. They admit that it was the duty of said judges to fix and determine the tax levy, as set forth in above petition. They admit that there has been collected in the way of taxes on property lying within the territorial limits of said special road district of Randolph county, Mo., for the year 1917, and paid into the county treasury, \$4,066.40, as set forth in petition and alternative writ. They admit that on February 25, 1918, said special road district requested said county court to pay over to said Moberly special road district, and before said moneys were distributed, the said sum of \$4,066.40. They admit that said county court refused to pay said sum so collected as aforesaid or any part thereof to said special road district, and still refuse so to do.

Said return further avers that a writ of mandamus ought not to issue herein, for the

reason that section 10594, R. S. 1909, as amended by section 1 of Acts of Missouri, of 1913, p. 675, is repealed by section 166 of Acts of Missouri, of 1917, p. 477, and for the further reason that, under the law as it now stands, it is optional and discretionary with said county court, as to paying the taxes collected and set forth in petition to the commissioners of said special road district, and, the county court having exclusive jurisdiction thereof having acted in the matter, the circuit court ought not by mandamus to compel said county court to reverse its decision, etc.

Appellant demurred to said return for the reason "that it appears upon the face thereof that the same does not state facts sufficient to constitute a defense, nor show any cause whatever for not obeying said writ."

On April 24, 1918, said demurrer was overruled. Appellant stood upon its demurrer and refused to plead further. Thereupon the issues were found in favor of respondents, and on April 24, 1918, judgment was entered accordingly. Appellant, in due time, appealed the cause to this court.

Willard P. Cave, of Moberly, for appellant.

Aubrey R. Hammett, of Moberly, for respondents.

RAILEY, C. (after stating the facts as above). [1] 1. As a matter of precaution, counsel for appellant filed a motion for a new trial, motion in arrest of judgment, and a bill of exceptions. In this case, the alternative writ, the return thereto, the demurrer to said return, and the judgment constituted the record proper. No motion for a new trial, motion in arrest of judgment, nor bill of exceptions were necessary in order to present to this court the errors complained of herein. *Spears v. Bond*, 79 Mo. 467; *Hannah v. Hannah*, 109 Mo. 236, 240, 241, 19 S. W. 87; *State ex rel. v. Campbell*, 120 Mo. loc. cit. 403, 25 S. W. 392; *Thorp v. Miller*, 137 Mo. 231, 38 S. W. 929; *McKenzie v. Donnell*, 151 Mo. 431, 52 S. W. 214; *Benton County v. Morgan*, 163 Mo. loc. cit. 670, 64 S. W. 119; *Mallinckrodt Chemical Works v. Nennich*, 169 Mo. loc. cit. 395, 69 S. W. 355; *Dysart v. Crow*, 170 Mo. loc. cit. 280, 70 S. W. 689; *Meissner v. Railway Equipment Co.*, 211 Mo. loc. cit. 121, 122, 109 S. W. 730; *State v. Christopher*, 212 Mo. loc. cit. 246, 110 S. W. 697; *Shohoney v. Railroad*, 223 Mo. loc. cit. 659, 660, 122 S. W. 1025; *Houtz v. Hellman*, 228 Mo. 655-663, 128 S. W. 1001; *Diener v. Chronicle Publishing Co.*, 230 Mo. loc. cit. 619, 620, 132 S. W. 1143.

2. After spending three days investigating the laws of this state as they existed prior to 1917 in regard to the status of special road districts, we have reached the conclusion that appellant is entitled to maintain this

action, unless it is precluded from so doing by the provisions of sections 36 and 37 of Acts of 1917, pp. 457-458, relied upon by respondents. It is contended by the latter that the last-named act, in legal effect, if not in terms, repeals the former laws upon this subject. Waiving the above contention for the present, we will first determine whether appellant is entitled to recover upon the record before us under the act of 1917 *supra*. If answered in the affirmative, there will be no necessity for passing upon the former question.

Respondents in their return "admit that there has been collected in the way of taxes on property lying within the territorial limits of said Moberly special road district of Randolph county for the year 1917, and paid into the county treasury the sum of \$4,066.40 as set forth in plaintiff's petition and alternative writ; admit that petitioner on the 25th day of February, 1918, requested said county court to pay over to said Moberly special road district, and before said moneys were distributed, the said sum of \$4,066.40; admit that said county court has refused to pay said sum so collected as aforesaid or any part thereof to said Moberly special road district, and that they still refuse so to do." They take the position that it is optional and discretionary with said county court as to whether it will pay to the special road district the tax collected and set forth in the above return, and that, as the county court had jurisdiction over this matter, and acted in regard to same, its decision should not be reversed.

Sections 36 and 37 of Acts of 1917, pp. 457-458, read as follows:

"Sec. 36. *County Court to Levy Road Tax—When.*—The county courts in the several counties of this state, having a population of less than two hundred and fifty thousand inhabitants, at the May term thereof in each year, shall levy upon all real and personal property made taxable by law, a tax of not more than twenty cents, nor less than ten cents on the hundred dollars valuation, as a road tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the 'county road and bridge fund.'

"Sec. 37. *Special Tax How Levied—Collected and Disbursed.*—In addition to the levy authorized by the preceding section, the county courts of the counties of this state, other than those under township organization, in their discretion may levy and collect a special tax not exceeding twenty-five cents on each one hundred dollars valuation, to be used for road and bridge purposes, but for no other purposes whatever, and the same shall be known and designated as the 'special road and bridge fund' of the county: [Provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any road district, shall be paid into the county treasury and placed to the credit of the special road district, or other road dis-

trict, from which it arose, and shall be paid out to the respective road districts upon warrants of the county court, in favor of the commissioners, treasurer or overseer of the district as the case may be.] Provided, further, that the part of said special road and bridge tax arising from and paid upon property not situated in any road district, special or otherwise, shall be placed to the credit of the 'county road and bridge fund' and be used in the construction and maintenance of roads, and may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village; but no part of said fund shall be used to pay the damages incident to, or costs of, establishing any road."

(Italics ours.)

It will be observed from reading section 36, in connection with the first proviso mentioned in section 37 (placed in brackets by way of convenience), that all the tax which is collected from property lying within any road district shall be paid into the county treasury, and placed to the credit of the said district, etc. That part of section 37 contained in the above proviso is valid to the extent of requiring all tax collected by virtue of section 11 of article 10 of the Constitution, under section 36, *supra*, on property within the special road district, to be applied to the credit of the latter. Said proviso, however, cannot legally apply to the special road and bridge taxes levied under section 37, *supra*, and section 22 of Article 10 of our Constitution, adopted in 1908, which reads as follows:

"Sec. 22. *Special Road and Bridge Tax.*—In addition to taxes authorized to be levied for county purposes under and by virtue of section 11, article 10 of the Constitution of this state, the county court in the several counties of this state, not under township organization, and the township board of directors in the several counties under township organization, may, in their discretion, levy and collect, in the same manner as state and county taxes are collected, a special tax not exceeding twenty-five cents on each \$100 valuation, to be used for road and bridge purposes; but for no other purpose whatever; and the power hereby given said county courts and township boards is declared to be a discretionary power." (Italics ours.)

Under this section of the Constitution, the county court had the right to levy, in addition to the 10 cents described in section 36, a special road and bridge tax of 25 cents on each \$100 valuation, under section 37. Section 22 of the Constitution did not vest in the Legislature the power to compel the county court to levy said 25 cents or any part of same. On the contrary, the county court is given a discretionary power in respect to said matter. This, however, does not relieve

the county court from levying a tax for road purposes of not more than 20 cents nor less than 10 cents on the \$100 valuation, which is to be collected from the property in the special road district by virtue of section 36, supra, under section 11 of article 10 of our Constitution.

This whole subject was fully considered in an able and exhaustive opinion of the other division in *Carthage Special Road District of Jasper County v. J. C. Ross et al.*, 270 Mo. 76 and following (192 S. W. 976), in which the various provisions of our laws were considered, as they existed prior to 1917. We are of the opinion that the principles of law announced in the above case apply with equal force to a reasonable construction of sections 36 and 37 of the Laws of 1917.

[2] It appears from the record that the county court of Randolph county, Mo., in May, 1917, levied 10 cents on the \$100 valuation of all the taxable property in said county for road purposes, that by virtue of the first proviso contained in section 37, supra, the 10 per cent. collected on all of said taxable property contained in the Moberly special road district was properly paid into the county treasury of said county, and belonged to said special road district. It being conceded that the above amount collected for that purpose was \$4,066.40, and due demand having been made for said sum, the right of relator to enforce the payment of same by mandamus was clearly established. We are therefore of the opinion that the trial court reached an erroneous conclusion as to the disposition of this case.

We accordingly reverse and remand the cause, with directions to the trial court to set aside its judgment, and to dispose of the case in accordance with the views heretofore expressed.

WHITE and MOZLEY, CC., concur.

PER CURIAM. The foregoing opinion of RAILEY, C., is hereby adopted as the opinion of the court.

All concur, except WILLIAMS, P. J. who dissents.

STATE v. LINTON. (No. 21938.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

1. Criminal law §170 — That defendant was misnamed in information did not affect question of former jeopardy.

Where information was intended to charge defendant with a crime, and where defendant was arrested and entered his plea thereunder

the fact that he was incorrectly named did not affect question of whether he was put in jeopardy by such prosecution so as to bar a prosecution under an amended information in which he was similarly named, in view of Rev. St. 1909, § 5113.

2. Criminal law §170—Information, charging person other than defendant, not basis for former jeopardy plea.

Information, charging person other than defendant with the crime, cannot be used as the basis of a plea of former jeopardy.

3. Criminal law §200(4) — Prosecution for unlawfully keeping, etc., liquor a bar to prosecution for sale based on same transaction.

Prosecution for unlawfully keeping, storing for and delivering to another person, intoxicating liquor is a bar to another prosecution for unlawful sale, based upon the same transaction.

4. Criminal law §180—Defendant put in jeopardy when information is nolle after jury is sworn.

Where information in two counts was nolle after jury had been sworn upon discovery that first count was defective in charging person other than defendant with the crime, the fact that the second count was nolle barred subsequent prosecution, defendant having been placed in jeopardy, notwithstanding Const. art. 2, § 23, providing that person shall not be again put in jeopardy after being "acquitted" by jury of same offense; such constitutional provision not changing common-law rule that a defendant is put in jeopardy when jury is sworn, in view of Rev. St. 1909, § 8047.

Appeal from Circuit Court, Dunklin County; W. S. C. Walker, Judge.

A. E. Linton was convicted of violating the local option law, and he appealed to Court of Appeals, from which the case was transferred to the Supreme Court (217 S. W. 874). Reversed, and defendant discharged.

Defendant was convicted and fined in the sum of \$300 in the circuit court of Dunklin county upon an amended information which charged him with a violation of the local option law, in that he unlawfully sold one pint of whisky in Dunklin county, in which the local option law was in full force and effect. The defendant was charged and arrested under the name of William Linton. Upon the trial defendant filed a plea of autrefois acquit, alleging, in substance, that he had before been placed in jeopardy for the identical crime.

The facts upon which the former jeopardy arises are admitted, and may be briefly summarized as follows: On December 14, 1918, the prosecuting attorney of Dunklin county filed an information in the circuit court of that county against William Linton. The information was in two counts, but by some

mishap, the reason for which does not appear in this record, the first count charged one William Sharp with the unlawful sale of one pint of whisky on December 13, 1918, in Dunklin county, in violation of the local option law. The second count charged William Linton with having violated said local option law on December 13, 1918, by unlawfully keeping, storing for and delivering to another person, one pint of whisky. It is admitted that defendant, A. E. Linton, was arrested under this first information, and gave bond thereunder, and when the case was called for trial under the first information on January 14, 1919, defendant, A. E. Linton, appeared and answered ready for trial. Thereupon a jury was selected and sworn to try the cause. Shortly thereafter the prosecuting attorney discovered the mistake in the first count of the information, and entered a nolle prosequi in said cause, and the jury was discharged over the protest, objection, and exception of the defendant. Thereafter and on the same day the said prosecuting attorney filed the amended information upon which the present trial was had.

It stands conceded by this record that both of these informations undertook to charge a crime based upon the identical transaction. In other words, there is evidence tending to show that defendant did violate the local option law by selling said pint of whisky in said county, and in so doing, and as part of the transaction, he delivered said pint of whisky, also in violation of said local option law.

The defendant was granted an appeal to the Springfield Court of Appeals, but that court, in an opinion rendered, transferred the case here, on the theory that a constitutional question was involved, in that the cause involved the construction of article 2, § 23, of our Constitution, which deals with the subject of former jeopardy.

Hall & Billings, of Kennett, for appellant.
Frank W. McAllister, Atty. Gen., and O. P. Le Mire, Asst. Atty. Gen., for the State.

WILLIAMS, P. J. (after stating the facts as above). [1] I. The fact that defendant, A. E. Linton, was named as William Linton in the respective informations does not in any manner affect the question of former jeopardy. It is admitted that defendant A. E. Linton, was the person intended in both informations, and that he was the person who in fact was arrested and entered his plea in both instances. Whenever a defendant is indicted by his wrong name, and does not call the trial court's attention to his correct name before pleading, he is to be proceeded against by the name in the indictment. Section 5113, R. S. 1909.

II. It stands conceded that the second count of the original information and the amended information each charge a crime growing out

of one and the same criminal transaction. In other words, the unlawful delivery charged in the second count of the original information is but a part of the transaction going to make up the unlawful sale charged in the amended information.

[2] We have no hesitancy in saying that the first count of the original information cannot be used as the basis of a plea of former jeopardy because upon its face it charges no crime against the defendant.

[3] But under the second count of the original information, defendant is charged with an unlawful delivery of this one pint of whisky. The case was called, the parties announced ready for trial, and a jury was selected and sworn to try the cause, and thereafter, over the objection and exception of defendant, the prosecutor entered a nolle prosequi, and the jury was discharged. Under a recent ruling of the Springfield Court of Appeals, had the trial proceeded to an acquittal or conviction upon the second count of the original information, it would have been a complete bar to another prosecution for the unlawful sale, based upon the same transaction which forms the basis of the charge in the amended information. *State v. Needham*, 194 Mo. App. 201, 186 S. W. 585. We think the above ruling of the Court of Appeals is sound, and is in harmony with the greater weight of authority. *Kelley's Criminal Law and Practice* (3d Ed.) par. 237, p. 194; 8 R. C. L. 143; 16 C. J. 279.

[4] If it be true, as above stated, that a conviction or acquittal under the second count of the original information would be a complete bar to a prosecution under the amended information, then there is no escape from the conclusion that defendant was placed in jeopardy under the second count of the original information when the jury was sworn. This is the well-established rule at common law. *State v. Webster*, 206 Mo. 558, loc. cit. 571, 105 S. W. 705; *State v. Hays*, 78 Mo. 600, loc. cit. 606; 8 R. C. L. 138, 139, and cases therein cited; 16 C. J. 236 and cases therein cited.

III. Although it be conceded that the defendant has been once before in jeopardy for the same offense, is he entitled to be discharged by reason thereof, and, if so, by what authority of law? Section 23 of article 2 of the Missouri Constitution is as follows:

"That no person shall be compelled to testify against himself in a criminal cause, nor shall any person, after being once acquitted by a jury, be again, for the same offense, put in jeopardy of life or liberty; but if the jury to which the question of his guilt or innocence is submitted fail to render a verdict, the court before which the trial is had may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the next term of court, or, if the state of business will permit, at the same term; and if judgment be arrested after a verdict of guilty on a defective indictment, or if judgment on a

verdict of guilty be reversed for error in law, nothing herein contained shall prevent a new trial of the prisoner on a proper indictment, or according to correct principles of law." (*Italics ours.*)

We are of the opinion that the above constitutional provision has no real application to the situation now held in judgment. The Constitution says:

"Nor shall any person, *after being once acquitted by a jury* be again for the same offense put in jeopardy for life and liberty," etc.

The defendant in the instant case was not acquitted by a jury, and hence we are unable to see in what manner the constitutional provision can be held to apply. The language of the Constitution is clear and unequivocal, and we know of no reason why it should not be construed as it reads.

There seems to have arisen some confusion on the question of former jeopardy, and our own reports are not entirely free from criticism along this line. After carefully reviewing many of the cases upon the subject we are led to the belief that this confusion arises by reason of failing to call to mind that the law of former jeopardy first arose under the common law (8 R. C. L. 134, 135), and that in some state Constitutions and in the federal Constitution the old common-law rule that no person shall for the same offense be twice put in jeopardy of life or limb was incorporated in its entirety, while in other state Constitutions, notably that of Missouri, apparently only a portion of the common law on the subject was incorporated (and thereby removed from legislative interference).

But it goes without saying that the common law as to former jeopardy is in effect in this state, unless the same has been changed or modified by the Constitution or by statutory enactment. Section 8047, R. S. 1909. The fact that a portion of the common law on this subject was written into our Constitution should certainly not be given the effect of having repealed the remaining portion of the common law on the subject, unless the constitutional provision should be found to be in conflict therewith. Section 8047, *supra*.

The common-law general rule applicable to the situation now held in judgment was quoted with approval by this court from Cooley on Constitutional Limitations in the case of

State v. Webster, 206 Mo. 558, loc. cit. 571, 105 S. W. 705, 708, as follows:

"A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance. And a jury is said to be thus charged when they have been impaneled and sworn. The defendant then becomes entitled to a verdict which shall constitute a bar to a new prosecution; and he cannot be deprived of this bar by a *nolle prosequi* entered by the prosecuting officer against his will, or by a discharge of the jury and continuance of the cause."

There are certain well-known exceptions to this general rule, and a large number of them will be found discussed in the learned opinion by Faris, J., in State v. Buente, 256 Mo. 227, loc. cit. 241, 165 S. W. 340, Ann. Cas. 1915D, 879, but none of the exceptions are applicable to the case at bar. Some of these exceptions are exceptions recognized by the common law, and others are exceptions created by statute, as was the situation held in judgment in the case of State v. Buente, *supra*. The statutory exception in the Buente Case was held not to conflict with the above-mentioned provision of our state Constitution, which is further persuasive proof that our constitutional provision was not intended to supply all the law on the subject, but only to save from legislative change that portion which was permanently preserved by the constitutional mandate, leaving the Legislature free to act upon such portions of the law of former jeopardy as was not included in the constitutional provision.

We find no statute in this state which changes or conflicts with the above-mentioned general rule of the common-law applicable to the facts in the case at bar. That being true, the rule should be considered as remaining in full force and effect. Applying said rule to the facts held in judgment in the case at bar, it clearly appears that defendant was placed in jeopardy under the second count in the original information, and that the same constitutes a bar to a prosecution under the amended information. Such being the case, defendant's plea of former jeopardy should have been sustained.

It therefore follows that the judgment must be reversed, and the defendant discharged. It is so ordered.

All concur.

CARSON et al. v. HECKE et al. (No. 20826.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1920.)

1. Partition \S 111(1)—Tenant by curtesy, not a party, not entitled to participate in proceeds of sale.

A tenant by curtesy who was not a party to a partition proceeding was not entitled to participate in the proceeds of a sale; his curtesy being neither sold nor bought at such sale, but only the interests and estates of the parties, even though made a party defendant on petition after the sale.

2. Curtesy \S 11(1)—Acceptance of portion of proceeds of partition by tenant by curtesy estops asserting of curtesy interest.

An acceptance by a tenant by the curtesy, who was not a party to a partition action, of a portion of the proceeds of a sale awarded to him, would estop him to assert the curtesy interest thereafter.

3. Appeal and error \S 1201(7)—Judgment ordering distribution of proceeds of sale in partition open for correction of errors after appeal from final judgment.

An appeal having been taken from a final judgment ordering distribution of the proceeds of a sale in a partition proceeding, the proceeding is still open for the correction of errors, including a defect of parties.

4. Partition \S 46(1)—All persons interested in lands required to be made parties.

Following the practice of equity courts, Rev. St. 1909, §§ 2561, 2562, 2572, require every person interested in land sought to be partitioned to be made a party and his interest set out in the pleadings and determined by the judgment.

5. Appeal and error \S 187(3)—Omission of interested parties in partition suit calls for reversal on appeal.

If the omission of interested parties in a partition suit is passed over in the trial court, the general practice is to reverse the judgment on appeal.

6. Partition \S 13—Tenant by curtesy may not sue for partition if not a tenant in common.

The statutory authority given for an action for partition by a tenant by curtesy relates only to estates held in common.

7. Partition \S 12(2)—Joint or cotenants for life may have partition.

Joint or cotenants for life may have partition between themselves.

8. Partition \S 12(5)—Partition impossible between life tenants and remaindermen except by statutory authority.

Except by statutory authority, compulsory partition is impossible between life tenants, whether by the curtesy or otherwise, and remaindermen or reversioners.

9. Partition \S 12(5)—Statutes do not authorize compulsory partition between life tenants and remaindermen.

The statutes relating to compulsory partition do not authorize compulsory partition between life tenants, by the curtesy or otherwise, and remaindermen or reversioners.

10. Partition \S 12(5)—May be had between life tenants and remaindermen by consent.

Partition between life tenants, by the curtesy or otherwise, and remaindermen or reversioners may be granted, if all the parties consent.

11. Partition \S 22—Minors cannot consent to partition.

Minors are incapable of consenting to a partition between life tenants and remaindermen.

12. Partition \S 22 — Insane persons cannot consent to partition.

Insane persons cannot consent to partition between life tenants and remaindermen or reversioners.

13. Infants \S 73—Incumbent on court to protect rights in partition proceedings.

It is incumbent on the courts to protect the legal rights of minors in proceedings for partition of land.

14. Partition \S 12(4)—Division when minors held interest.

Although partition of real property may be ordered and the statutory provision for a sale enforced if the property is not susceptible of division in kind notwithstanding minors hold an interest, such rule governs only the cases in which the remedy by partition is allowed, namely, when the interests to be separated are of a joint or common kind, and not where a life tenancy by curtesy or otherwise incumbers the fee, notwithstanding Rev. St. 1909, § 8499, regarding mortality tables and directing their use.

15. Life estates \S 27(1)—Statutes regarding mortality tables do not extend authority of courts to adjudge money to life tenant in lieu of estate.

Rev. St. 1909, § 8499, regarding the mortality tables and directing their use, does not extend the authority of the courts to adjudge money to a life tenant, by curtesy or otherwise, in lieu of his estate in instances or under circumstances theretofore unauthorized, but prescribes a mode to compute the value of his interest when according to the settled law this may be done.

Error to Circuit Court, Charlton County; Fred Lamb, Judge.

Suit by Louisa J. Carson and others against George T. Hecke and others to partition land. After sale of land under judgment and report by sheriff, John S. Lane filed a petition to be made a defendant in the proceedings. From a subsequent judgment ordering a distribution, George T. Hecke and others bring error. Reversed and remanded.

S. A. Davis, of Brunswick, and Ed. M. Yates, of Kansas City, for plaintiffs in error.
Roy W. Rucker, of Sedalia, O. P. Ray, of Keytesville, and John S. Lane, for defendants in error.

GOODE, J. This action was filed to have partitioned two parcels of land inherited by the parties as heirs of Annie E. Lane, who died intestate March 29, 1915. The facts of the case up to the interlocutory judgment rendered by the circuit court are stated well in that judgment, which, omitting caption, reads as follows:

"Now on this the 21st day of September, 1916, this [cause] coming on to be heard, and it appearing that all of the defendants have been served by process except Perry Keith, who has since entered his appearance as defendant in this cause by answer filed.

"And the court finds that it has jurisdiction of the subject and defendants herein.

"Wherefore the cause is submitted to the court upon the petition of plaintiff, the answer of Gilbert Lamb, as guardian ad litem of Emittie Roesen, a person of unsound mind, and answer of A. W. Johnson, guardian ad litem of Lonnie S. Hecke, Ruby M. Hecke, Clara Z. Hecke, Lillie B. Hecke, and Harry L. Hecke, minor heirs of Louis Hecke, deceased, and interpleader of Allie Drace, as administrator of Louis Hecke, deceased, and the answer of Willie A. Hecke, Laura Hecke, George T. Hecke, Alice V. Hecke, Sarah Keith, and Perry Keith, filed in this court, and the evidence of plaintiffs' witnesses in support thereof, all of which was heard, seen and considered by the court, and the court finds from the pleadings and evidence:

"That Mrs. Anna E. Lane died on the 29th day of March, 1915, intestate, leaving as her sole heirs George Hecke, Louis Hecke, Robert Hecke, Louisa J. Carson, Sarah W. Keith, and Mrs. E. A. Roesen.

"That subsequent to the death of said Anna E. Lane one of her said heirs, namely, Louis Hecke, died intestate, leaving surviving him as his sole heirs the following named parties, namely: His widow, Sopha Hecke, and the following named children: Lonnie S. Hecke, Ruby M. Hecke, Clara Z. Hecke, Lillie B. Hecke, Willie A. Hecke, Mamie Wilhelm, Leonora Rodgers, Rody C. Gotchalk, Denver Hecke, Theodore Hecke, and Harry L. Hecke—and that Allie Drace has been appointed and qualified as administrator of the estate of Louis Hecke, deceased.

"The court further finds that said Annie E. Lane at the time of her death was the owner in fee simple of the following tracts or parcels of land; 90 acres being 15 acres off the south end of 70 acres, the west side of the northeast quarter; 10 acres off the west side of the southeast quarter of the northeast quarter; also 5-acre strip off of the east part of the southwest quarter of the northeast quarter, and 60 acres being the east half of the west half of the southeast quarter and part of the west half of the east half of the southeast quarter, all of section 32, township 53, range 19, Chariton county, Mo.

"The court further finds that Louisa J. Car-

son, plaintiff, and George Hecke or his assignee, Alice Hecke, Robert Hecke, Sarah W. Keith, Emittie Roesen are each entitled to one-sixth of said real estate, and that the estate of Louis Hecke, deceased, combined are entitled to one-sixth part of said real estate.

"That plaintiff and said defendants are tenants in common and are severally entitled to moiety of said estate as specified aforesaid, and as such tenants in common are of right entitled to partition of the real estate aforesaid, but that, owing to the character and location of said real estate and number of parties, partition in kind cannot be had without great prejudice to the rights of all parties in interest.

"The court further finds that Messrs. Benecke & Benecke and F. C. Sasse, Esq., have been employed by plaintiff as attorneys and to be allowed a reasonable compensation for their services herein to be taxed up as cost in this proceeding. Wherefore, the premises considered and the court being fully advised, the court doth find and decree and adjudge that prayer for partition of said land be granted, and that it is decreed and adjudged by the court that the lands be sold by the sheriff at public sale for terms cash in hand, and that after deducting the cost of proceedings the proceeds be divided in accordance with this decree, and that the share to which Louis Hecke would have been entitled to if living shall be paid to the administrator of his estate, and the cause to be continued to await the report of the sheriff."

The sheriff of Chariton county reported February 6, 1917, that he had sold the land at public auction to the highest bidders, in compliance with the aforesaid judgment, the parcel of 15 acres having been bought by William and Charles A. Susawind for \$2,100, the other tract of 60 acres by Robert H. Hecke, one of the defendants, for \$4,200 and the purchase money for both tracts had been paid. About a month after this report was filed, and on March 10, 1917, John Lane filed a petition to be made a defendant in the proceeding, alleging he was the widower of Anna E. Lane, deceased, and entitled to a curtesy interest in the lands, that he had not theretofore been made a party and had had no notice of the suit for partition until after the judgment was rendered and the lands sold, that he was willing to accept in lieu of his curtesy interest a gross sum in cash to be computed under the mortality tables of the state, concluding with a prayer to be made a defendant, for the court to ascertain the extent of his interest in the land and its value according to said mortality tables, and that the value be paid him in lieu of his life estate. He made no averment about being in possession, and the conclusion to be drawn from the record is that he was not, but instead the parties plaintiff and defendant who are disputing the validity of his claim of a curtesy interest.

Omitting to notice some intermediate proceedings which are immaterial on this appeal, the following appear in the record: First, a

demurrer to the intervening petition of Lane was filed by all the defendants and overruled; then, on October 17, 1917, George T. Hecke, Alice Hecke, Sarah W. Keith, and Perry Keith, four of the defendants, filed an answer to Lane's petition, denying he was entitled to a gross sum in cash out of the proceeds of the land in lieu of an estate by curtesy, and praying the petition be dismissed.

The evidence taken on the issues raised by the petition and the answer to it was intended to support the contention of the parties that Lane had forfeited his curtesy by deserting and failing to provide for his family. The facts, in substance, were: John and Anna Lane, the deceased, were married in 1873, and from two to four years thereafter a daughter, Emmitt Lane, who afterwards became Emmitt Roesen, was born of the marriage. In 1877 or 1878 Lane abandoned his wife and lived with her no more. During the years of his absence he stayed for various periods in Linn county, Mo., Ft. Worth, Tex., Wichita, McPherson county, Emporia, Dodge City, and Topeka, Kan., Seneca, Mo., Castle Rock, Cripple Creek, and Leadville, Colo., Pleasant Valley, Utah, and perhaps in other places. When he left home he took his daughter with him, kept her a few months, and then his wife took charge of her. It is not shown that a divorce ever was granted to either spouse, and presumably they continued to be husband and wife until the wife died. Neither does the record state the relationship of the parties to the action to Mrs. Lane, and it is rather vague about whether Lane's whereabouts after he left home were known to his wife and her heirs, but some of the parties knew he was living at least for a good portion of the period of his absence. George Hecke testified he had not heard from him in 18 or 20 years; but he testified, too, that his (Hecke's) father-in-law told him of seeing Lane in Seneca, Mo., but not the year when he saw him. Lane testified he returned to Brookfield, Mo., in 1900, and was in Linn county that winter with his brother, near Brookfield.

The court below on October, 5, 1917, in passing on the issues raised by Lane's petition and the answer to it, found Lane was the widower of Annie E. Lane, and Emmitt Lane (afterwards Emmitt Roesen) was their daughter; that Lane was 63 years old, was not a party to the partition suit, but was entitled to an estate by curtesy in the proceeds of the sale of the aforesaid lands. Other findings in the judgment, and the judgment itself, are as follows:

"The court further finds that there is now in the hands of the sheriff of this county for distribution among the heirs and legal representatives of the said Annie E. Lane, arising from said partition suit, the sum of \$5,737.35, and that the cost incident to this motion is \$20.50, and that the present cash value of the

rest of the said John S. Lane in said fund,

computed under the mortality tables of this state, is \$2,646.

"The court further finds that since the death of the said Annie E. Lane there has been collected in rents from the said lands so sold in partition the sum of \$350, no part of which has been paid to the said John S. Lane, but all of the same has been paid to the descendants of the said Annie E. Lane, and that in addition thereto the defendant Robert Hecke owes as rent from said lands the further sum of \$160, and making in all the sum of \$510 in rents from said lands, which belongs absolutely to the said John S. Lane, as tenant by the curtesy, all of which rents should be charged to the descendants of the said Annie E. Lane, in proportion to which they owe the same.

"It is therefore ordered and adjudged and decreed by the court that said sum of \$5,737.35, be distributed by the sheriff among the parties hereto entitled in the following sums and amounts, to wit:

Costs incident to motion.....	\$ 20 50
John S. Lane, curtesy interest.....	2,646 00
John S. Lane, rent from lands.....	510 00
Louisa J. Carson.....	453 47
Alice V. Hecke.....	453 47
Robert Hecke.....	233 47
Sarah W. Keith.....	453 45
Emmitt Roesen.....	453 45
Estate Louis Hecke, deceased.....	453 45

\$5,737 35

"It is further ordered that this cause be continued to await the final report of the said sheriff distributing said funds."

The appeal was taken from that judgment, apparently by all the defendants.

The court below computed the value of Lane's estate for life by the curtesy, according to chapter 82 of the Revised Statutes of 1909. The first section of the chapter reads as follows:

"When a party as tenant for life, or by the curtesy, or in dower, is entitled to the annual interest on a sum of money, or is entitled to the use of any estate, or part thereof, and is willing to accept a gross sum in lieu thereof, or the party liable for such interest, or affected by such claim, has the right to pay a gross sum in lieu thereof, or if the court in any legal proceeding adjudge or decree a gross sum to be paid in lieu thereof, the sum shall be estimated according to the then value of an annuity of six per cent. on the principal sum during the probable life of such person, according to the following table, showing the present value, on the basis of six per cent. interest, of an annuity of one dollar (according to the Carlisle Tables of Mortality) payable at the end of every year that a person of a given age may be living, for the ages therein stated." R. S. 1909, § 9489.

Next follows the table referred to in said section, and two other sections prescribing the rule of calculation and giving examples to show the proper use of it. No error having been assigned concerning the amount awarded to Lane as the value of his curtesy, the sections need not be transcribed.

[1, 2] We can think of no theory on which

Lane is entitled to part of the proceeds of the parcels, as he was not a party to the suit prior to the sale, and his curtesy was neither sold nor bought, but only the interests and estates of the parties. *Smoot v. Judd*, 161 Mo. 673, 691, 61 S. W. 854, 84 Am. St. Rep. 738. If the purchasers knew Lane was living and held the curtesy, probably the prices they bid were less than they would have offered had he been a party and his interest adjudged and sold. However that may be, they bought the titles only of the parties to the suit, and, so far as appears on the present record, claim no more. As to whether they were misled regarding the state of those titles or should have relief for any reason, nothing should be said on this appeal. But, as the facts appear at present, the money to be distributed was paid to the sheriff for the interests of those owners who were parties to the proceeding when the decree was entered and the lands sold and belongs to them exclusively. The case of *Hinds v. Stevens*, 45 Mo. 209, wherein was discussed the right of a dowress whose husband died after judgment had been given fixing his interest as a coparcener, differs from this one in that her dower was consummate as soon as her husband died in the portion allotted to him, whereas Lane's curtesy covers the entire fee. It is true an acceptance by him of the portion of the proceeds awarded to him would estop him to assert his curtesy interest hereafter (*Bogart v. Bogart*, 138 Mo. 419, 40 S. W. 91; *Fischer v. Siekmann*, 125 Mo. 165, 28 S. W. 435); but this rule of law does not meet fully the exigencies of the case, and other facts are to be considered.

[3] This appeal having been taken from the final judgment ordering distribution of the proceeds, the proceeding is still open for the correction of errors, including a defect of parties. *Clark v. Sires*, 193 Mo. 502, 92 S. W. 224; *Collier v. Lead Co.*, 208 Mo. 246, 106 S. W. 971.

[4, 5] Our statutes, following the practice of equity courts, are rigorous in requiring all persons interested in lands sought to be partitioned to be made parties to the suit, and their interests set out in the pleadings and determined by the judgment. R. S. 1909, §§ 2561, 2562, 2572. The rule which obtains in chancery regarding the parties to such suits is held to apply, on a proper construction of the statutes, in full force to statutory actions for partition. *Estes v. Nell*, 108 Mo. 172, 18 S. W. 1006. In the cited case the court said:

The rule "in chancery is that, unless all persons whose interests in the subject-matter of the suit, and the relief sought, were bound up with that of others," are brought before the court and made subject to its jurisdiction, the suit would not be entertained. "It was therefore indispensable that all the cotenants not uniting in the petition be made defendants." [Citing authorities.] This rule in equity is made to apply to our statutory proceeding for partition (section 7135) providing that "every

person having any interest in such premises, whether in possession or otherwise, shall be made a party to such petition." 108 Mo. loc. cit. 177, 18 S. W. 1007.

Accordingly the judgment was reversed, and the cause remanded for the omitted persons to be brought in as parties. A prior case was disposed of in the same way, because the owner of an undivided one-third of the premises had been left out of the proceedings, the court saying:

"Rosina is not a party to this suit, and as her interest appears on the face of the record, there can be no partition until she is made a party." *Dameron v. Jameson*, 71 Mo. 97, 99.

Where one who had a vested interest in the land to be divided was no party, and though the fact appeared on the face of the petition and no objection was raised on that score at the trial, it was held the defect was not waived as it would have been in other actions; and this because the jurisdiction of partition suits had originally been in the chancery courts, which were careful to have before them all persons interested in the lands, so the entire title would pass and future controversies be avoided. To the same effect are *Hiles v. Rule*, 121 Mo. 248, 256, 25 S. W. 959; *Lilly v. Menke*, 126 Mo. 190, 214, 28 S. W. 643, 994; *Johnson v. Johnson*, 170 Mo. 34, 56, 70 S. W. 241, 59 L. R. A. 748. And if the omission of interested parties is passed over in the trial court, the general practice is to reverse the judgment on appeal. 30 Cyc. 202, and cases cited in note.

The proper course would be to remand this cause for the sale to be set aside and Lane brought in as a party, his interest determined, and a resale ordered, if there can be partition between a life tenant and remaindermen. But in this jurisdiction and most others a tenant for life, whether by curtesy or otherwise, absent statutory authority, cannot compel partition against remaindermen and reversioners, nor they against him, and between such estates the remedy is unavailable except by consent of the respective owners. This is because no common interest exists between them of any character, either in coparcenary, tenancy in common or joint tenancy. The right to partition in such cases extends, for the benefit of cotenants for life, to allowing their estates to be divided between them, and for the benefit of remaindermen and reversioners, to allowing partition of their holdings, subject to the life estate. *Atkinson v. Brady*, 114 Mo. 200, 21 S. W. 480, 35 Am. St. Rep. 744; *Hayes v. McReynolds*, 144 Mo. 348, 46 S. W. 161; *Stockwell v. Stockwell*, 262 Mo. 671, 679, 172 S. W. 23. Where the owners of an estate for life owned, besides, an undivided interest in the remainder, the remedy has been allowed for a division of the interests in remainder, subject to the life interest. For example, in one case it was said:

"As the petitioner is himself the owner of the life estate in the whole tract proposed to be divided, and also owns the interest of a part of the remainder mentioned, no objection can of course be made to the partition on account of the entire property being subject to a life estate." *Reinders v. Koppelman*, 68 Mo. 482, 500, 38 Am. Rep. 802.

In another case the opinion said, on the authority of the proceeding one, "that the estate sought to be partitioned is subject to be partitioned, is settled," but, by looking at the briefs in connection with the opinion, it is perceived the suit was for a division among remaindermen, subject to an unexpired life term. *Preston v. Brant*, 96 Mo. 552, 10 S. W. 78. The fact of a cointerest also existed in *Doerner v. Doerner*, 161 Mo. 399, 407, 61 S. W. 801. One decision seems out of line with those which declare against the right of partition between life tenants and the owners of the fee; for in it the holder of a life estate was permitted, as coplaintiff with one who held a contingent remainder, to maintain an action for partition against the other contingent remaindermen. *Sikemeier v. Galvin*, 124 Mo. 367, 27 S. W. 551.

Whatever support these three decisions last mentioned may lend to the view that life tenants may sue remaindermen in partition, and vice versa, was taken away by a later decision, where it was said regarding them:

"While the three cases mainly relied upon by appellant may not have been expressly overruled, they have been intentionally disregarded in cases where they are cited and could have been followed. We hold they are not controlling authorities in this state as far as they conflict with the conclusion announced in this case."

The conclusion referred to was against the right of persons to whom a testator had devised and "during their natural lives," with remainders over, to maintain an action to partition by a sale of the land the value of their life estates to be paid to them out of the proceeds. *Hill v. Hill*, 261 Mo. 55, 168 S. W. 1165. The same conclusion was reached in a still later opinion in which all the authorities in this state were examined. The action was where the lands in controversy had been granted to the plaintiff and her bodily heirs, thereby creating an estate for life in her with remainders over to her children. One point presented for decision was the right of the plaintiff, as the holder of the life term, to maintain the action, and to decide the point it was necessary to interpret the first section of the article of our partition statutes. R. S. 1909, § 2559. Said section, on a first reading, appears to confer the remedy on any one or more of the persons holding interests in lands, whether of joint tenancy, tenancy in common, coparcenary, fee, for life, years, by the curtesy, or in dower. Following previous precedents the court held, notwithstanding the section mentioned

owners of life estates held by the curtesy or otherwise as entitled to partition, the remedy was allowed only when there were coestates between the parties, saying:

"The controlling feature of the provision is that there must be an existing undivided tenancy or holding in land by two or more owners, susceptible of being so parceled between them as to become a several holding by each. We may at the outset eliminate *Mrs. Stockwell*, the life tenant, because she not only has nothing which is susceptible of division, her tenancy covering in its breadth the entire estate and in its length the period of her life, in and during which no other person can have any interest unless severed from this freehold by her own act. That this does not constitute a subject for partition is not only evident from the use of a word which, in such a connection, can have no other meaning than the severance of common and undivided interests, but also from the frequent adjudications of this court. *Atkinson v. Brady*, 114 Mo. 200; *Throckmorton v. Pence*, 121 Mo. 50; *Stewart v. Jones*, 219 Mo. 614." *Stockwell v. Stockwell*, 262 Mo. loc. cit. 679, 172 S. W. 25.

[6, 7] Those remarks were followed by a thorough review of the Missouri cases on the question under discussion. In *Atkinson v. Brady*, 114 Mo., supra, the statute where it speaks of suits by life tenants, by the curtesy, etc., was construed to have no application to an estate by the curtesy alone, because the holder of it possessed the entire interest during his life, and there was nothing, so far as he was concerned, to partition; that the statutory authority given for an action by a curtesy tenant related only to estates held in common; for instance, where the deceased wife and another owned property as tenants in common at the demise of the wife, or her husband acquired an undivided interest afterwards, in addition to his curtesy interest; then, as a matter of course, he could have his right ascertained and his interest set off by a suit for that purpose. This view is sound, but it should be added that joint or cotenants for life may have partition between themselves; and a court has said that a leading text-writer meant to state no more than the latter proposition when he declared a tenant for life or years could, both at law and in equity, compel partition, citing *Freeman on Partition*, § 455. *Brown v. Brown*, 67 W. Va. 251, 67 S. E. 596, 28 L. R. A. (N. S.) 125, 21 Ann. Cas. 263. Whether this is a correct statement of that learned commentator's meaning may be doubtful; for the few citations given in support of his text go further. In another case in this state where a parcel of land held by a dowress was sought to be partitioned between her and the owners of the remainder, this court decided she was neither cotenant nor joint tenant with the remaindermen, but owned the whole property for her natural life, independent and irrespective of other parties, and, this being

true, there was no interest to set off. *Hayes v. McReynolds*, 144 Mo. 348, 353, 46 S. W. 161. In both the Missouri cases just noticed it was said remaindermen could have a partition of their interests, subject to the life estate.

[8-13] The rules in the different states and the authorities declaring the rules have been collected and annotated in several volumes. *Brown v. Brown*, 67 W. Va. 251, 67 S. E. 598, 28 L. R. A. (N. S.) 125, 21 Ann. Cas. 263; *Aydlott v. Pendleton*, 111 N. C. 28, 16 S. E. 8, 32 Am. St. Rep. 776; *Field v. Leitz*, 125 Am. St. Rep. 997; *McConnell v. Bell*, 121 Tenn. 198, 114 S. W. 203, 130 Am. St. Rep. 770; *Chickamauga Trust Co. v. Lonas*, 139 Tenn. 228, 201 S. W. 777, L. R. A. 1918D, 451. The notes to the last case are comprehensive, and it will be perceived by reading them that the weight of authority is in accord with the Missouri decisions, the effect of which may be summarized as follows: First, except by statutory authority, compulsory partition is impossible between life tenants and remaindermen or reversioners; second, our statutes on the subject do not authorize compulsory partition of those interests; third, a partition between them may be granted if all the parties consent.

[11-13] Some of the parties in the case before us are incapable of consenting to a partition because two or three are minors and one is insane. Therefore the next question is whether, if the cause were remanded to have Lane brought in and another sale made to pass his interest, this course would be lawful. Unless there is statutory authority for it, clearly it would not be, and it is incumbent on the courts to protect the legal rights of minors in proceedings of this kind. *Freeman, Otenancy and Partition*, 457. And one can readily see their interests might be sacrificed or seriously impaired by a sale and division of the proceeds with the life tenant, computing the latter's interest by mortality tables. Persons who are *sui juris* may use their judgment about the expediency of such a course and determine for themselves whether they prefer to have partition by a sale and an apportionment of the purchase money with the curtesy holder, or await the termination of his life and estate. A different principle controls where some of the parties in interest are under the disability of minority or insanity. Courts have had occasion to consider the question, and their conclusions are in harmony with what we have said. In one case minors by their guardian sued for the sale of lands they had inherited from the mother, and in which their father, the defendant, owned the curtesy. The court, in denying the relief prayed, on the ground of a possible wrong to the children, said it was the peculiar duty of courts to protect the rights of infants, and, although a suit in chancery might be brought by a gen-

eral guardian, nevertheless a minor was treated as the ward of the court and under its cognizance and protection, citing 2 Story, *Equity Jurisprudence*, c. 35. As a further reason for the decision, the court pointed out that the proceeds of a sale would be distributed according to the tables of mortality, which would give the curtesy tenant, who was 41 years of age, more than 67 per cent. and the children 32 per cent.; the owner of the life estate thereby receiving more than the owners of the fee. In the present case the disparity of apportionment would not be so great; yet Lane would receive for his interest over one-third of the purchase price of the land.

That statutes to enable property to be sold when division in kind is impracticable are to be enforced only when there are coestates has been decided by several courts. A Kentucky statute provides for the sale of joint estates if the land is indivisible without impairing its value; but the section was held to apply only to the estates in possession of persons holding jointly, and not where the possession was with an estate for life. In Kansas it was held a court had no power to compel a partition either in kind or by sale of the interests of remaindermen. *Shafer v. Covey*, 90 Kan. 588, 135 Pac. 676; *Ryan v. Cullen*, 89 Kan. 879, 133 Pac. 430. A decision of this court bears on the point, for in the *Stockwell Case* the proposition was pressed that the court could decree the sale of the interests of remaindermen by virtue of the section of the partition chapter which says:

"If, in any case, from the nature and amount of the property sought to be divided, and the number of the owners it shall be apparent to the court that the assignment of dower, if any, and partition thereof, in kind, cannot be made without great prejudice to the owners, an order of sale may be made." R. S. 1909, § 2612.

The court pointed out that said section authorizes a sale only in instances, when the interests held by the parties are cointerests, and therefore within the scope of the remedy by partition. Otherwise stated, the sale cannot be ordered unless the different interests could have been set apart in severalty by a partition in kind, if the nature of the property would have permitted the division without prejudice to the parties.

[14, 15] But it may be argued the law for computing the value of life estates by the mortality tables has changed the rule, as it was declared in the decision last cited, although the case arose after the enactment of the mortality tables law. But the court did not interpret the act with reference to the question in hand, and we must answer it without the help of a direct precedent. It is true a partition of real property may be ordered and the statutory provision for a sale

enforced if the property is unsusceptible of division in kind, notwithstanding minors hold interests. *Thornton v. Thornton*, 27 Mo. 302, 72 Am. Dec. 266. But we have seen that this rule governs only the cases in which the remedy by partition is allowed, namely, when the interests to be separated are of a joint or common kind, not where a life tenancy incumbers the fee. Nor is this rule affected by the words of the section regarding the mortality tables and directing their use "if the court in any legal proceedings adjudge or decree a gross sum to be paid in lieu thereof" (that is, of tenancies for life, by the curtesy or in dower). Those words do not extend the authority of the courts to adjudge money to such a tenant in lieu of his estate, in instances or under circumstances theretofore unauthorized, but prescribe a mode to compute the value of his interest when, according to the settled law, this may be done. On reading the section we have quoted (section 8499), it is apparent that it neither alludes to the remedy by partition, nor undertakes to amend the statutes which regulate the scope of the remedy. The language of the section expressed no purpose to change the law theretofore existing in this state against compulsory partition between life tenants and the owners of the fee, and so radical a change must be expressed or plainly implied for it to be held within the intention of the Legislature. The purpose of the enactment was to prescribe a method for computing the value of life estates whenever it is necessary to do so to enforce the rights of parties under the law as it stood, not to impair those rights by compelling the acceptance of money in lieu of estates. The Carlisle Tables were used to determine the value of a life estate, where the value was to be credited on an account (*Carnes & Perry v. Polk*, 5 Helsk. [Tenn.] 244), and where the value of such an estate was to be ascertained for the purpose of estimating the damages of remaindermen caused by changing the grade of a street (*City of Joliet v. Blower*, 155 Ill. 414, 40 N. E. 619), and under a statute which expressly empowered a court of chancery to sell an estate of dower or curtesy in partition, find its present worth, and apportion the proceeds of the sale accordingly (*Cronkright v. Haulenbeck*, 25 N. J.

Eq. 513), and to compute the value of a dower interest in an action by the administrator of the dowress to recover the consideration agreed to be paid by the heirs of her husband for a relinquishment of all her rights in his estate (*Andrews v. Broughton*, 84 Mo. App. 640), and in an action by a widow for the death of her husband, to show the life expectancy of the deceased when he was killed (*Boettger v. Iron Works*, 136 Mo. 531, 38 S. W. 298), and sometimes to determine the risk and the rate of premiums on insurance policies (*Abell v. Ins. Co.*, 18 W. Va. 400, 433). None of the Missouri cases that treat of the use of the tables, except two, deal with the sections in question. In *Tebeau v. Ridge*, 261 Mo. 547, 170 S. W. 871, L. R. A. 1915C, 387, it was held the statutory tables should be used to ascertain the value of an inchoate right of dower in a suit against a husband for specific performance of a contract by him to convey land, in order to deduct the value of the dower from the purchase price to be paid by the vendee. This case overruled the prior one of *Alple-Hemmelmann R. E. Co. v. Spelbrink*, 211 Mo. 671, 111 S. W. 480, 14 Ann. Cas. 652.

The decisions cited *supra* in no sense interpret those sections so as to determine the question we are considering, but are simply examples of the application of the tables in general, uninfluenced by legislation concerning them. But the cases do indicate, in our judgment, the kinds of litigation wherein our statutes contemplate the use of the mortality tables they prescribe. The theory is untenable that this legislation enlarges the power of a court to enforce partition of estates in land, where there is no community of interest such as has been held heretofore to be subject to the remedy. Indeed, one court has gone so far as to hold a legislative enactment intended to have that effect would work deprivation of property without due process of law. *McConnell v. Bell*, 121 Tenn. 198, 114 S. W. 203, 130 Am. St. Rep. 770.

The proceeds of the sale of the lands in the present case should be divided among the parties whose interests were sold; therefore the judgment is reversed, and the cause remanded.

All concur.

WAGNER v. PRYOR et al. (No. 16036.)

(St. Louis Court of Appeals. Missouri. June 8, 1920.)

1. Trial \S 165—In passing on demurrer, court is not restricted to plaintiff's testimony, if he is honestly mistaken in statements against interest.

In passing on a demurrer to the evidence, the court should consider all the evidence before it, and, though plaintiff's own testimony fails to make a case for the jury, yet where, through ignorance or honest mistake, etc., he makes statements against his interest, they are not conclusive.

2. Railroads \S 400(14)—Negligence under humanitarian doctrine held question for jury.

In an action by one struck by an engine when attempting to cross the tracks, evidence held sufficient to go to the jury under the humanitarian doctrine, though the testimony of plaintiff himself, who was very aged, that he stepped from behind a box car onto a track about 4 feet away, etc., tended to show the company's want of negligence.

3. Railroads \S 370—Duty of lookout defined.

It is the duty of a railroad company to use ordinary care in keeping a lookout for pedestrians at a point known to be customarily used by the public.

Appeal from St. Louis Circuit Court; Kent K. Koerner, Judge.

Action by Peter Wagner against Edward B. Pryor and another, receivers of the Wabash Railroad Company. From a judgment for plaintiff, defendants appeal, and, the original plaintiff having died since trial, the action was revived in the name of Ellen Wagner, administratrix. Affirmed.

N. S. Brown, of St. Louis, and A. E. L. Gardner, of Clayton, for appellants.

Frank A. Thompson and M. U. Hayden, both of St. Louis, for respondent.

NIPPER, C. This is a suit originally instituted in the circuit court of the city of St. Louis by Peter Wagner to recover damages for personal injuries sustained by him from being struck by a locomotive owned and operated by appellants. The accident is alleged to have occurred in front of defendants' railroad station at Ferguson, Mo., at about 7 o'clock in the morning on the 9th of June, 1914. The original plaintiff having died since the trial of this case in the court below, the cause has been revived in the name of the present plaintiff.

The petition counts upon the negligence of appellants: (1) Failure to give warning; (2) failure to keep a watch or lookout, when it was known, or should have been known by the exercise of ordinary care, that persons were likely to be crossing the tracks at the

place where the accident occurred; (3) operating and running the locomotive at a high and dangerous rate of speed; (4) failing to exercise ordinary care to stop or slacken the speed of the locomotive, after it was known, or should have been known, that plaintiff was in a position of peril, and was oblivious to the danger. The answer was a general denial, and a plea of contributory negligence. The reply was a general denial.

At the close of plaintiff's evidence, defendants offered an instruction in the nature of a demurrer to the evidence, which the court overruled. Defendants offered no evidence. The case was submitted to the jury under the "humanitarian" or "last clear chance" doctrine. Plaintiff recovered judgment in the sum of \$2,000. Defendants in due form and manner perfected their appeal.

The contention of appellants in this court is: (1) The court erred in overruling the demurrer to the evidence, offered at the close of plaintiff's case, for the reason that plaintiff was guilty of contributory and concurring negligence, and the "humanitarian" doctrine has no application. (2) The court erred in giving plaintiff's instruction, in that it omitted to submit to the jury the element involving plaintiff's right to be upon the tracks of defendants at the time and place mentioned in the evidence. Appellants, in their brief and argument with respect to the demurrer, seem to rely solely upon the testimony of plaintiff himself, without regard to the testimony of plaintiff's witnesses who testified in his behalf.

[1, 2] At the time of this accident, plaintiff was near 73 years of age, and lived in the town of Ferguson, and had lived there for many years prior thereto. He testified he worked for the United States government, in the city of St. Louis, and had so worked, with the exception of an interval of 3 years, since 1861. In going to his work each morning, he would board a train of defendants at Ferguson and ride into the city of St. Louis. On this particular morning he was ascending the embankment leading up to the railroad tracks of defendants, immediately in front of the station. There was a path leading diagonally up this embankment, which was used by the public, and had been so used for many years, as the most convenient way to reach the station from that portion of the town from which plaintiff was going. There were two tracks in front of the station, running north and south at that point. Plaintiff says these tracks were about 4 feet apart, but other witnesses place the distance at 8 feet. Plaintiff says that when he crossed the easternmost track there was a freight car standing on this track almost in front of the station; that he placed his hand on the coupling, leaned over, and looked, and saw no locomotive in sight (although it was

shown by other evidence that one could have been seen for half a mile), then stepped hurriedly in an effort to cross the western track immediately in front of the station, and while taking the last step he was struck by one of defendants' locomotives; that he did not see the same until it had struck him. At this time there were two or three other witnesses standing a little more than 100 feet away, who were watching plaintiff at the time the accident occurred. All of these witnesses contradict plaintiff as to his having looked, and as to the rate of speed at which he was walking. Each of them testified that plaintiff did not look, and was walking very slowly. Only one witness testified as to the distance the locomotive was from plaintiff at the time he started to cross the track he was attempting to cross when he was struck. This witness testified that when plaintiff started to cross that track he saw the railroad engine coming, and that it was about 70 feet away; that plaintiff never looked at any time after he reached the top of the embankment, and was walking very slowly; that no whistle was blown, but that he did not know whether any bell was ringing or not. Other witnesses testified the engine was traveling at a rate of speed of about 10 or 12 miles an hour.

If plaintiff was conclusively bound by his own statements, appellant's demurrer should probably have been sustained, for according to his testimony he stepped from behind a box car onto a railroad track 4 feet away and immediately in front of a moving train, and therefore his negligence in so doing would be the proximate cause of his injury, for appellants' servants, operating their locomotive, would have had no opportunity to have stopped the same in time to have prevented the injury. But in passing upon a demurrer the court should consider all the testimony before it, and even though plaintiff's own testimony fails to make a case for the consideration of the jury, yet where it is shown that one through ignorance, oversight, failing memory, due to old age, or mistake honestly made, makes statements against his interest which are not true, the jury is not bound to give conclusive effect to such statements. *Quinn v. Railroad*, 218 Mo. loc. cit. 566, 118 S. W. 46; *Norris v. Railroad*, 239 Mo. 695, 144 S. W. 783; *Huff v. Railway*, 213 Mo. 495, 111 S. W. 1145.

At the time plaintiff was giving his testimony it was shown that he was a very old man, suffered from loss of memory, and stated in his testimony that since his injuries he had suffered so much that he was unable to remember or to give correct dates. We think it is apparent from an examination of his testimony that he was not entirely cognizant of all that took place on the morning of the injury, and, as was said by the Kansas City Court of Appeals in the case

of *Downs v. Racine-Sattley Co.*, 175 Mo. App. loc. cit. 387, 162 S. W. 333, in speaking of an instruction telling the jury that admissions against interest are true, we find the following:

"But in more recent cases, of which that of *Huff v. Railway*, 213 Mo. 495, may be selected for review, such instruction is condemned on the ground that it not only singles out the plaintiff and comments on his testimony but that it erroneously declares the law. The court rejects the idea that a party testifying as a witness should be conclusively bound by the statements he may make against his interest, and announces the better and more just rule that if a party, through ignorance, oversight, or mistake, makes statements against his interest which are not true, the jury are not bound to give conclusive effect to such statements."

Considering the other testimony, if the jury believed it (and it was within its province to do so), it was shown that the engine was 70 feet away at the time appellant started to cross the track. At that time he was in a position of peril. There was a straight track and nothing in the way, and, conceding his negligence, it is shown by the testimony here that this locomotive, under the conditions mentioned in the evidence, traveling at the rate of speed at which it was shown to have been traveling, could have been stopped within a distance of from 35 to 42 feet. This would have left a space of least 28 feet between the engine after it was stopped, and the plaintiff, who, according to the testimony of his witnesses, was walking slowly across the track without looking, and entirely oblivious to the danger in which he was placed. This clearly makes a case under the "humanitarian" doctrine, and there was no error in the court's refusal to sustain a demurrer upon that ground.

[3] All the evidence tended to show conclusively that the point at which plaintiff entered upon the tracks of the defendants or upon its right of way, was at a place which had been used by the public generally for many years, in going to and coming from the station, and there was no dispute or room for argument upon that proposition. This was a point where defendants had a right to expect, and should have exercised ordinary care in keeping a lookout for persons who were likely to cross the tracks at the place mentioned in the evidence, and there was no error in the instruction given for the plaintiff. *Eppstein v. Railroad*, 197 Mo. 720, 94 S. W. 967.

We find no reversible error. The verdict was a righteous one. The Commissioner recommends that the judgment be affirmed.

PER CURIAM. The foregoing opinion of NIPPER, C., is adopted as the opinion of the court.

The judgment of the circuit court is accordingly affirmed.

REYNOLDS, P. J., and ALLEN and BECKER, JJ., concur.

ROBERTS v. HODGES et al. (VANDALIA BANKING ASS'N, Garnishee).
(No. 15719.)

(St. Louis Court of Appeals. Missouri. Submitted on Briefs May 7, 1920. Opinion Filed June 11, 1920.)

1. Landlord and tenant \S 328(3) — Landlord held not to waive his lien on corn by authorizing tenant to sell.

A landlord, by authorizing a tenant to sell rent corn, does not necessarily waive his lien on the corn given under Rev. St. 1900, § 7888, or his right to the proceeds, particularly where, although the tenant deposited the money in his own account, he made unsuccessful trips to see the landlord's agent for the specific purpose of figuring up the account and turning over the money received, so that the landlord's right thereto was superior to that of tenant's creditor.

2. Garnishment \S 105—Garnishment creditor has same right against garnishee as defendant has.

The garnishing creditor can have no higher right against the garnishee himself, in the absence of fraud, than had the defendant in the execution under which the attachment and garnishment were levied.

3. Landlord and tenant \S 246(6)—Landlord held entitled under lease to lien for meadow rent on deposit by tenant of money received from sale of corn.

Where a tenant deposited money in a bank received from his sale of corn, under the lease providing "all crops due to stand good for all rents," the landlord had a lien on the money for meadow rent, as well as for rent of corn ground.

4. Appeal and error \S 1054(1) — Erroneous admission of evidence not necessarily prejudicial in trial before court.

The admission over objection of evidence which ought to have been excluded is not necessarily prejudicial error requiring reversal of judgment, particularly where the trial was before the court without a jury.

Appeal from Circuit Court, Audrain County; Ernest S. Gantt, Judge.

"Not to be officially published."

Action by L. W. Roberts against J. R. Hodges, in which plaintiff recovered a judgment and sued out execution and the Vandalia Banking Association was made garnishee and the Farmers & Merchants Bank of Vandalia, Mo., interpleaded, claiming the garnished money. On trial of the interplea a

jury was waived, and judgment rendered for the interpleader. Motions for new trial and in arrest were overruled, and plaintiff appeals. Judgment affirmed.

Plaintiff, appellant here, on March 8, 1916, recovered a judgment against J. R. Hodges, in the circuit court of Audrain county, for \$551.40 with interest at 8 per cent. per annum from that date, and costs. On December 18, 1916, he sued out an execution, under which, and by direction of plaintiff, the sheriff attached in the hands of the Vandalia Banking Association all moneys, etc., belonging to the defendant and duly summoned it as garnishee. Interrogatories were duly filed, the garnishee appeared at the March, 1917, term of the circuit court and answered, admitting that it had in its possession and under its control the sum of \$876.35, which it held to the credit of the account of the defendant Hodges. With its answer the garnishee asked the court for an order permitting it to pay the above sum into court, to be allowed a reasonable sum for answering and for attorney's fee, and to be discharged. Depositing the amount, less \$25.00 allowed it, the garnishee was discharged.

At the same term of court the Farmers & Merchants Bank file its interplea, admitting the garnishment of the money and its deposit in court by the garnishee, and avers that when the money was attached it was not the property of defendant Hodges but of the interpleader, further claiming that the money so attached was money realized by Hodges on the sale of a crop of corn, and was rent money due by Hodges, as its tenant of the farm on which the crop was grown; that it had a lien on the crop, and this money, being its share of the proceeds of the sale of the crop, it has a lien on it.

Plaintiff, by reply, challenged the claim of the interpleader.

The cause coming on for trial under the interplea, a jury being waived, the court found the issues in favor of the interpleader and adjudged that it recover the sum of \$851.35, the amount paid into court by the garnishee, after deducting the sum of \$25.00 allowed.

At the trial the interpleader introduced evidence showing it was owner of the land, 220 acres, in Ralls county, and had leased it to Hodges and his brother. The lease was introduced in evidence. Among other provisions in the lease is one that the tenants are to pay \$112.50 for 25 acres of meadow and pasture land, and are to give a note for this amount, payable January 1, 1917, "all crops due to stand good for all rents." The lease further provides that the lessees, in consideration of the leasing, etc., agree to pay the party of the first part as rent for the corn land "two-fifths delivered at railroad or as good a market, * * *

and one-third of the oats threshed and delivered at Farber or Vandalia, Missouri."

Defendant Hodges testified that he lived on this farm, which he and his brother had leased, taking possession March 1, 1916; that he farmed the land under the lease, putting 45 acres in oats and about 110 acres in corn raising about 2,115 bushels of corn. He sold 1,508 bushels of this corn to one Grover Sutton and 617 bushels to one Samuel Sutton at 80 cents a bushel, which was all the corn he sold off the place; that he kept 431 bushels for his own use, making the total amount of corn raised on the place 2,546 bushels. The corn was not divided in the field but was gathered and weighed at the home place. Grover Sutton gave him a check for \$1,206.80 in payment of the corn. Asked if at any time the interpleader, or any of its directors, or its agent, had given him authority to sell this corn, he said "No." Witness testified that he deposited the money he had received from Grover Sutton for the corn to his own credit with the Vandalia Banking Association and had never turned over any part of it to the interpleader; nor had he done so at the time of the garnishment, nor in any manner compensated it for the rent, nor paid it any money since selling the corn to the Suttons; that the money garnished was the money he had received from the sale of the corn. Witness said he sent the check he had received from Grover Sutton for the corn, down to the Vandalia Banking Association by mail, and went to Vandalia a few days afterwards to see Mr. Gatson to apply it on the rent, but Mr. Gatson was not there; missed him on a second trip. The third trip he made to see Mr. Gatson at Vandalia was on the day the money was garnished; had never been able to see Mr. Gatson after he sent in the check, and had not seen him before the money was garnished, after he had deposited it in the Vandalia Banking Association. Asked what he wanted to see Mr. Gatson for, witness said that he wanted to figure up with him and go over the weights and things and apply the money in the bank to the rent; pay his rent for the two-fifths of the corn. None of the rent has been paid, neither the corn rent nor the cash rent, except the rent on oats, which he threshed; that had been paid. The oats rent had been settled for with his landlord and is not here involved.) What he has not paid for was two-fifths of the corn and \$112.50 cash rent for the grass. "The corn rent was due whenever the corn was disposed of," said the witness. The corn was delivered the latter part of November and the first part of December, 1916. Witness said that he had not given any note for the \$112.50.

On cross-examination defendant repeated that he had not sold any corn to any one, except the two Suttons, during the year 1916, from March 1, 1916, to the present time (April 5, 1917). Samuel Sutton had paid him

for the corn with a check, which he cashed. It was for \$445.00. Out of this he paid his expenses; had kept 421 bushels of corn to feed out and had about 100 bushels left. Asked how he happened to deliver the corn to Samuel and Grover Sutton, witness answered that at the time they were paying a little more out there—feeders were—than was being paid at the railroad; were paying 80 cents a bushel; had gone ahead and sold the corn to them without asking anybody; that he had had a talk with Mr. Gatson and he had told him to go ahead and deliver the corn; never said for him to sell it and collect for it, but that if he could sell it out there for as much or more than at the railroad, to do so. Gatson did not tell him to go ahead and deliver the corn to either Grover or Samuel Sutton. His understanding was that Gatson told him to go ahead and deliver the corn to anybody he could sell it to out there who would pay as much or more than he could get at the railroad; that was his understanding; could not say exactly when he collected from Grover Sutton for the corn he had delivered to him; but he had deposited the check for \$1,206.80, received for it, December 7th; judged that he had received it two or three days before. He had deposited this check in the Vandalia Bank, as well as a check given him by a man named McClardy for rent of a house and ten acres of ground on the Curtley farm. That check was for \$50.00. Witness testified that he deposited the checks with the Vandalia Banking Association to his own credit and checked on them himself. He testified as to the deposits that he had made with the Vandalia Banking Association from November 1st, when his balance was \$33.35, down to the time of the deposit April 3, 1917, depositing \$1,256.80 December 8, 1916. (This included the Grover Sutton check for \$1,206.80 and the McClardy check for \$50.00.) The money he received from Grover Sutton was evidenced by the check for \$1,206.80, which he sent to the Vandalia Banking Association by mail. Asked by the court why he had not deposited the money in the Farmers & Merchants Bank, witness answered that he always did business at the Vandalia Banking Association and his check was on that institution and he sent it to them. At that time the Farmers & Merchants Bank of Vandalia was not actively engaged in banking business. Asked if that was the reason he did not send it to the Farmers & Merchants Bank, or if it was because he was doing business at the Vandalia Banking Association, witness answered that it was both, he supposed; that there was no such bank there at the time as the Farmers & Merchants Bank. There was another bank there but under a different name. The Vandalia Banking Association was where he did business and he felt like that was the place for him to send the check. A part of the

corn delivered to Grover Sutton belonged to the Farmers & Merchants Bank of Vandalia, and a part to witness and his brother; hauled enough to pay the rent; "it belonged to the bank; that is we hauled enough to pay our rent;" and owed the interpleader \$112.50 cash rent; did not send the Farmers & Merchants Bank of Vandalia the money for its corn but deposited it, together with his own part of it, in the Vandalia Banking Association. Asked by the court if he had consulted with any one connected with the interpleading bank about where he should deliver its part of the corn, witness answered that he had a talk with Mr. Gatson some time before he commenced to gather the corn and told him he thought he would be able to get more money for it out there, that is, close in the neighborhood and from feeders than at the local market, and Gatson told him he could deliver it out there. When he deposited the check in the bank, about the 6th or 8th of December, 1916, he only had about \$18.00 to his credit.

Mr. Gatson, sworn in behalf of the interpleader, testified that he was the agent of the Farmers & Merchants Bank in this transaction; that the bank had never been paid anything for the rent except as to the oats; that no part of the corn rent, or any part of the money rent on the pasture had been paid. Asked if he, acting in his capacity as officer and agent of the bank, authorized Hodges at any time to sell and dispose of the corn, objection was made by counsel for plaintiff, overruled, exceptions saved, and witness answered that he did not at any time authorize him to sell it. On cross-examination, asked whether he had given Hodges any directions about where to deliver the corn, he answered that he had not; had given him no directions as to where he should deliver it; had a talk with Hodges about the time he was commencing to gather the corn and he told witness he thought there were some feeders in the neighborhood—mentioned a few of them—that would probably buy the corn and take it at a better price than people at the market, "and for his accommodation I told him if he could do that, and also for our accommodation, if he would get a better price why, to deliver it in the neighborhood." Asked if Hodges had consulted with him about the price, witness said he thought so. Asked if that was before or after the corn was sold, witness answered that he did not know whether or not the corn was ever sold; that he did not know anything about it at all until after the attachment; that there was no price fixed on the corn except that Hodges was to get as good a price as he could at the market, or better, if he could; thought that conversation was before the gathering of the corn and about corn gathering time, which was the latter part of October, 1916.

At the instance of the court Hodges was recalled and questioned by the court. He testified that he had deposited this check which he had received from Grover Sutton the 6th, 7th or 8th of December; that he had mailed the check to the Vandalia Bank. Asked by the court what he had testified to about going down to Vandalia after that, he said that he went down a few days after that—two or three days after the check was sent down; went down to see Mr. Gatson. Asked what he wanted to see Mr. Gatson about, witness said that he wanted to go over the figures with him and apply this on the rent. This was all objected to by plaintiff and exceptions saved. That, said the witness, was for applying the money for two-fifths of the corn. Hodges missed Gatson twice. The third time he went back was the day the garnishment was run against the Vandalia Bank and he found that the money had been attached under the garnishment. Asked why he had not sent the check to Gatson for the amount due on the rent, over objection and exception of plaintiff, as calling for a conclusion and not evidence of any act, word or deed, the witness answered that he went to see Mr. Gatson "and go over the figures" with him, so it would be satisfactory, and he had just mailed the check there and thought it would be all right meaning by "figures" the weight of the corn; had with him the scale tickets showing the weight of the corn and the amount of money that was taken in.

This is the substance of the relevant testimony for the interpleader. On the part of plaintiff, the judgment, the execution, the return of the sheriff, the summons to the garnishee, were introduced in evidence. At the close of all the evidence plaintiff asked the court to declare as a matter of law "that under the pleadings and evidence the plaintiff is entitled to recover and retain out of the funds garnished the full amount of the judgment, interest and costs due him under his judgment against the defendant Hodges, amounting to \$565.40." The court refused this, plaintiff excepting and, as before stated, rendered judgment in favor of the interpleader and against the plaintiff and that the interpleader have and recover the sum of \$851.35, the net amount deposited by the garnishee. Filing a motion for new trial, as also in arrest, plaintiff has duly appealed.

R. D. Rodgers and J. W. Buffington, both of Mexico, Mo., and Clarence A. Barnes, of St. Louis, for appellant. Gatson & Hollingsworth, of Vandalia, for respondent.

REYNOLDS, P. J. (after stating the facts as above). [1, 2] A prominent question presented is as to whether the landlord, interpleader here, by authorizing the defendant to sell the corn in the neighborhood, waived

his lien on the corn, which, under the statute (section 7888, Revised Statutes 1909), and in the light of the lease, he had on the crop or its proceeds.

The sale to the Suttons is not attacked. It is not sought to hold them. The effort is to reach the proceeds of the sale.

In *Fulkerson v. Lynn*, 64 Mo. App. 649, loc. cit. 654, it is said that a lien may be waived in a variety of ways, which do not involve agreement or a consideration. "Thus it may be waived by the landlord consenting to a sale of the property. *Dockham v. Parker*, 9 Greenl. 137; *Cloud v. Needles*, 6 Md. 501; *Volmer v. Wharton*, 34 Ark. 691. We do not say that in all cases of consent to sell, the landlord would, as a matter of law, waive his lien, for the circumstances might rebut the intention, or leave it doubtful." See, also, *Wimp v. Early*, 104 Mo. App. 85, loc. cit. 89, 78 S. W. 343, 344, in which it is said:

"A landlord may assent orally or by conduct to his tenant selling the crops grown on the leasehold, under circumstances that will release his lien on the crops."

The case of *Fulkerson v. Lynn*, supra, is cited approvingly in *Hayes v. Manning*, 263 Mo. 1, loc. cit. 47, 172 S. W. 897, 907, in support of the proposition that the Supreme Court has said, "not once, but many times, that no man is compelled to stand on a right given him by law. * * * Whatever this right may be, he may waive it if he chooses so to do, and without agreement or consideration, and lacking the essentials of an estoppel the waiver may be held to be valid and binding."

In *Francis and Hunter v. A. O. U. W.*, 150 Mo. App. 347, loc. cit. 355, 130 S. W. 500, 501, it is said, also referring to *Fulkerson v. Lynn*:

"Succinctly stated, a waiver is said to be the intentional abandonment or relinquishment of a known right."

And in *Porter v. Loyal Americans*, 180 Mo. App. 538, 167 S. W. 578, referring to *Fulkerson v. Lynn*, it is said that after an examination of the facts in the case, they "refute any idea of waiver, which must be an intentional relinquishment of a right." So that whether, under the circumstances attendant upon this sale of a part of this crop of corn with the consent of the landlord, a relinquishment of the lien of the landlord might be open to question, no lien is claimed as against the purchasers of the corn.

But the question is, had the interpleader, as landlord, a lien on the proceeds, or, passing that, had the interpleader a right to this fund as against *Hodges* and the creditor of *Hodges*, appellants here, plaintiff below. In brief, to whom did the fund belong? While this is an action at law, equitable principles may enter into its determination.

It is well settled by abundant authority, that the garnishing creditor can have no

higher right against the garnishee himself, absent fraud, than had the defendant in the execution under which the attachment and garnishment were levied. Over and above claiming a lien on this by virtue of the lease, the interpleader denies that the defendant *Hodges* is the owner of the fund, which was in the hands of the garnishee, and deposited by it in court, and claims that it is the owner.

The testimony of the defendant *Hodges* tends to show that he regarded this fund, which he had deposited in bank and which was in part the proceeds of part of the corn sold, as the money of the interpleader—as the share due the interpleader as landlord for rentals of the leased land, and that he so deposited it, although in his own name. In other words, according to the testimony of defendant, he had deposited that money in his own bank, in his own name, intending it as for the benefit of the interpleader, his landlord.

In *First National Bank of Carthage v. Moss*, Bank of Carthage, Garnishee, 80 Mo. App. 408, it was held that the sum there on deposit was in the nature of a trust fund in the hands of the depositor for a specific purpose, and that being the case and it being a valid trust, the fund was not subject to the debts of the trustee, and being personal property the trust may be shown by parol.

In *Wheless v. Meyer-Schmid Grocer Co.*, Garnishee of *William Morningstar*, 140 Mo. App. 572, loc. cit. 590, 591, 120 S. W. 706, 713, our court held:

"After all, the plaintiff in attachment, upon the garnishment being sustained, succeeds only to the rights of his debtor, the defendant in attachment. It is certain the attaching creditor could stand in no better situation in respect to the fund garnished than his debtor, the defendant in attachment, and if the fund garnished was not owing to the defendant in attachment or had been assigned prior to the garnishment, then the attachment defendant * * * had no rights therein to which plaintiff could succeed. * * * In such circumstances, the defendant in attachment had no property in the indebtedness whatever and no right therein subject to attachment. * * * And * * * this is true, even though the assignment of the indebtedness be an equitable assignment only, for when it is sought to reach upon garnishment a credit of the defendant in attachment, it must be both legally and equitable due to him. In such cases, even though the assignment be equitable only, the court will take notice of it and protect the rights of the assignee"—quoting *Drake on Attachments* (7th Ed.) 602, 604.

Further along, our court said (140 Mo. App. loc. cit. 591, 120 S. W. 714):

"Indeed, on principle, this must be true, for all that can be seized under execution or by process of garnishment, as in this case, is the right which remains in the assignor and this is nothing more (at least where the assignment is made bona fide as here) than the legal title,

subject to the equitable interests of the assignee. And therefore, as no right could be enforced by Morningstar [the judgment debtor] against the Meyer & Schmid Grocer Company after the assignment, none can be enforced by the plaintiff in attachment who succeeds only to the rights of Morningstar."

It is true we have no formal assignment here, but we do have such an acknowledgment by the defendant in the execution, as surely in equity amounts to an assignment; certainly as estops him from claiming the fund. To the same effect is the decision of the Kansas City Court of Appeals in *National Live Stock Commission Co. v. Thero et al.*, 154 Mo. App. 508, 153 S. W. 961.

In *Smyth v. Boroff*, 156 Mo. App. 18, 135 S. W. 973, it is held that a party cannot subject a fund in a bank to a garnishment, either at law or in equity, unless it is the property of the adverse party, or unless he has rights therein. In *Potter v. Conqueror Trust Co., Garnishee*, 170 Mo. App. 108, 155 S. W. 80, the Springfield Court of Appeals held that fraud forms an exception to the general rule that the judgment creditor can have no greater rights against the garnishee than did the judgment debtor; and that where it is sought to hold the debtor of a fraudulent grantee for the debt of a fraudulent grantor, garnishment is a proper remedy. In the case at bar, however, there is no suggestion whatever of any fraud in the matter. The judgment debtor, Hodges, has at all times as his testimony shows acknowledged the right of the interpleader, his landlord, to the payment of his proportion of the amount realized on the crop grown on the leased premises, and expressly testifies that the money which he deposited in the Vandalia Bank was the part of the rent money, of the interpleader due him for the crop grown on the premises. As far as the testimony in the case shows, while the defendant in the execution deposited this money in his own bank in his own name, he did it, recognizing the right of the interpleader, as landlord, to that very fund, and made no claim upon it; went to the town in which the bank containing the money was situated for the express purpose of turning it over to the authorized agent and representative of the interpleader. He missed him on two trips and on the third trip, as to which he testified he had gone for the express purpose of accounting to that agent for the rent and turning this money over to him—a third trip made for that same purpose on the day that the garnishment and attachment were run. So it is clear that as between the interpleader and the defendant, the defendant could not possibly claim the fund; and it is equally clear, under the law and the facts in this case, absent all fraud, that the judgment creditor—creditor of the defendant—has no

higher right to that fund than had the debtor himself.

[3] It is said that the allowance to the interpleader is too large. This on the theory that no lien should have attached for the \$112.50 that was to be paid for rent of the meadow. But that was as much rental as the amount to be paid for the corn and oats, and so it is said in the lease, and was as much the money of the landlord as was the money realized from the sale of the corn.

[4] We have read over the record with reference to the claims of the learned counsel for the appellant, to the admission and exclusion of evidence, more particularly in the admission of evidence, for none that was material and offered by the plaintiff was excluded. While the ruling of the trial judge on some of these questions may be incorrect, we cannot say that it was reversible error. As was said by our court in *Griffith v. Gillum*, 31 Mo. App. loc. cit. 39:

"But it does not follow that, because the evidence was irrelevant and ought to have been excluded under the plaintiff's objection, the error of admitting it was necessarily prejudicial, so as to require a reversal of the judgment."

That is particularly so where, as here, the trial was before the court without a jury. Finding no reversible error, the judgment of the circuit court is affirmed.

ALLEN and BECKER, JJ., concur.

STEWART v. CHITTICK. (No. 13407.)

(Kansas City Court of Appeals. Missouri.
June 14, 1920.)

1. Trial \S 250—Broker held not entitled to submission on theory that refusal of owner's wife to sign deed prevented sale.

Where a broker who sued a landowner several times testified that when he contracted for the sale of the land he had notice that the owner's wife would not sign the deed, and negotiated with his purchaser on that basis, and the complaint followed the theory of the testimony, the submission of the case on the hypothesis that when the broker negotiated the sale he did not know the wife would not sign, and that her refusal prevented the sale, was erroneous.

2. Vendor and purchaser \S 186—Vendor must give reasonable opportunity for examination of title.

A vendor cannot demand that a land sale be closed without giving the purchaser a reasonable opportunity for examination of the title.

3. Brokers ⇨88(4)—Whether principal defeated sale by refusing purchaser reasonable time for examination of title for jury.

In an action by a broker for commissions, where the vendor's wife would not sign, and after the vendor had executed the deed and submitted the same to the purchaser it was returned at the vendor's demand, *held* that, notwithstanding there was evidence that the purchaser declined to accept the deed unless signed by the wife, the question whether the vendor failed to give the purchaser reasonable time for examination of title, and thus prevented consummation of the contract, was under the evidence for the jury.

Appeal from Circuit Court, Livingston County; Arch B. Davis, Judge.

"Not to be officially published."

Action by Douglas Stewart against Smith Chittick. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Frank Sheetz, of Chillicothe, for appellant. Joseph Stewart and L. A. Martin, both of Chillicothe, for respondent.

ELLISON, P. J. This action was instituted by plaintiff to recover a commission for selling defendant's farm of 60 acres. The former recovered judgment.

It appears defendant resides in the state of Arizona, and that one Martin was his tenant on the farm; that defendant put the place in plaintiff's hands in December, 1915, for sale at \$50 per acre the sale to be made "soon." Afterwards defendant's wife concluded she would not sell and would not sign a deed. Defendant then notified plaintiff of his wife's refusal. Plaintiff negotiated a sale to Martin at \$53 per acre.

Plaintiff's account of the transaction is as follows:

"I sold the land to Mr. David Martin and entered into a contract with him at \$53 an acre, and so notified Mr. Chittick, and sent a deed for him and his wife to sign, and before that deed was returned a deed was placed on record here from Mrs. Chittick to Smith Chittick, and Mr. Chittick wrote to me that his wife had deeded to him her interest in the land and she would not sign any deed. So I said, 'Well you can sign the deed and send it here and I will take it without her signature;' and I advised Mr. Martin that that could be fixed all right, that I had a mortgage on the place, and that I would just foreclose the mortgage, and in that way get him a good title, as Mrs. Chittick had signed that mortgage. The deed was sent here to Mr. Sheetz [defendant's attorney] and presented to Mr. Martin and myself in my office, and Mr. Martin wanted to have the title examined. He took the abstract, I think, to Mr. Schmitz to have it examined and went home; and afterwards Mr. Sheetz [defendant's attorney] telephoned me that he would have to return it, something of that kind; and, as I understood, the deed was returned, and that is as far as it went."

Before defendant had sent the deed to Mr. Sheetz, signed by himself alone, plaintiff had written to him the following letter:

"In reply to your last letter, you say you want to do what is fair. There is only one thing to do, and that is to sign that deed and send it back here. I sold the land to Mr. Martin and made a contract and sent you the deed. I had your authority to sell it. I had been trying for seven or eight months to induce Mr. Martin to take it, and finally succeeded. Any communication between Mr. Martin and you about the matter does not affect my action. The sooner we get the deed back here the quicker your interest stops on the loan. I am quite sure that no one else would accept your deed signed just by yourself except me. I have talked that phase of the matter over with Mr. Martin and have shown him how I can correct it. Now sign the deed and send it here and let's get this matter closed up without any further talk or delay."

In response to this letter defendant sent the deed to Mr. Sheetz, and he and Martin and plaintiff got together, in the latter's office. Mr. Sheetz had the deed made to Martin in proper form and acknowledged, but the latter would not go any further until he had the title examined and he took the abstract to a Mr. Schmitz. He afterwards refused the deed, and Mr. Sheetz returned the deed to defendant. It is true that Martin testified that Mr. Sheetz returned the deed to plaintiff before Schmitz had time to examine the title, but he wrote plaintiff he would not take land unless the wife signed the deed, and he testified at the trial that he wanted a deed with plaintiff's wife's name to it.

[1] Plaintiff repeated several times in his testimony that, when he contracted with Martin for the sale of the land, he had notice that defendant's wife would not sign the deed, and he negotiated with Martin on that basis, and that he arranged with Martin how he could make the title right by foreclosing the mortgage. Yet plaintiff turned his back on the case made by the evidence, and by instructions submitted to the jury the hypothesis of his not knowing she would not sign. And, notwithstanding his own testimony that he accepted the situation made by the wife's refusal to sign and was to make the sale on the basis of a deed from defendant alone, he submitted the hypothesis that the failure to consummate the sale was because of the wife's refusal. There was no room for such instructions consistently with the case made by the evidence.

And so with the petition. It is there made plain that his case was based on the contract as recognized by the parties that the sale was to be by a deed to be signed by defendant alone. He alleges "that defendant executed a deed to such land to said David Martin on the terms specified in the contract for sale, but refused to deliver the same." The

only deed executed by defendant to Martin was the one without his wife's signature.

[2, 3] It is not only clear that plaintiff's instructions were at war with the case made by the evidence and the pleadings, but the case as thus made would have justified the demurrer to the evidence which defendant offered but for the fact that Martin testified that defendant did not give him time to examine the abstract of title before he ordered the deed to be returned to him. Of course, a vendor has not the right to demand that a land sale be closed without giving the purchaser reasonable opportunity for his counsel to examine the title. Whether that was done was a question for the jury. It is true that Martin testified, and so wrote to defendant, that he would not take the land without the wife joining in the deed, but whether he threw up the deal on that account was a question for the jury.

The judgment is reversed, and the cause remanded.

All concur.

MOSES v. RAWLINS. (No. 15998.)

(St. Louis Court of Appeals. Missouri. June 8, 1920.)

1. Insurance \S 750, 755(3)—Member not in "good standing" after failure to pay dues; application of overpayment to delinquent dues held not a waiver.

Where by-laws of fraternal benefit organization provided that "a member refusing or neglecting to pay his dues 6 months in advance in full is not in good standing 60 days after the first day of the semiannual period for which the amount is due," a member was not in "good standing" after failure to pay dues within first 60 days of period for which they were due, though the organization had applied an overpayment of assessments in part payment of delinquent dues; the application of overpayment not constituting a waiver of the forfeiture.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Good Standing.]

2. Insurance \S 755(3)—Letter advising member of delinquencies and opportunity for readmission held not a waiver.

Where by-laws of fraternal benefit association provided for readmission of delinquent members or those who forfeit their membership, the writing of letters to delinquent member without knowledge that he had died, advising him of his delinquency and urging him to comply with requirements necessary to readmission, held not a waiver of forfeiture.

3. Insurance \S 755(3)—Retaining of overpayment of assessments not a waiver of forfeiture.

In action on a death benefit certificate, the society, by retaining overpayment of assess-

ments, did not waive forfeiture, where it had tendered back the overpayment.

Appeal from St. Louis Circuit Court; Rhodes E. Cave, Judge.

"Not to be officially published."

Suit by Polly Moses against O. B. Rawlins, as general secretary and treasurer of a voluntary association known as the Order of Railway Telegraphers. Judgment for defendant, and plaintiff appeals. Affirmed.

Frederick H. Bacon, of St. Louis, for appellant.

William S. Campbell, of St. Louis, for respondent.

NIPPER, C. This is a suit brought by appellant on a benefit certificate issued to her son, and in which she was named as beneficiary. The petition states the nature of the defendant, and that the certificate was issued on the 21st of February, 1911, and that the deceased, Cleveland Moses, died on the 21st of October of the same year; that the secretary and treasurer is custodian of its funds, and has in his hands sufficient money to pay the certificate. The answer admits the nature of defendant, but denies that deceased performed the conditions required of him in said contract, in that he failed to pay the dues and assessments as required.

The case was tried before the court without a jury, and judgment rendered for the defendant. Appellant, in due time, perfects her appeal, and as grounds for reversal urges that the court rendered judgment for the wrong party and erred in overruling appellant's motion for new trial. At the trial in the court below, after plaintiff introduced the benefit certificate, the following admissions were made by counsel for the respective parties:

"It is admitted that the defendant, O. B. Rawlins, is the grand secretary and treasurer of the voluntary association known as the Order of Railroad Telegraphers, he being the successor of Leon W. Quick; that the head office and place of business of said association is in the city of St. Louis, and the defendant, C. B. Rawlins, as secretary and treasurer of said association is the custodian of its funds. It is admitted that Cleveland Moses, mentioned in plaintiff's petition, died on the 21st of October, 1911, from the effects of accidental injuries, and that after the death of said Cleveland Moses the defendant and mutual benefit department of said Order of Railroad Telegraphers, was duly notified of said death, but that defendant denied all liability under said certificate. It is admitted that the plaintiff is the beneficiary named in said benefit certificate and is the mother of the deceased Cleveland Moses. It is further admitted by the parties that the by-laws of the defendant association are correctly set forth in defendant's amended answer. It is agreed that the constitution of the Order

of Railroad Telegraphers, as revised and amended May 8, 1911, may be considered in evidence, and either party at liberty to read therefrom in evidence any part thereof.

"It is admitted that said Cleveland Moses did not pay on the 1st day of July, 1911, \$5 dues, and said dues were not paid at any time thereafter. It is admitted that at the time the application of said Cleveland Moses was approved he paid \$3.60, which, when applied in payment of his assessments, computed from the 1st day of the month in which he was admitted to the end of the current semiannual period, June 20, 1911, left to the credit of said Cleveland Moses the sum of 60 cents.

"It is further admitted that the only issue in this case is whether or not the defendant waived the payment of said dues or subsequent assessments, or is estopped from claiming a forfeiture because of said nonpayment."

This leaves but one question for this court to determine: Did respondent waive the forfeiture of the policy by retaining the 60 cents overpaid, and is it estopped from claiming a forfeiture? Appellant relies upon the case of *Leech v. Order of Railroad Telegraphers*, 130 Mo. App. 5, 109 S. W. 811, to sustain the contention which she makes before this court. A careful examination, however, of the case above referred to, reveals the fact that *Leech* had paid his assessments in advance, and there was no delinquency in any part of his assessments at the time of his death. The holding of the court in that case, so far as a majority of the court concurred, was stated by Judge Goode in these terms:

"In other words, I read the by-laws to mean that a delinquency in both assessments and dues for 60 days will work a forfeiture, or a delinquency in dues alone for 6 months will work a forfeiture."

In that case *Leech* had paid his assessments in full up to and including the month in which his death occurred, and was delinquent in his dues for about 5 months. Therefore the court properly held that there was no forfeiture.

A portion of section 26 of defendant's by-law reads as follows:

"A member refusing or neglecting to pay his dues 6 months in advance *in full* is not in good standing 60 days after the first day of the semi-annual period for which the amount is due."

[1] It seems that under defendant's by-laws, at the time the *Leech* Case was decided the assessments were payable monthly in advance, while the dues were payable semi-annually in advance. It was held in that case that there was no forfeiture, because deceased was not delinquent, or had not failed to pay both the dues and assessments in full, for 60 days. In the case before us, admitting the overpayment of 60 cents and its application to the part payment of dues for the semiannual period from July 1, 1911, to December 31, 1911, we find that on July 1, 1911,

deceased did not pay in full, in advance, either his dues or assessments as required, nor were such paid in full by him at any time thereafter prior to his death, which occurred on the 21st of October following. Therefore, at the end of 60 days from July 1, 1911, or for almost 2 months prior to the death of Cleveland Moses, he had been delinquent in the payment of both his dues and assessments, because he had not paid either in full at the time, and would therefore, under the contract of insurance before us, and the ruling of this court in *Leech v. Order of Railroad Telegraphers*, supra, have forfeited, his insurance, and would not have been in good standing, unless defendant, by some of its acts, had waived such forfeiture and was estopped from claiming such.

Appellant introduced in evidence two letters from the secretary and treasurer of the defendant company and addressed to the deceased, one dated November 20, 1911, the other December 11, 1911. At the time these letters were written, defendant had no knowledge of the death of deceased, because the letters gave the deceased, if living, an opportunity at that time, upon the payment of certain dues and assessments, to continue or be placed in good standing in the order. It is contended by appellant that these letters showed an intention to waive the payment of the delinquent dues and assessments, or that it did not intend to claim any forfeiture on account of such delinquencies; but we do not so construe these letters.

[2] Article 16 of defendant's by-laws provides for the readmission or reinstatement of delinquent members or those who forfeit their membership, and in both letters introduced in evidence, deceased is urged to make the payments of the dues and assessments, in order that he may be in good standing. If the policy in force had made no provisions for reinstatement, then appellant's contention could be upheld, but under the contract of insurance, the insured could be reinstated upon the performance of certain conditions, and the compliance with certain requirements. Therefore the mere fact that letters were addressed to him advising him of his delinquencies is not sufficient evidence of a waiver of the forfeiture. *Stiepel v. German American Mutual Life Association*, 55 Mo. App. 224.

[3] It is further contended by appellant that respondent retained and still retains the 60 cents, and that in doing so it has waived the forfeiture. In support of this contention, we are cited to *Davis v. National Council of K. & L. of S.*, 196 Mo. App. 485, 196 S. W. 97. However, the law as announced in the case above cited is not applicable to the facts in the case before us, for in the case here defendants did tender back the 60 cents, and we would not be justified in disturbing the judgment of the trial judge, who, sitting as a jury, heard this testimony and rendered

judgment for defendants. *Pavlick v. Supreme Lodge K. of P.*, 198 Mo. App. 184, 199 S. W. 442.

Therefore the Commissioner recommends that the judgment of the trial court be affirmed.

PER CURIAM. The foregoing opinion of NIPPER, C., is adopted as the opinion of the court.

The judgment of the circuit court is accordingly affirmed.

REYNOLDS, P. J., and ALLEN and BECKER, JJ., concur.



CAFFERATA v. GINNOCHIO. (No. 16129.)

(St. Louis Court of Appeals. Missouri. June 8, 1920.)

1. Gaming §26(1)—Purpose of statute authorizing recovery of losses is to aid criminal law.

The purpose of Rev. St. 1909, § 6623, authorizing recovery of losses by gaming, is to aid the criminal law in punishing gamblers and their colleagues by taking from them their winnings.

2. Gaming §26(3)—Horse racing is "gaming."

Horse racing is gaming, within Rev. St. 1909, § 6623, authorizing recovery of money or property lost at any game or gambling device.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gambling; Gaming.]

3. Gaming §30—Loser cannot recover from his agent to make wager.

Rev. St. 1909, § 6623, authorizing any person who loses money at any game to recover it by civil action, does not authorize recovery by a loser from one to whom he delivered money as his agent to wager upon a horse race.

Appeal from St. Louis Circuit Court; Wilson A. Taylor, Judge.

"Not to be officially published."

Action by John Cafferata against Dominick Ginnochio. Judgment for plaintiff in the circuit court, on appeal from a justice of the peace, and defendant appeals. Reversed.

Chase Morsey, of St. Louis, for appellant.

Frumberg & Russell, of St. Louis, for respondent.

BIGGS, C. Gambling among friends is said to be a prolific destroyer of friendship, as witness: Plaintiff and defendant, Italians by birth, were friends in their native country, which friendship continued in the land of

their adoption until interrupted by a gambling transaction, resulting in enmity between them and this lawsuit.

The case is founded on the following statement, omitting caption and signatures, filed in the justice of the peace court:

"To money lost in a gambling transaction by plaintiff to defendant, \$375.00."

The cause is founded on section 6623, R. S. 1909, which reads thus:

"Any person who shall lose any money or property at any game or gambling device may recover the same by civil action."

The testimony developed that the transaction referred to in the statement was a bet on a horse race. The plaintiff was victorious below, recovering a judgment for the full amount sued for. Defendant brings the case here, asserting, among other things, that the plaintiff failed to make a case for the jury.

[1, 2] The purpose of the gaming statute, as stated by the Supreme Court in *Williams v. Wall*, 60 Mo. 318, is to aid the criminal law in punishing gamblers and their colleagues by taking from them the fruits of their wager. As construed in *Shropshire v. Glascock*, 4 Mo. 536, 31 Am. Dec. 189, horse racing, under section 6623, is gaming within the meaning of that statute. In the case of *Swaggard v. Hancock*, 25 Mo. App. 596, it was held under this statute that the fact that the defendant acted as an agent for another in making the wager was no defense. So, in the case of *Crooks v. McMahon*, 48 Mo. App. 48, it was held that money lost in a game of poker may be recovered from the winner in the poker game, though the plaintiff did not lose directly to the winner.

[3] The case as made here by the plaintiff consists alone of his version of the transaction as follows: Plaintiff, in answer to a question as to what occurred on March 25, 1916, testified:

"I got down there on the 25th of March, and he said (referring to defendant), 'John, I have got a good thing;' and he came and talked to me just like that, 'And we will get in and straighten it up; we ain't got no money now.' And I was going to the bank and got a check cashed for \$375, and I handed it to him to place it, and he phoned to Pete Baker and Carney, and this horse lost."

On cross-examination the witness further testified:

"Q. What was said? A. He (referring to defendant) came in and he said, 'John, I ain't got the money just now, but I will square up in a little while with you (referring to another transaction);' and he said, 'I have got a good thing, and he will walk in, as the race is fixed;' and I gave him the \$375. Q. He was going to bet that money for you on some horse? A. Yes, sir; and he said that he had to have the cash money on account of his losing all that

he had; he was broke then. Q. What you did then was you gave him the money to bet for you on a horse? A. Yes, sir."

Under this evidence, it is clear that Caf-ferata did not bet with Ginnochio, but upon Ginnochio's advice with another, and through him as his agent. He turned over to Ginnochio \$375 for the purpose of having him place the money on a certain horse. The evidence clearly indicates, not that plaintiff and defendant made a bet on the race, one against the other, but that they went in together, and plaintiff authorized the defendant to make a bet for him with some one else.

It is plain that plaintiff has no cause of action arising under the statute. The evidence did not in any wise support the allegation of the statement to the effect that the plaintiff lost money to the defendant in a gambling transaction. The court should have sustained defendant's demurrer to the evidence, offered at the close of plaintiff's case.

The Commissioner recommends that the judgment be reversed.

PER CURIAM. The foregoing opinion of BIGGS, C., is adopted as the opinion of the Court.

The judgment of the circuit court is accordingly reversed.

REYNOLDS, P. J., and ALLEN and BECKER, JJ., concur.

GOLDBAUM v. GREAT EASTERN CASUALTY CO. (No. 16083.)

(St. Louis Court of Appeals. Missouri. June 8, 1920. Rehearing Denied July 3, 1920.)

1. Insurance — 668(1)—Whether ring taken from insured was owned by him held for jury.

In action on burglary policy insuring against loss of property taken by force, where a diamond ring of which insured was robbed had been given by him to his fiancée, and had been redeemed by insured when fiancée, on breaking engagement, had pawned ring and given him the pawn ticket on his promise to return ring to her on her payment to him of specified sum of money, whether ring belonged to insured held for jury.

2. Insurance — 668(1)—Submission of liability for vexatious delay and attorney's fees held error.

In action on burglary policy, where there was no testimony that the insured demanded, or that the insurer refused, payment, the submission of the question of insurer's liability for vexatious delay and attorney's fees held error.

Appeal from St. Louis Circuit Court; John W. Calhoun, Judge.

"Not to be officially published."

Action by Milton J. Goldbaum against the Great Eastern Casualty Company. Judgment for plaintiff, and defendant appeals. Judgment ordered vacated, and new judgment entered on filing of remittitur; otherwise judgment reversed, and cause remanded.

Chase Morsey, of St. Louis, for appellant.
Fordyce, Holliday & White, of St. Louis, for respondent.

NIPPER, C. This is an action to recover on a policy of burglary insurance, which policy had a special rider attached thereto covering a loss of property, when taken by force or violence, not exceeding \$1,000 on jewelry, and \$50 on money. The petition was in the usual form. The answer admits the issuance of the policy to the plaintiff, and concludes with a general denial. Plaintiff recovered judgment in the court below for \$899.85, and defendant appeals.

The policy was issued on the 24th of July, 1916, and on the night of the 21st of September of the same year, while in the city of Springfield, Ill., plaintiff was held up and robbed of a diamond pin, a diamond ring, and \$25 in money.

Plaintiff was a salesman for the Universal Film Company, and traveled over the country, distributing films for moving pictures. On the date last above mentioned, he testified he was in the city of Springfield, Ill., on a business trip; that in the afternoon he went from Springfield to Virden, a town a few miles out from Springfield, and engaged a room for the night, as Springfield was crowded with visitors by reason of its being fair week. After calling on some parties in Springfield, he made inquiries as to where he could locate a party named Wycroft, who was conducting a picture show in Springfield. He was directed as to what street car he should take in order to reach the place he desired to go. He got on this street car, which was crowded, and rode as directed to the end of the car line. He made some inquiries again as to how to reach Wycroft's place, and he was told that he would have to walk some four or five blocks from the end of this car line. After walking about two blocks, and while near a vacant lot, he was held up by two men, and robbed. The diamond pin was in his necktie. The ring he had upon his finger. The robbers removed the ring from his finger, and one of them cut away a portion of his necktie with a knife, taking the diamond pin. He notified the police department, as well as the defendant company. He says he notified the defendant by wire at its New York office, and also at the St. Louis office. He then came back to St. Louis. He said that for 15 years he had been investing money in diamonds and selling them again, and was familiar with the value of them. The value

of the diamond stud was about \$400, and the value of the ring was about \$400.

On cross-examination, he testified that he paid \$225 or \$250 for the ring, and \$360 for the stud; that he had given the ring to a Miss Zimmerman, in Memphis, as an engagement ring. Five or 6 years later the engagement was broken. In 1911 he went to Chicago, where he met Miss Zimmerman again. She told him at first she was married; then later admitted she was not married, but was living with a man named Batier. She then told plaintiff that Batier had pawned the ring, and she gave him the pawn ticket, after which he stated:

"Mabel, I will take these out, and any time you see your way clear to give me the two hundred and twelve dollars, I will give you back the ring."

Plaintiff paid the \$212 and received the ring. After the robbery he sent a newspaper clipping concerning the same to Miss Zimmerman. She then brought suit against him on a note, and it seems that defendant was served with a notice of garnishment. Plaintiff then wrote defendant's office in New York, or had his attorney do so, telling defendant he was not the Milton J. Goldbaum who was being sued in Chicago.

Witness Davis testified for the plaintiff that he was connected with a jewelry company, and had been engaged in the loan and diamond business for 15 years, and was familiar with the value of diamonds; that from the year 1902 to the year 1917, there had been an increase in value in diamonds of the character described in evidence of 50 per cent. This testimony was objected to by defendant, and was admitted over its objections and exceptions.

Other witnesses testified, corroborating plaintiff as to his statements after the robbery, and as to their actions in detail.

The defendant introduced in evidence the letter written by plaintiff to defendant company, also the testimony of the assistant state's attorney at Springfield and police officers of that city, which tended to show that a few months after the robbery two men were arrested, one of whom made a confession that he had robbed the plaintiff, or was one of the two implicated in said robbery, and that plaintiff refused to swear out a warrant for their arrest, or to go to the jail where they were being held, and identify them, claiming that he did not have the time to spare, and thought it was up to the insurance company.

Plaintiff claimed, however, that the defendant's witnesses would not let him see the parties who were arrested and held in the Springfield jail at the time he visited there and asked to see them.

Appellant contends here: First. That plaintiff was not entitled to recover. Second. That if entitled to recover anything, he was not en-

titled to recover: (a) \$400 for the diamond ring, for the reason that he was not the owner thereof; and that (b) defendant was not liable for any attorney's fees.

The verdict as returned by the jury was for \$525 due under the policy, \$24.85 interest, no damages, and \$350 attorney's fees.

[1] We think the court properly submitted the case to the jury on the question of plaintiff's right to recover, not only for the value of the diamond stud, but also for the value of the ring. There can be no serious contention that there was not sufficient evidence before the jury showing the value of the diamonds in question to be \$525. Plaintiff had obtained the return of the ring from Miss Zimmerman. The policy provided that the company would not be liable for loss unless the property belonged to the assured or some member of his immediate family who resided in the assured's premises. It is true he told Miss Zimmerman at the time he obtained the return of the ring from her that, if she would pay him at any time the \$212, he would give her back the ring, but she had never paid him this money, and the ring was his, and would remain his unless she had done so; and it would not be necessary for him to resort to any legal procedure in order to vest title in him to the ring, and the question as to whether or not the ring belonged to plaintiff was properly submitted to the jury under the evidence. *Robinson v. Pennsylvania Insurance Co.*, 87 Me. 399, 32 Atl. 996; *Farmers' Mutual Fire Insurance Co. v. Fogelman*, 85 Mich. 481; *Phoenix Insurance Co. v. Bowdre*, 67 Miss. 620, 7 South. 596, 19 Am. St. Rep. 326.

The next assignment of error relied upon by appellant is that there was no evidence justifying the submission to the jury of the question of its liability for vexatious delay and attorney's fees. In support of this, we are cited to *Non-Royalty Shoe Co. v. Phoenix Assurance Co.*, 277 Mo. 399, 210 S. W. 37.

It will be noted, in the case at bar, the jury did not assess the penalty of 10 per cent. for damages, nor was there any affirmative finding by the jury that the refusal to pay was vexatious. And while it was held in the case above cited that there should be a finding of the fact of vexatious refusal to pay the loss before the infliction of either penalty should be permitted to stand, yet it was further said in that opinion (277 Mo. 421, 210 S. W. loc. cit. 42):

"While, as we suggest above, it is technical error to assess one penalty without the other, the error is in favor of defendant and against plaintiff, and defendant may not complain. If the wind is to be tempered to the shorn lamb, however, the lamb ought to be advised that the temperature has risen merely as an act of grace, and not of merit."

[2] However, the only testimony in this record with respect to proof of loss and the

demand for payment is the testimony of plaintiff, who stated that after he notified the defendant by wire he was given some papers by defendant's agent in St. Louis to make out his claim with, and that he made out these papers and sent them back to the agent. Plaintiff, nowhere in his testimony, states that he made any demand for the payment of this loss, or, if made, what amount he demanded, nor is there anything in the record, aside from the pleadings, showing a refusal of the company to pay. Therefore we think it was error to submit to the jury the question of defendant's liability for vexatious delay and attorney's fees. *Non-Royalty Shoe Co. v. Phoenix Assurance Co.*, supra; *Patterson v. Insurance Co.*, 174 Mo. App. 37, 160 S. W. 59; *Keller v. Insurance Co.*, 198 Mo. 440, 95 S. W. 903.

In view of the above and foregoing, the commissioner recommends that upon respondent filing a remittitur of \$350 within 15 days, the said circuit court be directed to vacate and set aside the judgment rendered herein, and to enter a new judgment herein in favor of plaintiff in the sum of \$549.85, with interest from the date of the original judgment; otherwise the judgment should be reversed and the cause remanded.

PER CURIAM. The foregoing opinion of NIPPER, C., is adopted as the opinion of the court.

The judgment of the circuit court is accordingly affirmed, upon plaintiff's compliance with the requirements set forth in the above opinion; otherwise the judgment is reversed and remanded.

REYNOLDS, P. J., and ALLEN and BECKER, JJ., concur.

START v. NATIONAL NEWSPAPER ASS'N. (No. 13671.)

(Kansas City Court of Appeals. Missouri.
June 14, 1920.)

1. Corporations ⇨491—Ultra vires no defense in tort action.

In an action against a corporation for damages for personal injuries arising from alleged negligence in the conducting of a show in a rented building, it was no defense that the lease of the building by defendant was ultra vires.

2. Corporations ⇨432(12) — Evidence sufficient to bind corporation in lease of building in negligence case.

In an action against a corporation for damages for personal injuries arising from alleged negligence in the conducting of an entertainment in a building, evidence held sufficient to bind defendant, though the contract renting the build-

ing was entered into by an officer without formal express sanction of the board of directors.

3. Release ⇨29(2) — Common law abolished with respect to release of one or more joint wrongdoers.

Laws 1915, p. 268, abolished the common law in respect to the release of one or more joint wrongdoers discharging the others.

4. Release ⇨29(2)—Release of joint wrongdoer did not discharge others, where cause of action arose before statute abolished common law.

Where cause of action against joint tortfeasors arose before the enactment of Laws 1915, p. 268, abolishing the common law in respect to release of one or more joint wrongdoers discharging the others, a settlement, release, and discharge of some of the wrongdoers, after the enactment of such law, did not discharge the others.

5. Negligence ⇨138(3)—Instruction held inapplicable.

Where petition in negligence case alleged that incline was dangerous, in that "it was not provided with sufficient or suitable cleats or other footholds, nor with handholds nor railings along the side thereof," an instruction following the allegation of the petition, except that it was that there were "no cleats," was erroneous in part as not being supported by evidence and in part as not being justified by the pleading and evidence, where there was no evidence of "other footholds," and plaintiff testified that there were railings, and the proof was that there were cleats but that they were not sufficient.

6. Appeal and error ⇨1064(4)—Trial ⇨228 (1)—Instruction held in the disjunctive and not conjunctive and prejudicial error.

An instruction submitting question whether an incline was dangerous, in that "it was not provided with sufficient or suitable cleats or other footholds or with handholds or railings along the side thereof," was in the disjunctive and not in the conjunctive, and was prejudicial to defendant, where plaintiff's evidence showed that there were railings and handholds.

7. Appeal and error ⇨1207(3)—Interest how allowed on remittitur.

While ordinarily interest should only be allowed from the date of the new judgment on remittitur, under Rev St. 1909, § 7181, court did not err in rendering judgment for \$3,500 with interest from the date of original judgment, where remittitur read: "Upon intimation by the court to the effect that the assessment of damages herein in the sum of \$4,400 by the jury is excessive as to the difference between said sum and \$3,500 with interest upon the last-named amount from the date of the rendition of the original judgment, February 27, 1919; and that plaintiff should remit said excess, said plaintiff does hereby make and enter such remittitur," etc.—the remittitur not striking off a specific sum, and the original judgment not being reduced to \$3,500, but reduced to that sum plus the interest on it from date of the original judgment.

Appeal from Circuit Court, Jackson County; W. O. Scarritt, Special Judge.

"Not to be officially published."

Action by Sarah J. Start against the National Newspaper Association. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Frank M. Lowe, of Kansas City, for appellant.

E. H. Gamble and Rader & Rader, all of Kansas City, for respondent.

ELLISON, P. J. Plaintiff's action is for damages resulting from personal injury received by her in falling upon the floor of a building claimed to have been in the possession and occupancy of defendant. There were two other defendants, but for a consideration plaintiff entered into a covenant not to sue and the action was dismissed as to them. There was a verdict against the present defendant for \$4,400, but afterwards there was a remittitur bringing the sum down to \$3,500 and interest, and judgment was rendered for that amount with 6 per cent. interest from date of the first judgment.

The building concerned is what is known as "Convention Hall," in Kansas City, a place which is let for conventions and for exhibitions of great variety and character. In the instance of this controversy it was let for a space of nearly two weeks for a "Kansas City Land Show." To whom it was let and who gave the show is a matter of dispute. Plaintiff claims that defendant, as owner of the Kansas City Post, a daily newspaper published in that city, rented the building advertised and gave the entertainment, charging 25 cents admission to the public, as well as certain charges to exhibitors. The hall was rented by an agreement in writing, beginning with:

"This agreement made and entered into by and between the Kansas City Convention Hall Building Company, party of the first part, and the Kansas City Post, party of the second part."

After prescribing the various terms of the renting, providing for the show, etc., the paper is signed:

"Kansas City Convention Hall Building Company, by Louis W. Shouse, Secy." "Kansas City Post, by J. Dek. Towner, Secy. & Treas."

There are two points of defense stated by defendant at the outset; one is that the defendant, National Newspaper Association, was not in possession or control of Convention Hall at the time plaintiff was injured. But the evidence is abundant that it was. It is true that the contract renting the hall was signed by the Kansas City Post, per Towner, as secretary and treasurer. But he was secretary and treasurer of the defendant

association and it was the owner and publisher of the Kansas City Post. So far as the land show was concerned, the Post and this defendant were one. It was advertised as the Post's enterprise, but all the bills were paid by defendant and the large income, consisting of sums received from exhibitors and door receipts, went to the defendant. It was shown that one Buckley was the personal manager of the show, hired, put in charge, and paid by defendant.

[1] But it is strongly insisted that "the lease of Convention Hall signed by Towner, secretary and treasurer of the National Newspaper Association, is ultra vires and absolutely void," and *Millinery Co. v. Trust Co.*, 251 Mo. 553, 158 S. W. 859, and *Orpheum Theater Co. v. Brokerage Co.*, 197 Mo. App. 661, 199 S. W. 257, are cited in support of the point. Those cases involved liability on matters of contract, while the case before us is one in tort, in which ultra vires is not a defense. *Alexander v. Relfe*, 74 Mo. 495, 517.

[2] It is next claimed that there was no evidence that Towner, secretary and treasurer of the defendant, newspaper association, had authority from the board of directors to execute the contract renting Convention Hall. There was no direct evidence showing that the directors ever ordered the contract of renting be made, but it was shown, and not disputed, that Towner was the resident official of this association and received the moneys of the association, and the president of the association knew of the show and gave directions in regard thereto, and that he gave Towner orders with respect to handling the expenses and receipts derived from the show, and that the large sum of money received as proceeds of the show were paid to the association. Besides this, Towner testified that he had general direction from the president of the association:

"That Mr. Buckley was going to run the land show and that I should do all in my power to help him do it, and I had my instructions that we should advance Mr. Buckley—help him at the start, and then I was to take over the receipts of the land show as they came in."

It was further shown that Buckley's salary was paid with checks of the defendant association by direction of the president. It was further shown that the rental contract with Convention Hall was carried out by defendant association, the rent being paid by it. We think this showing is evidence sufficient to bind the corporation without a formal express sanction of the board of directors.

[3] As stated at the beginning, there were two other defendants claimed in the petition to be joint wrongdoers, and on settlement plaintiff covenanted not to sue them and the action was dismissed as to them. Defendant

insists that plaintiff did not merely covenant not to sue them but that she, in fact, settled her claim and discharged them, which, under the common law, also operated as a discharge of this defendant. If we concede that the paper entitled a covenant not to sue was in fact a release of the other wrongdoers, it will not avail defendant, for the reason that by the Laws of 1915, p. 268, the common law was abolished in respect to the release of one or more joint wrongdoers discharging the others. It reads as follows:

"It shall be lawful for all persons having a claim or cause of action against two or more joint tort-feasors or wrongdoers to compound, settle with, and discharge any and every one or more of said joint tort-feasors or wrongdoers for such sum as such person or persons may see fit, and to release him or them from all further liability to such person or persons for such tort or wrong, without impairing the right of such person or persons to demand and collect the balance of said claim or cause of action from the other joint tort-feasors or wrongdoers against whom such person or persons has such claim or cause of action, and not so released."

[4] It is true that this cause of action arose before the enactment of that law, but the settlement with the other wrongdoers was not had until more than two years after the Legislature had acted. In thus applying the law we are not giving it retrospective force (*Abbott v. Mining Co.*, 255 Mo. 378, 164 S. W. 563; *Gibson v. Railway Co.*, 225 Mo. 473, 125 S. W. 453; *Clark v. Railway Co.*, 219 Mo. 524, 118 S. W. 40), and this is recognized in *Clark v. Union Elec. Co.*, 213 S. W. 851.

Defendant's objection to plaintiff's instruction No. 2 is well taken. It is charged in the petition that in the arrangement of the hall for the show there was a steep temporary wooden incline running from a temporary wooden floor, up and down which those attending the show traveled; that this incline was dangerous, in that "it was not provided with sufficient or suitable cleats or other footholds, nor with handholds nor railings along the side thereof," and that at the bottom of the incline there was a hole in the wooden floor; that plaintiff, in descending the incline, near the bottom, and on account of its dangerous condition, slipped and the heel of her shoe caught in the hole and she fell and was injured.

[5] The instruction followed the allegation of the petition, except in the use of the word "or" handhold instead of "nor" handhold. That was immaterial. But there was no evidence of "other footholds" than cleating, and such character of footholds should therefore not have been included in the instruction as one of the issues. So the instruction submitted the hypothesis of negligence, in that there were no railings along the side of the incline, when the evidence in plaintiff's behalf showed there were railings, and there was no evidence that there were

not. So the instruction submitted the hypothesis of negligence in not providing the incline with cleats, while the negligence alleged in the petition is that it was not "provided with sufficient or suitable cleats." The instruction is that there were no cleats, whereas the pleading and proof were that there were cleats but they were not sufficient. So therefore we rule the instruction erroneous, in that it in part was without supporting evidence and in part was not justified by the pleading and evidence. *Huff v. Railroad*, 222 Mo. 286, 303, 121 S. W. 120; *State ex rel. Coal Co. v. Ellison*, 270 Mo. 645, 653, 195 S. W. 722; *Degonia v. Railroad*, 224 Mo. 564, 589, 123 S. W. 807; *Sparkman v. Railroad*, 191 Mo. App. 463, 469, 177 S. W. 703; *Lord v. Delano*, 188 S. W. 93, 95.

[6] Plaintiff seeks to avoid this point by the claim that the instruction was in the conjunctive and only put an additional burden on her. The instruction was in the disjunctive. She likens her case to those of that character and cites *Rigg v. Railroad*, 212 S. W. 878, *Blair v. Union Light Co.*, 213 S. W. 976, and *Meeker v. Union Light Co.*, 216 S. W. 923. But it is readily seen that those cases are not analogous.

The original judgment was rendered on the verdict on the 27th of February, 1919, for \$4,400. The case was then continued over on motion for new trial until the following September 12th, when a remittitur was entered reducing it to \$3,500 and interest from date of the original judgment, and the latter set aside and in lieu thereof a new judgment, in the sum of \$3,500 with interest from the date of the original judgment, to wit, 27th of February, 1919.

[7] Ordinarily interest should only be allowed from the date of the new judgment on the remittitur. The original judgment becomes a nullity, and the judgment rendered on the sum remaining after subtracting the remittitur becomes the judgment, and interest should only be allowed "from the day of rendering the same." Section 7181, R. S. 1909; *Erwin v. Jones*, 191 S. W. 1047; *Sculin v. Railroad*, 192 Mo. 6, 90 S. W. 1028; *State ex rel. v. Broadus*, 212 Mo. 685, 111 S. W. 508; *Stolze v. Transit Co.*, 122 Mo. App. 458, 99 S. W. 471. But the remittitur involved here is somewhat peculiar. It reads as follows:

"Upon intimation by the court to the effect that the assessment of damages herein in the sum of \$4,400 by the jury is excessive as to the difference between said sum and \$3,500 with interest upon the last-named amount from the date of the rendition of the original judgment, February 27, 1919, and that plaintiff should remit said excess, said plaintiff does hereby make and enter such remittitur, and moves the court to set aside said original judgment in this cause and enter a new judgment in her favor for the sum of \$3,500 with interest as aforesaid from the date of said original judgment."

It does not strike off a specific sum, but only such amount as is "the difference between the verdict of \$4,400 and the sum of \$3,500 with interest upon the latter amount from the date of the original judgment." In other words, plaintiff did not reduce the original judgment to \$3,500, but reduced it to that sum plus the interest on it from the date of the original judgment, and so the new judgment was rendered, and we think properly. It would have been less involved if the interest on \$3,500 had been calculated down to the day of the new judgment and added to that sum and the new judgment entered accordingly.

The judgment will be reversed and the cause remanded.

All concur.

CADELL v. CADELL. (No. 13225.)

(Kansas City Court of Appeals. Missouri.
June 14, 1920.)

1. Divorce \Leftrightarrow 180 — Wife's appeal from divorce decree not to be dismissed because of husband's subsequent death.

In wife's suit for divorce, wherein defendant husband filed cross-bill and secured decree, appeal taken by plaintiff wife will not be dismissed on account of subsequent death of defendant husband, property rights of wife requiring that divorce be set aside if erroneously adjudged.

2. Divorce \Leftrightarrow 130—Husband held not entitled to decree.

In a wife's suit for divorce, defendant husband, who had seduced her during the lifetime of his first wife, and had married her after his first wife's death, held not entitled to decree, in view of the evidence.

Appeal from Circuit Court, Livingston County; Arch B. Davis, Judge.

Action for divorce by Margaret Caddell against George W. Caddell, wherein defendant filed cross-bill. From decree for defendant on the cross-bill, plaintiff appeals. Reversed.

Thos. H. Hicklin and Scott J. Miller, both of Chillicothe, for appellant.

W. W. Davis, of Chillicothe, for respondent.

ELLISON, P. J. This action was instituted by plaintiff for divorce. Defendant filed a cross-bill. A decree was rendered for him on the cross-bill. Plaintiff appealed to this court.

After the appeal was taken defendant died, and the cause was revived against the administrator of his estate, and it is suggested that as defendant has died, the action being for divorce, nothing can be done save to dismiss the appeal.

[1] It appears that defendant was possessed of property, in which instance justice requires that the case be heard, not as regards the mere dissolving the relation of husband and wife, for death has done that, but that the plaintiff, if she has had a divorce adjudged against her erroneously, may have such adjudication set aside to the end that she may assert a widow's claim in his estate which, if the judgment stands unreversed, she could not do. It requires but a moment's reflection to see the rank injustice which might be done an innocent woman. The death of her husband ought not, ipso facto, to deprive her of her legal rights.

In *Danforth v. Danforth*, 111 Ill. 236, 243, the Supreme Court of Illinois said:

"It is claimed that the death of either party puts an end to all further legal proceedings. This is true where the death takes place before any final decree of divorce. *Ewald v. Corbett*, 32 Cal. 493; *Swan v. Harrison*, 2 Coldw. 534; *Pearson v. Darrington*, 32 Ala. 227. But where a decree of divorce has been improperly obtained, and the proceedings are erroneous, the party whose property rights have been injuriously affected by such decree ought not to be concluded by reason of the subsequent death of the other party. While both parties live, a writ of error lies to reverse an erroneous decree of divorce, the effect of which is to restore both parties to their former status of husband and wife, in law, and after the death of one it ought to lie in favor of the other party not for the same purpose, but to restore the survivor to his or her rights of property divested erroneously by the decree. On the reversal of a decree of divorce, the parties will be placed in the position they occupied before the decree was entered, and if one of them has died between the date of the decree of divorce and its reversal, the survivor procuring the reversal will be entitled to all rights of succession or dower, and the like, in the estate of the other, the same as if no divorce had ever been had; but in such case the court need not ordinarily remand the case, as no other decree of divorce can ever be had."

And so the law is declared in *Strickland v. Strickland*, 80 Ark. 451, 97 S. W. 659, *Nickerson v. Nickerson*, 34 Or. 1, 48 Pac. 423, 54 Pac. 277, and *Thomas v. Thomas*, 57 Md. 504. To the same effect is 1 *Corpus Juris*, 208, § 404; *Id.* 171, § 289.

We have examined the evidence in the case, and find that the decree cannot be sustained. It appears: That plaintiff was defendant's second wife. That before the death of his first wife he employed plaintiff (who was then 19 years old) as his stenographer in his office, and that shortly thereafter he began illicit relations with her, promising to marry her when his wife died; the latter's health not then being good. As a result of this intercourse, she gave birth to a child, still living. That defendant's

wife having died in the meantime, he and plaintiff were married. They soon fell into disagreements, and each used gross language towards the other. She accused him of attentions to other women. And he accused her, not directly, with adultery, but with improper conduct, especially with a certain "drunk man." His charges appear to be without foundation. He concedes plaintiff to be a good woman but for the influence of her mother. But at the same time he cast an aspersion on her by saying "it might be my child, but I don't know whether it is or not." But he testified to the following on cross-examination:

"I married her after the birth of the child. The reason I married this girl, we done wrong, me and her, while she was working in our jitney office, and we talked this over, and I said we could rectify this—a man will never do a wrong if he has the right kind of a heart in him without rectifying it—and I married the woman because we done wrong and because I loved her, in my first wife's lifetime. October 10, 1917, was about the time of our marriage. If I ever got along with her a week I have known her 10,000 years to my knowledge. She is the best woman living to-day when she is a good woman. Jealousy of me is the most of the trouble."

As we have said, he made accusations of infidelity against her, but he was also abusive in other ways. At one time, in answer to a vile name she called him, he said, "If you were a man, I would cut your liver out and wash your face with it."

[2] There was other evidence which need not be gone over in detail. Suffice it to say that we think defendant was not entitled to a decree of divorce, and that it should be reversed.

In view of the fact that defendant died after the decree was rendered and during the pendency of plaintiff's appeal, it is not necessary to decide whether she should have had a decree on her petition; for whether she should or not, defendant not having been entitled to one in his favor, our reversal of that decree leaves her and her rights unaffected by it.

The judgment is reversed.

All concur.

BRINGHURST v. BRINGHURST. (No. 17006.)

(St. Louis Court of Appeals. Missouri. Submitted on Briefs May 11, 1920. Opinion Filed June 8, 1920.)

I. Divorce \S 303(3)—Reputation of mother of divorced wife seeking to modify decree as to custody of child immaterial.

On application by a divorced wife for modification of the decree as to the custody of the child, testimony that the wife's mother was not a woman of good reputation was inadmis-

sible, in the absence of showing that there would be any association between mother and daughter when the child was with the latter.

2. Appeal and error \S 205—Party offering testimony should set it forth as basis for ruling by appellate court.

The party offering testimony should set forth what it will be if the witness is permitted to testify; otherwise the appellate court cannot say whether the evidence is admissible, or, if so, whether its exclusion will work reversal.

3. Trial \S 45(1)—Offer of proof must be specific.

An offer of proof must be specific and definite.

4. Divorce \S 303(3)—Evidence held to warrant modification of decree as to custody of child.

Evidence held to warrant the action of the trial court in modifying decree of divorce in favor of a husband at the instance of the wife to permit her to have custody of the child of the parties for five specified weeks in each year, thus making definite the indefinite requirements of the first order as to custody that the husband permit the wife to see the child.

Error to St. Louis Circuit Court; Victor H. Falkenhainer, Judge.

"Not to be officially published."

Suit for divorce by Robert Bringhurst against Daisy Bringhurst wherein decree for plaintiff was entered, which defendant moved to modify in so far as relating to the custody of the child. To review judgment modifying decree in such respect, plaintiff brings error. Affirmed.

Curlee & Hay, of St. Louis, for plaintiff in error.

Abbott, Fauntleroy, Cullen & Edwards, of St. Louis, for defendant in error.

REYNOLDS, P. J. On June 10, 1918, by decree of the circuit court of the city of St. Louis, plaintiff in error, but who will hereafter be designated as plaintiff, was granted a decree of divorce against his then wife, now defendant in error but who will hereafter be referred to as defendant. The ground of the divorce was desertion of the husband by the wife, without cause. In rendering the decree the circuit court granted the custody of the minor child born of the marriage, a boy then about six years old, to the husband, the decree, however, containing this proviso:

"With the privilege to defendant to visit said child for a period of one week in each three months, and also at any time said child may happen to be seriously ill, plaintiff agreeing to notify defendant of such illness promptly should such event occur."

There was also a clause, unnecessarily inserted, that the court retained jurisdiction of the cause "for the purpose of making fur-

ther orders respecting the custody of said child should it become necessary or proper to do so."

The provision permitting the defendant to visit the child for a period of one week in each three months does not seem to have been satisfactorily carried out. After the divorce the defendant remarried and so did the plaintiff, and the child for a time was at plaintiff's home in St. Louis, where the second wife and a child born of the second marriage resided; but a short time after the divorce, plaintiff's mother came and lived with him for a time and then took the child to her home in Litchfield, Illinois, there residing with her husband and the boy until the death of the former, a short time before the trial of the motion now before us, the father providing for his clothing and maintenance and visiting him at least every two weeks. Defendant, on her remarriage, resided with her second husband at Carterville, Illinois. It appears that plaintiff, in the course of his employment, moved to New Orleans, Louisiana, taking his wife, the child born of the second marriage, and this boy, now some 9 or 10 years old, with him and now resides there. On September 8, 1919, defendant filed, in the circuit court of the city of St. Louis, a motion to modify the decree theretofore rendered, so far as related to the custody of the child. In this motion it is set out that at all times since June 10, 1918, and until plaintiff took the child from the state of Missouri, he had refused to allow defendant to see him at any place other than in the flat in which plaintiff and his second wife resided, and refused to permit defendant to see her child except in the company of himself and his wife; that she had repeatedly, from the date of the adjudication of the divorce to the time of the removal by plaintiff of the boy from the state of Missouri to New Orleans, tried both through plaintiff and his attorney to see the child and to have plaintiff bring the child to some proper place in St. Louis where she could see him, other than the home occupied by plaintiff and his second wife, but plaintiff at all times declined and refused to allow plaintiff to see the child; that while she had sent the child a present at Christmas, the plaintiff declined to allow the child to receive it and returned the present to the defendant unopened, and has at all times prevented defendant from having communication with the child prior to the time and within the last few weeks when plaintiff removed the child from the state of Missouri; that since her divorce from plaintiff, defendant had married one Dowell, with whom she is living as wife at Carterville, and that he is ready and willing and amply able to support the child adequately and to maintain, clothe and educate him; that they have a comfortable home where defendant

can support, maintain and educate the child and look after his moral and physical welfare. The premises considered and because of the abuse, as defendant says, by plaintiff of his right to the custody of the child, and because of the age of the child, she avers his welfare will be best supervised by being in the care and custody and supervision of defendant as his mother, she moves the court to modify the order of June 10, 1918, heretofore set forth with reference to the custody of the child, and to award the custody of it to her, the defendant.

A hearing was had on this motion before the court and a judgment entered to the effect that the custody of the child remain in plaintiff, "defendant to have the custody of said child each year for a period of five weeks, as follows: From December 26th to and including January 2d, and from July 1st to 31st, both dates inclusive. Plaintiff to permit defendant to call for said child in Litchfield, Illinois, and without molestation or interference to take the child to her home in Carterville, Illinois, to remain there for the periods above designated, after which the defendant is to return the child to the custody of plaintiff at Litchfield, Illinois, all of which to be at the cost of defendant, should the child be in the custody of the mother of plaintiff by and with plaintiff's consent, plaintiff is nevertheless held personally responsible for the full performance of this decree."

A motion for new trial was duly filed by plaintiff, overruled, exceptions saved and the cause brought to our court on writ of error.

We have read all of the testimony in the case and see no reason to disturb the finding of the learned trial court. There is some conflict, but not very much; with few exceptions on immaterial matters, there is no conflict; and the evidence tended to sustain the allegations of the motion as to the exclusion of defendant from access to her son under the first order.

The assignments of error by learned counsel for plaintiff are two; first, error of the trial court in excluding evidence offered by plaintiff tending to prove that defendant's mother, who lives in the same town with defendant, and who, it is charged, must be presumed to associate with the defendant and with the child, if in the custody of defendant, is a woman of bad repute.

The second assignment is to the alleged error of the court in modifying the decree.

The first assignment is untenable. While a witness in behalf of defendant was under cross-examination by counsel for plaintiff, he was asked if he knew defendant's mother. He said that he did. Counsel then asked witness if he knew her general reputation for virtue and chastity in the community. That was objected to. The court sustained the objection, stating, however, that he did so unless counsel for plaintiff showed that the de-

fendant "intends or has her mother under her charge and that the same association would be in the home." Whereupon counsel made this statement:

"I offer to show by this witness that the reputation of Mrs. B. (mother of defendant)—I will say this, your Honor: I ask for an answer to this question upon this theory: From my information, I wish to inquire of this witness, is it not true that the reputation of the mother of the defendant for virtue and chastity is not good? My theory of that is this: I do not claim I shall be able to show it is the intention to keep her in the same home with the defendant, but having shown the relationship of mother and daughter and that they will be in the same town, that the unavoidable result would be the associations of the home on the child."

Mr. Edwards: "We object to that."

The Court: "Objection sustained. That is a far-fetched proposition, Mr. Hay, I take it. I don't believe you have a right to infer that there will be any association there, unless you can show that there has been some association and that it will continue, and the Court may then find that."

Mr. Hay: "From my own mental operation I cannot infer anything else. I can't control any other inference but my own. That is all. We except."

[1-3] We see no error in this ruling of the learned trial court. At best, as remarked by the court, it was rather "a far-fetched proposition," and one from which the inference was sought to be drawn that there would be any association between the mother and daughter, unless it was shown that there now was such association and that it would continue. No such offer of testimony was made. The mere relation of mother and daughter does not necessarily carry with it the implication that there will be an intimate association between them, even assuming that the reputation of the mother of defendant was bad and that the daughter, whose reputation was proved by incontrovertible testimony to be very good, would associate with her or bring the boy into contact with her or under her influence. Moreover, this offer does not fall within the rule frequently announced by our courts, Supreme and Appellate, that the party offering testimony should set forth what the testimony would be if the witness is permitted to testify on the point, and unless that is done the appellate court is unable to say that the evidence which it is desired to offer is admissible, or whether, if admissible, its materiality is such that its exclusion would work a reversal of the judgment in the case. An offer to prove must be specific and definite. *Linstroth et ux. v. Peper*, not yet officially reported, but see 218 S. W. 431, loc. cit. 435, and authorities there cited.

[4] As to the second proposition, as before said, we think that the action of the trial

court in modifying the decree in the manner in which it did, was warranted by the evidence in the case. It made that definite which before had been rather indefinite in the first order. The evidence tended to show that defendant bore an excellent reputation in the town in which she resides with her present husband; that the latter is amply able to provide for the child while it is with the mother and is willing to do so. Defendant is the mother, and with the good character which it has been proved she has, there is no reason why she should not have the society of her child during the limited period fixed by the court, which is not unreasonable as to time or duration. The learned trial court, with the witnesses before him, had ample opportunity to determine the weight to be given them by their demeanor and, particularly as far as the defendant is concerned, to determine her fitness to have the custody and society of her child during this period, and we have no reason to criticize or depart from his action.

The judgment of the circuit court is affirmed.

ALLEN and BECKFR, JJ., concur.

NAPOLEON HILL COTTON CO. v. H. OETTER GROCERY CO. (No. 16061.)

(St. Louis Court of Appeals, Missouri. Argued and Submitted May 11, 1920. Opinion Filed June 8, 1920. Rehearing Denied June 28, 1920.)

1. Corporations \S 432(12)—Evidence held to show secretary's authority to issue checks to himself.

In an action to recover from defendant the amount of checks of plaintiff corporation drawn by its secretary in favor of himself and indorsed to defendant in payment of his personal debts, evidence held to support secretary's authority to issue such checks.

2. Appeal and error \S 931(6)—Whether court considered evidence admitted subject to objection held not determinable.

In an action by corporation to recover money paid on plaintiff's checks, issued by its secretary manager to himself and indorsed to defendant, where the trial was to the court, it cannot be said whether he considered at all, in arriving at his conclusion, a certificate showing that such secretary manager had such authority with reference to plaintiff's deposits in another bank, objected to on the grounds that it did not affect the payee bank and was not known to defendant and admitted subject to objection.

3. Appeal and error \S 1010(1) — Finding of fact, sustained by substantial evidence, conclusive.

Finding of fact by trial court sustained by substantial evidence is conclusive on court of appeals.

4. Corporations \Leftrightarrow 425(3)—Knowledge of habit of officer in drawing checks to himself held to preclude objection by corporation.

Where plaintiff corporation had permitted its secretary to draw checks payable to himself for a number of years, and some of these checks had been indorsed by him to defendant to pay his debts, which plaintiff must have known, plaintiff cannot recover therefor from defendant.

5. Corporations \Leftrightarrow 425(4)—Established practice avoids rule that checks drawn by officer for his private business are invalid.

The rule that checks drawn by an officer of a corporation for his own private business are invalid is without application, where an officer was allowed for years to draw the company's checks for his salary and indorse these to others in payment of his debts.

6. Corporations \Leftrightarrow 432(6)—Certificate showing officer's authority to draw checks held competent.

In a corporation's action to recover from defendant money paid by depositary upon corporation's checks drawn by its officer to himself and indorsed to defendant, a certificate of the corporation, showing such officer's authority to draw checks, was competent and admissible.

Appeal from St. Louis Circuit Court; Rhodes E. Cave, Judge.

Action by the Napoleon Hill Cotton Company against the H. Oetter Grocery Company. Judgment for defendant, and plaintiff appeals. Affirmed.

H. R. Boyd, of Memphis, Tenn., and W. M. Fitch and Homer Hall, both of St. Louis, for appellant.

Taylor R. Young, of St. Louis, and T. T. Hinde, of Madison, Ill., for respondent.

REYNOLDS, P. J. The petition in this case, after averring the incorporation of plaintiff and defendant, for the first cause of action avers that on February 11, 1911, defendant received a check of plaintiff for the sum of \$225.00, drawn in the name of plaintiff on the Boatmen's Bank, to the order of one R. W. Upshaw, by him indorsed in blank and delivered to the defendant indorsed by the latter to the Mercantile Trust Company of St. Louis and paid by the Boatmen's Bank on February 13, 1911. Averring that the plaintiff at the date of the draft or check, was not indebted to R. W. Upshaw in any sum whatever, and that defendant received a check for the money on that date and is indebted to plaintiff in that sum as money had and received by it, judgment is prayed for the amount of that check and interest from February 11, 1911.

The second cause of action is on a check of plaintiff, dated June 28, 1912, drawn by Upshaw and to his order, for the sum of

\$225.00, and put through bank and collected by defendant, it being averred that plaintiff was not indebted to the defendant on the date of the check in any sum whatever. Interest is also prayed on this from July 31, 1911.

The third count is on a check in the name of plaintiff, of date December 16, 1912, for \$241.00, payable to R. W. Upshaw and signed by him as secretary and manager of plaintiff. Averring that it was not indebted to R. W. Upshaw in any sum whatever, and that defendant received the money to the use of plaintiff and was indebted to it for that sum, judgment is prayed for that and for interest from February 1, 1912.

The answer, admitting the incorporation of the parties, sets up that plaintiff is a corporation organized under the laws of the state of Missouri, with a capital stock of \$250,000, with all of its stock, except 50 shares owned by the heirs of Napoleon Hill and Noland Fontaine; that Hill and Fontaine and their heirs were and are residents of Memphis, Tennessee, residing there, and that the business and office of the plaintiff company was and is in St. Louis, Missouri, and at the time these checks referred to were issued, was under the sole control, management and charge of R. W. Upshaw, who was the owner of 50 shares of stock in the corporation and its secretary and treasurer; that the corporation was organized as a matter of convenience for the parties, but that the corporate forms were seldom observed and the business and assets of the company were treated as if belonging to a partnership, the stockholders drawing from the treasury of the corporation such funds as they might from time to time need for their purposes; that Upshaw, secretary and treasurer of the corporation, was authorized by the stockholders and directors, both generally and specially, and by acquiescence in long custom, to deal with the assets and bank account of the corporation as he saw fit; that in pursuance of such authority, Upshaw was authorized to and did execute notes, checks and other instruments of various kinds and character on behalf of the corporation, and had authority and did issue checks for his own personal use on the bank account of plaintiff; that Upshaw was to receive a salary of \$3,600 per annum for his services, which he paid himself from time to time by issuing checks for his personal use upon the bank account of plaintiff; that the stockholders of the plaintiff company knew of this fact, and authorized Upshaw to make payments to himself in this manner; that Upshaw and other stockholders in the corporation from time to time, for their own purposes, drew upon the treasury of the corporation, and there was carried overdrafts upon the books of the plaintiff charged against various stockholders, which practice

was well known to the stockholders of the corporation and approved and authorized by them; that after twenty years the Fontaine and Hill interests in the company became dissatisfied with the management of Upshaw, claiming that he had abused the privileges conferred upon him by the stockholders and the board of directors of the corporation and had overdrawn his account largely in excess of the amount they had expected and in excess of what they believed to be due for his salary and other obligations due from the company or the stockholders thereof to Upshaw; that knowledge came to the Fontaine and Hill interests of the alleged breach of trust on the part of Upshaw in the year 1912, at which time they caused some investigation to be made, and subsequently, in the latter part of 1913 and the early part of 1914, the stockholders of plaintiff company made a further investigation of the books and records of the company and became possessed of all the facts with reference to the dealings of Upshaw with the company and with other stockholders therein, and that with the knowledge that Upshaw had not properly kept his books and had falsified his accounts, the plaintiff company continued Upshaw in their employ, and on June 5, 1915, for the purpose of settling the differences and adjusting all matters between Upshaw and plaintiff company, the stockholders in the company, through their board of directors, accepted 50 shares of stock in plaintiff company, then belonging to Upshaw, in full satisfaction and settlement of the over draft shown on the books of the plaintiff company against Upshaw; that the stock of Upshaw in plaintiff company represented the total assets of Upshaw; that plaintiff and its stockholders, Fontaine and Hill, appropriated to themselves all of the assets of Upshaw for the purpose of liquidating the obligations of Upshaw to the company, and in so doing deprived the other creditors of Upshaw of the benefit of his assets; that at the time of this appropriation plaintiff company had actual knowledge of all the facts with reference to Upshaw's alleged defalcations, and that he had issued the checks to the defendant described in plaintiff's petition; that these checks were issued by Upshaw in payment of his personal obligations for groceries furnished him by defendant for family use, and that defendant believes and has reason to believe that these checks were a part of the thirty-six-hundred-dollar salary of Upshaw, and that the primary liability to defendant on account of the issuance of these checks, if they were in excess of the salary, is that of Upshaw, and if Upshaw had exceeded the amount due him from plaintiff, then defendant was entitled to participate in the assets of Upshaw, represented by the 50 shares of stock which plaintiff and its stockholders appropriated for their own purposes, and which

said stockholders now hold as beneficiaries thereof; that defendant had no knowledge of the alleged defalcation of Upshaw until December 9, 1915, at which time plaintiff notified it, making a demand upon defendant for the payment of the money received under the three checks; that had defendant been informed of the situation promptly and at the time the knowledge of it first reached Fontaine and Hill and plaintiff company, that Upshaw was then alive and defendant could have participated in his assets, which were appropriated by plaintiff and its stockholders, and could have protected itself by recourse against Upshaw; that since the institution of this action Upshaw has died, and by reason of plaintiff company failing to notify defendant of the alleged defalcations of Upshaw and its claim against Upshaw as soon as plaintiff had knowledge of the same, defendant is precluded and has been precluded from protecting itself against Upshaw; that in equity and good conscience plaintiff herein and its chief stockholders, Fontaine and Hill, should not be permitted to create a condition whereby Upshaw, as their agent and representative, could for a long period of time issue checks upon plaintiff's account under direct authority and permission and with the consent and knowledge of plaintiff and its stockholders, which checks were received current in the city of St. Louis for the payment of the personal obligations of Upshaw, and upon Upshaw proving false to his trust be allowed to appropriate for their own use and benefit the only assets which Upshaw possessed, without promptly notifying defendant and other creditors of Upshaw of his defalcations as soon as they became possessed of the knowledge, and thereby enable this defendant to pursue its recourse against Upshaw; that plaintiff and its stockholders by their conduct in dealing with this defendant, and with the assets of Upshaw, are in equity and good conscience estopped from asserting any rights against defendant on account of the checks described in plaintiff's petition; that although as set out in plaintiff's petition, the checks were paid at or about the time of their issue, no objection was made to the issuance and delivery of the checks until on or about December 9, 1915; that the defendant company, its officers, directors and stockholders knew, or by the exercise of ordinary care could have known, of the issuance of these checks and of the practice of Upshaw of issuing the company's checks in payment of his personal obligations long prior to December 9, 1915. By reason of all of which facts defendant alleges that plaintiff company is guilty of laches and estopped to assert that Upshaw, as secretary and treasurer and general manager of plaintiff company had no authority to issue and deliver these checks in payment of his obligations due this defendant,

wherefore defendant prays judgment against plaintiff.

The cause was tried by the court, a jury being waived, and submitted to the court May 7, 1917. On September 10, 1917, the court made its finding and verdict and rendered judgment thereon in favor of defendant and against plaintiff. Motions for new trial were duly filed, overruled, exceptions saved and plaintiff appealed.

Plaintiff introduced the three checks in evidence, which are as before set out. It was in evidence that Upshaw drew a salary of \$300 a month, as secretary and treasurer; that he was the only officer of defendant company in St. Louis who at the time had authority to sign checks when these checks were issued, and it was admitted that defendant had received payment for them.

One Robert H. Jones, secretary and treasurer of plaintiff, testified that he had been such for about two years prior to the trial and had been cashier of the company from May 15, 1914, but Upshaw had preceded him as secretary and treasurer of the company; that he (witness) lived in Memphis, Tennessee, before he came to St. Louis as cashier of plaintiff; that the principal owners of the Napoleon Hill Cotton Company were Napoleon Hill and Noland Fontaine. That Upshaw held a certificate of stock representing \$5,000. Except that held by Hill, Fontaine and Upshaw, a few shares were held by others to qualify them as directors, these holding one share each; that Hill died in 1909, and Fontaine about two years afterwards, and their stock is now held in trust by the estates of their respective families.

[1] Without going into the evidence in detail, it is sufficient to say that that on the part of defendant tended to establish the material facts relied on by defendant in support of the authority of Upshaw to issue these checks. We have set out the answer in some detail, for it presents the issues as relied upon by defendant and on which the trial court undoubtedly acted.

Plaintiff is a Missouri corporation, having its domicile in the city of St. Louis. All of its stockholders and officers, except Upshaw, at the time of the transactions here involved, resided in Memphis, Tennessee, although meetings of its directors as well as of its stockholders were held in St. Louis at stated periods. Upshaw had entire control of its business in St. Louis. Napoleon Hill and Noland Fontaine died and on their death new directors were elected in their places on October, 1912, and at a meeting of the board held that year Upshaw was re-elected secretary and treasurer. On October 18, 1912, the board of directors instructed the president to engage a firm of auditors to audit the books. R. W. Upshaw continued to be elected secretary and treasurer, his salary fixed at \$300 a month, and at a meeting on May 13, 1914, a

cashier was elected or appointed, to him being committed the sole custody of all the assets of the company, he to countersign with the president, vice-president or secretary and treasurer all contracts, checks and notes issued by the company. It was in evidence that Upshaw had made overdrafts—at what time does not distinctly appear—some of which he charged to account and some of which were carried as "interest." A son of Napoleon Hill, who succeeded his father as president and in the company, testified that his father knew of Upshaw's overdrafts two or three years before he died. It seems there was some settlement made with Upshaw in June, 1915. He had taken some land in Arkansas in his own name, which he had paid for out of funds of the company, and this he turned over. The overdrafts of Upshaw were figured at some \$7,000, and charging that off to profit and loss, the company demanded of Upshaw that he turn over to it 50 shares of stock which he owned in the company. This he did in settlement of his then known overdrafts. Thereafter he made none. Upshaw had drawn his salary up to September 1, 1915, but at that time had not an active share in the management of the business of the company, it being agreed that he would assist the auditor in tracing down the title to some real estate. He was discharged September 1, 1915. He was not re-elected secretary and treasurer at the June, 1915, meeting, his successor being elected. The checks sued on, it was in evidence, were charged on the books of the company to Upshaw or to "interest account" or "expense account." The man selected to audit completed his work, bringing it down to the time when Upshaw drew checks as secretary and treasurer, sometime in September, 1915, and about December 9, 1915, defendants demanded payment of these checks. Upshaw had not signed any checks after May, 1914, as secretary and treasurer alone; after that date they had to be countersigned by the cashier. Upshaw, during his occupancy of the office of secretary and treasurer, paid his own salary either by taking money from the cash drawer or writing a check. He had been secretary and treasurer from the time the company organized in St. Louis, in 1878, down to 1915.

There was introduced in evidence a by-law of the company as follows:

"VII. In the absence from sickness, death or inability of the president to act, his duties shall be performed by the vice-president. But in the absence of both president and vice-president, the business shall be transacted and under the control of the secretary and treasurer and he shall be empowered to sign all documents the same as if the president was present. He shall keep a faithful record of all business transacted at the meetings of the board of directors, countersign all certificates of stock, checks, deeds and formal written contracts, and perform such other duties as the board of di-

rectors may prescribe or as the president may from time to time require of him."

[2] There was also introduced in evidence a certificate from the plaintiff, which had been furnished to the Franklin Bank, with which it did business, but there was testimony that Upshaw "was the only man who had authority deposited in the banks to draw checks." In this certificate the substance of the by-law above quoted is set out and then follows the certificate from the president, F. W. Hill, and R. W. Upshaw, as secretary, of date June 9, 1913, in which it is set out "that R. W. Upshaw is the treasurer of said company (having been elected by board lastly on October 17, 1912) and, as such, is authorized to receive and give receipts for all money due and payable to said company, to draw checks against the deposits of the company, to his own order or to bearer, as well as to the order of third persons, to sign and indorse notes for the company, as shown by the above extract from its books, and that such authority remains unrevoked and unchanged at this date, and shall continue in force until written notice of the discontinuance thereof shall have been received and acknowledged by the Franklin Bank of St. Louis."

This was signed, as stated, by the president and by Upshaw as secretary and treasurer, with the seal of the bank attached.

When this certificate was offered by defendant it was objected to by counsel for plaintiff as incompetent and immaterial and as constituting no defense to the cause of action because it was given to the Franklin Bank and not to the defendant, and there is no evidence before the court that the defendant had any knowledge of the existence of such paper or relied in any way upon the same in accepting the checks of Upshaw. The court held it admissible against the company "as showing this was in the record." Whereupon counsel for plaintiff made the further objection that the minutes of the company would be the best evidence as to the authority of Upshaw, that any statement or interpretation of the meaning of the minutes or by-laws of the company should not be binding on the plaintiff and would not constitute any defense to the cause of action, and that it does not purport to give Upshaw the right or authority to issue checks on the funds of the plaintiff for the purpose of paying his own indebtedness to defendant or any one else. These objections were the only ones to this certificate and the trial court admitted it "subject to objection." It is to be remembered that the trial here was to the court and we cannot say whether he considered it at all in arriving at his conclusion. It will be noted that the by-law, which was abbreviated in this certificate, was introduced in evidence.

[3] It was in evidence that during the time of the issuance of the checks in controversy

neither the president, nor vice-president of the company was present at St. Louis. That Upshaw had overdrawn his account was certainly known a year before the death of Napoleon Hill in 1909, possibly two or three years before that; in brief, there was substantial evidence in support of the averments of fact in the defendant's answer to sustain the action of the trial court in finding for defendant on these checks, to the effect that the course of business of plaintiff with Upshaw, and of Upshaw with them, was of such a character and so long continued as to estop the plaintiff from claiming recourse on the defendant. That finding is conclusive on us.

[4] It appears in evidence that for a long series of years, running back to the beginning of business by this corporation in St. Louis, Upshaw, as its secretary and treasurer, had been drawing his own checks on the funds of the company for the payment of his own indebtedness. It does not seem reasonable that he could have done this without the knowledge of the corporation. It would seem that the slightest examination of the books of the concern, its banking accounts, would have shown that this was a fact, and yet plaintiff company made no effort to check it or stop it until in 1915, when it discovered the large overdraft. Under these circumstances it does not seem equitable that plaintiff should now be permitted to recover from the defendant, which, as far as the evidence shows in the case, was entirely innocent of any lack of authority on the part of Upshaw to so use the checks of the plaintiff company. The president of defendant company testified that he had known Upshaw for 16 or 17 years; had furnished him groceries during that time and that during some of the time he paid in checks, at other times in cash, the checks similar to these sued on and signed in the same way. "That," said the witness, "ran on probably for ten or fourteen years." He further testified that at the time Upshaw died, he left no estate.

[5] We are aware that there are a number of cases, many cited by learned counsel for appellant, in which it is held that checks, drawn by an officer on his company for his own private business, were invalid or, as held in *St. Charles Savings Bank v. Edwards*, 243 Mo. 553, loc. cit. 567, 147 S. W. 978, voidable. We do not think that the facts in any of these cases are precisely parallel to the facts in the case at bar. As said by our Supreme Court in *State ex rel. Bixby et al. v. St. Louis*, 241 Mo. 231, loc. cit. 238, 145 S. W. 801, 803:

"It would be a wide and very mischievous departure from correct canons of interpretation to disconnect general language from the issues and facts of a given case and to apply that general language mechanically or automatically to the different facts and different issues of another case; for the sense must be limited according as the subject requires, and words

take color from their context. In the House of Lords in *Quinn v. Leatham* (Appeal Cases 1901, l. c. 506), the Earl of Halsbury, Lord Chancellor, said: 'Now, before discussing the case of *Allen v. Flood* and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are found. The other is that the case is only authority for what it actually decides. I entirely deny that it can be quoted for a proposition which may seem to follow logically from it.'

Judge Lamm follows this with quotations from Vattel and other accepted authorities to the same effect. This rule was approved by our Supreme Court in *Koerner v. St. Louis Car Co.*, 209 Mo. 141, loc. cit. 156, 107 S. W. 481, 17 L. R. A. (N. S.) 292, and in *Bender v. Weber*, 250 Mo. 551, loc. cit. 561, 157 S. W. 570, 46 L. R. A. (N. S.) 121.

In apparently departing from some of the cases cited we have applied to the case at bar the rule so forcibly stated and buttressed by authority in the above cited cases.

[8] Learned counsel complain of error in admitting evidence of overdrafts of various persons other than Upshaw, which had been made, and in admitting in evidence a paper called "Certificate of the Corporation," showing authority of Upshaw to draw checks, etc., the certificate given to another bank, and of error in admitting list of suits brought by plaintiff. Except the certificate referred to these were all admitted "subject to objection" by the court. We cannot possibly say what weight he gave to them. At any rate, their admission was not reversible error. As to the admission of the certificate referred to, we think its admission was competent. It tended to show the authority which the corporation had vested in Upshaw.

Some point is made by counsel for respondent as to the effect on this action of the Act of April 9, 1917, effective June 18, 1917, it being argued that no vested rights can be gained in rules of evidence and that such rule may accordingly be modified at the pleasure of the Legislature, and when so modified are applicable to pending actions. Counsel for appellant attack that act both as not here applicable and as unconstitutional. In the view we take of the case on the facts in evidence and as found by the trial court, it is not necessary here to consider these propositions and we do not determine them.

The judgment of the circuit court is affirmed.

ALLEN and BECKER, JJ., concur.

NAPOLEON HILL COTTON CO. v. ST. LOUIS UNION TRUST CO.
(No. 16062.)

(St. Louis Court of Appeals. Missouri. Argued and Submitted May 11, 1920. Opinion Filed June 8, 1920. Rehearing Denied June 23, 1920.)

Corporations ~~§~~425(3)—Knowledge of officer's authority on custom to draw checks payable to himself held to estop it to deny his authority.

In a corporation's action to recover money paid upon its checks drawn by its secretary to himself and by him indorsed to defendant in payment of his debts, where there was substantial evidence of such officer's authority, custom, and practice to so do, and plaintiff's knowledge thereof, plaintiff was estopped from denying such authority, and could not recover.

Appeal from St. Louis Circuit Court; Rhodes E. Cave, Judge.

"Not to be officially published."

Action by the Napoleon Hill Cotton Company, a corporation, against the St. Louis Union Trust Company, a corporation. Judgment for defendant on each count, and plaintiff appeals. Affirmed.

H. R. Boyd, of Memphis, Tenn., and W. M. Fitch and Homer Hall, both of St. Louis, for appellant.

Bryan, Williams & Cave, of St. Louis, for respondent.

REYNOLDS, P. J. This case was heard by the court along with that of the same plaintiff against H. Oetter Grocery Company, 222 S. W. 876, the two cases argued and submitted together. The petition counts on seven checks drawn on the Boatmen's Bank at St. Louis, in the name of plaintiff and to the order of the St. Louis Union Trust Company, which are signed "R. W. Upshaw, Secretary and Treasurer," and run from February 1, 1911, to February 2, 1914, each of them for \$200. The pleadings and facts in the case are substantially as in that of the same plaintiff against H. Oetter Grocery Company and, as in that case, it was tried before the court, a jury being waived and resulted in a finding and judgment for defendant on each count.

Without repeating what is said in the H. Oetter Grocery Company Case, it is sufficient to say that, as in that case, there was substantial evidence tending to sustain the allegations in the answer as to the authority and custom and practice of Upshaw, the knowledge of that by the plaintiff company, and of the acts of Upshaw and that company in the matter. Here, as there, we think

plaintiff was estopped from denying the authority of Uphaw to draw these checks.

The judgment is affirmed.

ALLEN and BECKER, JJ., concur.

STATE v. PATTERSON. (No. 13590.)

(Kansas City Court of Appeals. Missouri.
June 14, 1920.)

1. Indictment and Information \S 110(31)—Information charging physician in language of statute sufficient.

Information charging physician, in language of Rev. St. 1909, \S 5784, with unlawfully issuing a prescription for intoxicating liquors, *held* sufficient.

2. Criminal law \S 371(10)—Prescriptions issued previously during month admissible to show intent of physician issuing them.

In prosecution of physician for unlawfully issuing prescription for intoxicating liquors, in violation of Rev. St. 1909, \S 5784, prescription issued by defendant to the prosecuting witness during preceding days of the month, each calling for a quart of liquor, *held* admissible as bearing on physician's good faith and intent.

3. Criminal law \S 656(3)—Remarks on ruling on admissibility of evidence not erroneous.

In prosecution of physician for unlawfully issuing prescription for intoxicating liquors, in violation of Rev. St. 1909, \S 5784, remarks of trial court in ruling on admissibility of other prescriptions issued by defendant previously in month, ruling being they were admitted as bearing on good faith of defendant in issuing one on which charge was founded, *held* not erroneous.

4. Criminal law \S 1036(1), 1054(1) — Language in ruling on evidence cannot be relied on in absence of objection or exception.

Language of the trial court in ruling on admissibility of prescriptions cannot be relied on on appeal as reversible error where no objection was made nor exception saved.

5. Intoxicating liquors \S 236(12)—Evidence held to sustain conviction for unlawful issuance of prescription.

Evidence *held* sufficient to sustain conviction of physician for unlawfully issuing a prescription for intoxicating liquors in violation of Rev. St. 1909, \S 5784.

Appeal from Circuit Court, Boone County;
David H. Harris, Judge.

"Not to be officially published."

J. W. Patterson was convicted of unlawfully issuing a prescription for intoxicating liquor, and he appeals. Affirmed.

Harris & Price, of Columbia, for appellant.
George S. Starrett, of Columbia, for the State.

TRIMBLE, J. This a prosecution under section 5784, R. S. 1909, against a physician for unlawfully issuing a prescription for intoxicating liquor. The defendant stood on his demurrer to the evidence and offered no testimony. The jury returned a verdict finding defendant guilty as charged and assessing punishment at a fine of \$200. The defendant has appealed.

[1] The first claim is that the information is not sufficient. We think it is. It charges the offense in the language of the statute. State v. Anthony, 52 Mo. App. 507; State v. Pomeroy, 163 Mo. App. 288, 147 S. W. 144; State v. Bates, 186 Mo. App. 365, 172 S. W. 79. The information has none of the defects contained in State v. Hume, 141 Mo. App. 489, 124 S. W. 1099, or State v. Bradford, 195 S. W. 523.

The instruction on the part of the state submitting the case is likewise unobjectionable and without error. Under it and all of the instructions the jury could not fail to understand that the intent and good faith of the physician as to the purpose for which the intoxicating liquor was to be used was the vital question, and not the purpose or intent of the person obtaining the prescription.

[2] The state prosecuted and submitted the case upon a prescription issued to one Ed. Prewitt on the 18th of November, 1918. As bearing solely upon the question of the good faith and intent of the physician in issuing the one he was charged with issuing unlawfully, the state introduced five other prescriptions issued by the defendant to the same prosecuting witness during the preceding days of that month each of which prescriptions called for a quart of liquor. The introduction of these prescriptions was objected to, but the objection was overruled, and this is assigned as error. But this was permissible. State v. Spough, 200 Mo. 571, 98 S. W. 55; State v. Roberts, 201 Mo. 702, 100 S. W. 484; State v. Sarony, 95 Mo. 349, 8 S. W. 407; State v. Cohen, 254 Mo. 437, 162 S. W. 216, Ann. Cas. 1915C, 86.

[3, 4] We see no error in the remarks of the court in ruling on the admissibility of these other prescriptions wherein it was ruled that they were admitted as bearing on the good faith and intent of the defendant in issuing the one upon which the charge was founded? However, if there had been objectionable matter in the language of the court in ruling on the admissibility of the prescriptions, it could not be relied upon here as reversible error, since no objection was made nor exceptions saved to such remarks.

[5] The claim that there was no evidence to sustain the conviction and that the verdict is the result of passion and prejudice is untenable. The defendant was not the prosecuting witness' family physician. The witness was not sick; he was able to be down

in town, in pool halls and other places. The evidence is that the witness had a cold and told defendant he felt badly; that the defendant looked at his tongue and thumped him a little, and then the physician asked his patient(?) what he thought he needed, and when the latter said he thought whisky was the proper remedy, the prescription was issued. All of these things afforded substantial evidence which required the case to be submitted to the jury and upon which the jury could base their verdict.

The judgment is affirmed.

All concur.

SLOAN v. MARADOES et al. (No. 13605.)

(Kansas City Court of Appeals. Missouri.
May 10, 1920.)

1. Landlord and tenant \S 233(3)—In an action for rent eviction held for jury on the evidence.

In an action for rent, *held*, that an issue of eviction claimed by defendants was for the jury on the evidence, and it was error to direct a verdict for plaintiff.

2. Landlord and tenant \S 231(2)—Testimony of tenants as to trouble between parties relevant.

In an action for rent, testimony of tenants as to trouble that arose about coal *held* relevant as tending to show the truth of the tenants' claim that the landlord wanted to and did force them out.

3. Landlord and tenant \S 230(7)—Amendment of answer in action for rent not inconsistent with answer as it stood.

In an action for rent, an amendment by interlineation by inserting words quoted in the answer as to an eviction, stating that while said lease was in force and effect plaintiff, in order to deprive defendants of the use of said property, "ordered the defendants out of said property," took possession of said property, and from and after a specified date to the end of the lease did have and hold the possession, etc., was not inconsistent with the answer as it stood.

Appeal from Circuit Court, Jackson County; Thos. B. Buckner, Judge.

"Not to be officially published."

Action by Minnie L. Sloan against Tom Maradoes and A. Triatoes. From judgment for plaintiff, defendants appeal. Reversed, and cause remanded.

Noyes & Heath, of Kansas City, for appellants.

Francis E. House, of Kansas City, for respondent.

ELLISON, P. J. This is an action for rent in which the trial court gave a peremptory instruction to find for the plaintiff. It ap-

pears that plaintiff rented to defendants two storerooms in Kansas City known as No. 15 and No. 17 Missouri avenue, by a written lease for the term of three years from October 1, 1914, to September 30, 1917, at a rental of \$50 per month, payable in advance. It was shown that the rent was paid up to and including September 30, 1916, but not afterwards. The defense set up in the answer is that plaintiff wrongfully evicted them for the time that rent is claimed. The matters constituting such eviction are set up as follows:

"Further answering, the defendants state that while said lease was in force and effect the plaintiff, in order to deprive the defendants of the use of said property [ordered the defendants out of said property], took possession of the said property, and from and after the 1st day of September, 1916, to the end of the lease did have and hold the possession of the same and refused to let the defendants use, have, or hold the same, and did deprive the defendants of the peaceful and lawful enjoyment of the said property and refused to let the defendants have the keys to the same."

[1] There is no doubt that these acts charged against plaintiff, if committed, constituted an eviction, and as to whether they were committed the evidence conflicted, and undoubtedly should have been submitted to the jury. One of defendants testified that plaintiff's agent by deception got the keys from him for some pretended use, with the promise he would return them next day, which he never did. Defendants said they would pay rent if plaintiff would let them have the property; while the agent testified that defendant came to him, "laid the keys to the premises upon the desk, and announced, 'I am out;' and thereafter refused to pay any more rent."

Prior to this, according to testimony in defendants' behalf, there was some complaint made by defendants to plaintiff about the condition of the premises, in that she had allowed coal to be thrown in, and "she told him to move." There was also testimony tending to prove that the agent told one of defendants that "he got his \$50 more rent and I never could go back no more." There was also evidence tending to prove that defendants procured more room, but with no intention of giving up their lease from plaintiff, and that they never began to look for any other place until they had been told by plaintiff or her agent that they had to move, that she would make them move, and that she was getting \$50 more rent for another piece of property. But all the while, according to their testimony, defendants intended to keep the property in controversy and did keep it until it was practically forced from them.

[2] From the face of the record it is mani-

test that plaintiff had little faith in defendants' testimony in their defense, and she was led too far from the beginning of the case for defendants on to the end. At the start defendants were overwhelmed with objections to testimony. These were so constant as to prevent an intelligible and connected story. Defendants started to tell of the trouble that arose about the coal. As far as we are able to judge from the little that cropped through the objections, that was relevant evidence. It perhaps would tend to show the truth of defendants' claim that plaintiff wanted to and did force them out of the premises.

[3] An amendment was made to the answer by interlineation. This consisted in the words "ordered the defendants out of said property." They are included in brackets in the above quotation from the answer. This was also objected to as being inconsistent with the answer as it stood. We do not see any inconsistency.

Defendants pleaded a counterclaim. A demurrer to that part of the answer was sustained by the trial court. Plaintiff insists that no judgment was rendered thereon and that there should have been. She also contends the matters set up were not a subject for counterclaim. We make no decision on these matters. It seems that, among other things, a shed for defendants' delivery automobile was built by them on the vacant part of the lot on which the buildings stood and that plaintiff destroyed it. Whether the vacant portion of the ground went with the buildings as described in the lease is not discussed or briefed. At another trial the matter of counterclaim can be examined and all questions made by plaintiff in regard thereto be settled by an examination of the authorities.

The judgment is reversed and the cause remanded.

All concur.

DAVIS v. CITY LIGHT & TRACTION CO. (No. 13382.)

(Kansas City Court of Appeals. Missouri.
June 14, 1920.)

1. Negligence ¶93(1)—Negligence of automobile driver not attributed to guest.

Negligence of the driver of an automobile struck by a street car is not attributed to a person riding therein as a gratuitous guest.

2. Street railroads ¶99(14) — Automobile guest must exercise care for his own safety.

A gratuitous guest in an automobile must look out for himself by exercising care in crossing a street railroad, and, if he fails to do so, he is contributorily negligent.

3. Street railroads ¶102(2) — Contributory negligence must be proximate cause of injury.

Negligence by a gratuitous guest in an automobile which did not contribute to his injury in a collision between the automobile and a street car does not bar recovery by him.

4. Street railroads ¶117(29) — Automobile guest's contributory negligence in failing to look held question for jury.

Where there was evidence that the driver of an automobile saw an approaching street car in time to stop, but could not because of trouble with his car, it was a question for the jury whether the negligent failure of a guest to look for the car contributed to his injury.

5. Appeal and error ¶1068(1)—Submission under humanitarian doctrine alone held prejudicial, regardless of verdict for defendant.

Error in submitting an action against a street railroad company for injuries to a guest in automobile under the humanitarian doctrine alone, where there was evidence to support a finding that plaintiff's negligence did not contribute to his injury, was prejudicial, notwithstanding a verdict for defendants, since it practically told the jury that plaintiff brought the injury on himself and could recover only from a sense of sympathy or humanity.

Appeal from Circuit Court, Pettis County;
H. B. Shain, Judge.

Action by A. G. Davis against the City Light & Traction Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Lamm, Bohling & Lamm, of Sedalia, for appellant.

George F. Longan, of Sedalia, for respondent.

ELLISON, P. J. Plaintiff's action is for damages resulting from personal injury received in a collision with one of defendant's street cars at the intersection of Ohio and Fifteenth street in Sedalia. The verdict and judgment in the trial court were for the defendant.

Plaintiff, 68 years of age, resides in Sedalia, and had been out in the country on some business connected with a farm which was formerly his home. Being ready to return, a former neighbor (Mr. Arnold) who was going into the city offered him a seat in his automobile. A Mr. Jeffries accompanied them. Plaintiff sat alone on the rear seat, while Jeffries and Arnold were seated in front, the latter driving. As above stated, Ohio street and Fifteenth street intersect; the crossing being much used by the public. The former of these streets runs north and south, while the latter runs east and west, and defendant's tracks are on the former.

Plaintiff and his companions arrived in Sedalia safely. The automobile was being driven east along Fifteenth street, approach-

ing the crossing, at 4 or 5 miles an hour, while the street car was approaching from the north at the rate of about 15 miles an hour. When the automobile reached Ohio street, both Arnold, the driver, and his companion, Jeffries, saw the car coming, and Arnold undertook to stop, but something was wrong, the machine only slowed up a little, then started up and got "on the street car track, and it just kind of stopped, just about stopped and started again." The street car hit the back end of the auto, smashed one fender, broke one of the rear wheels, and carried the auto along the track a distance of 54 feet. The street car fender was broken off and glass in front of the car was broken out, and plaintiff was hit on the head and body making a large contusion on his forehead and fracturing several ribs, besides breaking his collar bone. He was unconscious for a time.

The refusal of the automobile to stop, the effort of Arnold to force it, the slowing up and starting forward, were all in plain view of the motorman on the street car and he put on his brake, slackened the speed of his car some, but released the brake which let the car resume its speed.

Plaintiff, as we have stated, was sitting on the back seat, the top of the auto was up, and the door shut, but the curtains were not on. His attention was drawn, and he did not look in the direction of the street car until a moment before the collision.

Plaintiff offered several instructions which were refused. It is apparent from the record that the trial court considered that, unless plaintiff made out a case under the humanitarian rule, he failed as a matter of law, for, after refusing instructions offered by defendant and most of those offered by plaintiff, it gave one on its own motion submitting the case on that rule, closing with these words "that the issue of contributory negligence is withdrawn by the court from the consideration of the jury." That was but another way of ruling that plaintiff was guilty of contributory negligence as a matter of law, and that, in consequence, he could only recover under the humanitarian rule. Therefore we have only to consider whether the court erred in this view.

[1-3] Plaintiff has rightly insisted that, even if Arnold, the owner and driver of the auto, were guilty of contributory negligence, it could not be attributed to him (*Moon v. Transit Co.*, 237 Mo. 425, 435, 141 S. W. 870, Ann. Cas. 1913A, 183; *Sluder v. Transit Co.*, 189 Mo. 107, 139, 88 S. W. 648, 5 L. R. A. [N. S.] 186; *Neff v. City of Cameron*, 213 Mo. 350, 362, 111 S. W. 1139, 18 L. R. A. [N. S.] 320, 127 Am. St. Rep. 606), and that, if defendant's servants were negligent, plaintiff should recover unless his own negligence directly contributed to his injury. So we are to judge plaintiff's actions alone in the circumstances attending his injury. We recognize that,

while a driver's negligence will not be imputed to the passenger, yet it is the latter's duty to look out for himself by exercising care in crossing railway tracks, and that, if he does not do so, he will be guilty of contributory negligence. *Leopard v. Street Railway Co.*, 214 S. W. 268. But it must be such character of contributory negligence as directly produces the injury. Any negligence that is too remote to be called direct, or any act or omission of the injured party which would not have changed the result had action been taken, or omission not have occurred, is not the proximate cause of the injury, and hence is not contributory negligence in the sense of the law. *Moore v. Railroad*, 126 Mo. 265, 278, 29 S. W. 9; *Klockenbrink v. Railroad*, 172 Mo. 678, 688, 72 S. W. 900; *Whalen v. Railroad*, 60 Mo. 323.

[4] Thus, if plaintiff had been on the lookout and had seen the car approaching, he could have done but two things—one to have warned the driver, and the other to have jumped out. Warning the driver would have been wholly useless, since the latter was aware of the car and was using his every endeavor to stop, but failed without fault of any one, if the evidence in his behalf is to be believed. His failure to open the door of the auto and jump out was not such an omission, in the circumstances, as to constitute negligence as a matter of law. The top of the auto was up. Plaintiff was 68 years old, and consequently not so agile as a younger person. But more than that, if he had observed the driver at all, he saw he was trying to stop. It is true plaintiff stated that when he first saw the car it was about 40 feet up the track, and that the crash came so quickly the auto must have been on the track. At another part of his testimony he said that he was not looking "until he felt a jerk of some kind." That was evidently the jerking of the auto. Then he said he looked and saw the street car 40 feet away, "and it seemed like just in an instant it crashed into the auto, and that is the last thing I knew." But there was abundant evidence tending to show that before and during this time Arnold was doing everything in his power to stop the machine until it got on the track and to start it after it got on; all in full sight of the motorman. In view of the situation and the circumstances to which we have referred, it seems clear that plaintiff's action and conduct presented a question for the jury.

[5] It may be suggested that, as the case was submitted to the jury on the humanitarian rule, and the verdict was for the defendant, the jury must have found the defendant's servants were not guilty of any negligence, and hence no harm could result from the court finding, as a matter of law, that defendant was guilty of contributory negligence. But to allow this would be taking away from a plaintiff the right to have his case submitted as it exists. It was highly

prejudicial to plaintiff to have the jury told by an instruction, as they were, that "under all the facts and circumstances in evidence the plaintiff can only recover, if he recovers at all, under what is known as the last chance doctrine." That was equivalent to the court saying to the jury that plaintiff had brought the injury on himself through his own fault, and that only from a sense of sympathy or humanity would he be allowed to recover anything.

In view of another trial, we deem it proper to add that there was abundant evidence which, if believed, tended to prove that Arnold was a victim of unforeseen circumstances and free from negligence. It was shown that he would have crossed safely but for his unruly machine; on the other hand, tending to prove that the motorman saw the predicament in which the occupants of the auto were; that he nevertheless released his brake after once applying it; that he saw the auto and the loss of control in ample time to have stopped.

The judgment must be reversed, and the cause remanded.

All concur.

HUBBARD et al. v. HOME INS. CO. OF NEW YORK. (No. 2637.)

(Springfield Court of Appeals. Missouri. June 5, 1920.)

1. Insurance @328(5)—Insured's transfer of equitable title avoids policy under change of interest clause.

If the insured without consent of the insurer makes a contract to sell, vesting equitable title in the purchaser, the purchaser acquires such an interest as to constitute a breach of an insurance contract change of interest clause so as to void the policy.

2. Sales @202(7), 208—Where full price not paid and goods had not been separated from others, title had not passed.

Where seller agreed to deliver hay on board cars at place where stored, buyer to furnish the cars, and buyer had paid part only of price before the hay was burned, and no portion of the hay sold had been separated or identified, and the sale was to be for cash, the title had not passed.

3. Insurance @328(2)—Where goods sold had not been separated or paid for when burned, there was no change of interest.

Where buyer had paid only part of cash sale price for hay and had not yet furnished cars at point where hay was stored as agreed so seller could deliver on board cars, and the hay had not been separated and title not passed when it was burned, no such interest was vested in buyer as to destroy seller's insurable interest under change of interest clause, and the fact that buyer could recover from seller for payments made did not constitute such a change,

in view of the rules against forfeiture and for the construction favorable to the insured in case of doubt.

Appeal from Circuit Court, Wright County; C. H. Skinner, Judge.

Suit by J. M. Hubbard and another, doing business as Hubbard & Perry, against the Home Insurance Company of New York. Judgment for plaintiffs, and defendant appeals. Affirmed.

Fyke, Snider & Hume, of Kansas City, for appellant.

Lamar, Lamar & Lamar, of Houston, for respondents.

BRADLEY, J. On August 22, 1918, defendant issued its policy for \$1,400 insuring plaintiffs against loss or damage by fire on some baled hay consisting of 59 tons, 710 pounds, then in a certain building. The hay burned on September 22d thereafter, and plaintiffs sought to collect under the policy, and payment was declined, and hence this suit. A jury was waived, and the cause tried before the court. Judgment went for plaintiffs for \$1,378.40, and defendant brings the cause here by its appeal.

The policy contained a provision that it would be void "if the interest of the insured be other than unconditional and sole ownership of the said property, or if any change take place in the interest, title, or possession of the subject of the insurance." On this clause defendant relies to defeat recovery. On September 5th plaintiffs contracted to sell 50 tons of this hay to one Lawler; the hay was sold to be delivered by plaintiffs on board cars at Mountain Grove, where it was stored in the building where it burned. The purchaser was to obtain the cars, and was to notify plaintiffs. Cars could not be readily obtained, and no time was fixed as to when the cars would be furnished. At the time of the purchase by Lawler his agent, Wheeler, gave plaintiff Perry a check for \$250, and the next day, September 6th, gave plaintiff Hubbard a check for \$350, and these checks were cashed. Plaintiff Hubbard seemed to be fearful that the payment of \$250 might not be sufficient to impel Lawler to take the hay should the price drop considerably, and for this reason the \$350 payment was requested. Cars were not obtained, and the hay burned as stated on September 22d. Plaintiffs sought to prove that Lawler was threatening suit to recover back what he had paid, and that they were compelled to and did pay Lawler back his money, but the court excluded this evidence.

Defendant contends that Lawler had acquired such an interest in the hay as to bring into operation the change of interest

clause in the policy, and render it void as the clause provided. Plaintiffs contend that there was no separation or setting apart of the hay contracted to be sold, so that it could be identified from other hay in the building, and that there was no delivery which plaintiffs were required to make, and that the sale was for cash, and that full payment of the purchase price was a prerequisite to the passing of title, and that therefore there was no breach of the policy. In addition plaintiffs relied upon an alleged waiver, but we do not deem it necessary to consider the question of waiver.

Defendant relies on *Manning v. Insurance Co.*, 123 Mo. App. 456, 99 S. W. 1095. In that case the policy was issued to one McElroy, who sold the lot and dwelling house insured to Manning, and with the company's consent transferred the policy. Afterwards, on September 19, 1904, Manning entered into a written contract with one Molesworth whereby the latter sold to Manning a farm valued at \$4,000 to be paid for by paying \$500 at the time, and conveying to Molesworth the lot and dwelling insured, the balance of the consideration to be paid on March 1, 1905. The contract recited that deeds were to be made upon payment of the balance of the consideration, and deeds were afterwards made. But after the contract was executed, and before the deeds were made, and before possession was given, the insured dwelling burned. The policy contained this clause:

"The entire policy shall be void if the interest of the insured be not truly stated herein, or if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple, or if any change other than by the death of the insured takes place in the interest, title or possession of the subject of insurance, whether by legal process or judgment or voluntary act of the insured."

The court held that plaintiff could not recover; that the contract of sale vested an equitable interest in Molesworth, and that he obtained a right to the legal title; that the loss occasioned by the fire was Molesworth's loss, and not Manning's. The court in discussing the question in the *Manning* Case used this language:

"After a valid contract of sale of real property and before a deed is made the vendor merely holds the legal title in trust for the purchaser, and, if there be unpaid purchase money, as security therefor. All must agree that after a valid contract of sale all appreciation of the property is the purchaser's, and so also necessarily all depreciation. So, therefore, in all jurisdictions, where, as in this state, the property is at the risk of the purchaser between the execution of a contract of sale and of a deed, it must be held that the execution of such contract, binding upon both parties, changes the interest of the seller and brings him within the

terms of the provision in the contract of insurance above set out and avoids the policy."

Snyder v. Murdock, 51 Mo. 175, is cited in the *Manning* Case as supporting the conclusion there reached. In the *Snyder* Case the court held that, after an executory contract for the conveyance of real estate has been entered into, by the execution of a bond for title and notes for the purchase money, the property is at the risk of the purchaser, and if it burns it is his loss, and if it increases in value it is his gain, and that this is the settled equity doctrine based upon the principle that in equity what is agreed to be done must be considered as done. In *Moseley v. Insurance Co.*, 109 Mo. App. 464, 84 S. W. 1000, the policy contained this clause:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if any change other than by the death of the insured take place in the interest, title or possession of the subject of the insurance, whether by process or judgment, or by voluntary act of the insured, or otherwise."

The day before the fire Moseley agreed to sell insured property which was a dwelling. The arrangement to sell was made by one Pollard, a real estate agent. Cusick, the purchaser, paid to the agent \$400 on the contract for which the agent executed a receipt designating the lot as the "Moseley property." Moseley was to furnish the purchaser with an abstract of title, and the sale was to be consummated if the title proved satisfactory. Pollard's authority as agent was verbal. The court held that plaintiff Moseley could recover, that, Pollard's authority to sell not being in writing, the sale was not binding on Moseley, and that the purchaser could not have enforced specific performance, and had no equitable estate in the premises by virtue of the transaction. In the course of the opinion discussing the meaning and significance of the word "interest" as used in the clause in the policy, Judge Goode, speaking for the court, said:

"An interest in land is often used as synonymous with an estate in it, and is said to embrace estates, rights, and titles. Co. Lit. 345a; *Hoge v. Hollister*, 2 Tenn. Chan. 629. It has been said to be the most general term used to denote property in lands and chattels. Without going into the lore on the subject, which may be read in *Coke* and *Blackstone*, it is safe to say no one has an interest in land, technically speaking, unless he has some kind of property in it, either legal or equitable."

It was urged in the *Moseley* Case that the purchaser, Cusick, had an interest in the land to the extent of the purchase money paid as he could have charged the land with a lien to that extent, but of this the court says:

"But if he could that possibility certainly did not constitute a change of interest. If he had enforced the lien by process or judgment, there might be force in this argument."

[1] It seems that the rule in this state respecting insured real property is that, if the insured without the consent of the insurer makes a contract to sell vesting the equitable title in the purchaser, the purchaser acquires such an interest as to constitute a breach of an insurance contract containing a change of interest clause as here. Also to the same effect are *Brighton Beach Racing Ass'n v. Home Insurance Co.*, 113 App. Div. 728, 99 N. Y. Supp. 219; *Id.*, 189 N. Y. 526, 82 N. E. 1124; *Grunauer v. Westchester, etc., Co.*, 72 N. J. Law, 289, 62 Atl. 418, 3 L. R. A. (N. S.) 107; *Gibb v. Insurance Co.*, 59 Minn. 267, 61 N. W. 137, 50 Am. St. Rep. 405; *Brickell v. Atlas Assur. Co.*, 10 Cal. App. 17, 101 Pac. 16.

It is held in *Garner v. Ins. Co.*, 78 Kan. 127, 84 Pac. 717, 4 L. R. A. (N. S.) 654, 117 Am. St. Rep. 460, 9 Ann. Cas. 459, that the word "interest," as used in a fire insurance policy declaring that the policy shall be void if any change shall take place in the interest, title, or possession of the subject of insurance, is not synonymous with "title," but means some right different from title; that the term "interest" cannot mean a greater estate than "title," since "title," as used in the policy, is intended to mean "estate," and that the word must therefore be used in contradiction to title, as including any right in property less than title, and that, if the insured was the owner of the title, the word "interest" would have no application. See, also, *Hillyard v. Banchor*, 85 Kan. 516, 118 Pac. 67.

[2] It is clear that the title to the hay had not passed to Lawler. The portion sold had not been separated or identified in any way, and it was sale for cash, and the full purchase price had not been paid. All the authorities are to this effect. See *Grocer Co. v. Clements*, 69 Mo. App. 446; *Metal Co. v. Daugherty*, 204 Mo. 71, 102 S. W. 538; *Ficklin v. Tinder*, 161 Mo. App. 283, 143 S. W. 853; *Hamra Bros. v. Herrell et al.*, 200 S. W. 776; *Boyer v. Lumber Co.*, 187 Mo. App. 523, 174 S. W. 113. Defendant does not contend that the title to the hay had passed, so we will not dwell longer on this feature.

[3] In a recent case in the Kansas City Court of Appeals, *Terminal Ice & Power Co. v. Ins. Co.*, 196 Mo. App. 241, 194 S. W. 722, it was held that the change of interest referred to in the policy there, similar or like the one here, in view of the rules which frown upon forfeitures, and require that insurance policies be strictly construed against the insured, means some change which would cause the loss by fire to fall on the

buyer. That the title to the hay had not passed seems clear, and is conceded, and no such interest therein had been vested in Lawler as to destroy plaintiffs' insurable interest. It appears, therefore, that the loss by fire of the hay was plaintiff's loss, and not Lawler's. The mere fact that Lawler would have had recourse for the recovery of the amount he had paid would not be in the nature of an interest in the insured property, or a change of interest, any more than was Cusick's right to enforce his lien for what he had paid in the case of *Moseley v. Insurance Co.*, 109 Mo. App. loc. cit. 469, 84 S. W. 1000, *supra*. The purpose of a provision providing for forfeiture for change of interest is to prevent the interest of the insured in the subject of the insurance from being diminished; to keep the insured as much concerned during the whole life of the policy in the preservation of the property as he was when the policy was first issued. *Moseley v. Insurance Co.*, *supra*. When this purpose is considered, and under the facts here, and with the rules against forfeiture in view, and also that, where there is doubt or ambiguity, the policy will be construed in favor of the insured, and against the insurer, we hold that Lawler had not acquired such interest in the hay destroyed as to work a forfeiture of the policy.

Reaching this conclusion, it follows that the judgment should be affirmed; and it is so ordered.

STURGIS, P. J., and FARRINGTON, J.,
concur.

TODD v. FITZPATRICK et al. (No. 2554.)

(Springfield Court of Appeals. Missouri.
June 5, 1920.)

1. Witnesses \S 159(8)—Defendant in unlawful detainer action could not prove verbal contract with decedent.

In an action by a grantee in unlawful detainer, defendant could not prove a verbal contract with deceased grantor for a renewal of the lease under which he was holding.

2. Frauds, statute of \S 53, 129(4)—Oral contract for lease for year to begin at future date held void; possession under valid lease not part performance taking subsequent lease out of statute.

A contract for a lease for one year, to begin at a future date, is void under the statute forbidding the enforcement of a contract not to be performed within a year from the making of same unless in writing; and where the person making such invalid contract is already in possession of the land under an unexpired valid lease, then such acts of part per-

formance as plowing the land or seeding same for future crops do not remove the barrier of the statute.

3. Frauds, statute of §125(2)—Remedy of tenant for one year to begin at future date stated.

The only remedy of a tenant for landlord's violation of a verbal agreement for a lease for one year, to begin at a future date, is for damages for work and labor performed thereunder, or the right to harvest the crops sown.

4. Husband and wife §14(2)—Conveyance to both creates entirety.

Where land is conveyed to husband and wife, they become tenants by the entirety.

5. New trial §26—Parties §75(8)—Defect as to party plaintiff must be raised by demurrer or answer.

In a suit by husband in unlawful detainer, the objection that the wife is a necessary party plaintiff must be raised by demurrer or by answer, under Rev. St. 1909, §§ 1800, 1804, and it cannot be raised by motion for a new trial.

6. Husband and wife §207—Husband only party to sue for possession of land held by entirety.

The husband is the only party to sue for possession of land held by himself and wife as tenants by the entirety.

Appeal from Circuit Court, Jasper County; Grant Emerson, Judge.

Action by J. Frank Todd against A. Fitzpatrick and another. Judgment for plaintiff, and defendants appeal. Affirmed.

T. C. Tadlock, of Joplin, and Frank L. Forlow, of Webb City, for appellants.

George V. Farris, of Webb City, for respondent.

STURGIS, P. J. This is a suit for unlawful detainer of a large farm in Jasper county, Mo. The plaintiff purchased this land from one Hannum in December, 1918. At that time the defendants, father and son, were in possession of said farm under a written lease from Hannum for one year, expiring March 1, 1919. The deed of conveyance from Hannum to plaintiff was made subject to this lease. Defendants' lease, which expired March 1, 1919, specifically stated that they were to surrender possession at that time.

[1] The defense is that the former owner, Hannum, in the fall of 1918, and before selling the farm to plaintiff, promised defendants to renew the lease for another year, beginning March 1, 1919; and on the strength of such agreement defendants plowed and sowed in wheat 135 acres of the farm before plaintiff purchased same, and that plaintiff had notice of this fact at the time of such purchase. Hannum was dead at the time

of this trial, and the court properly excluded defendants' proffered evidence as to his having made any verbal contract with Hannum with reference to such land. Such contract would also be void for the reason that it was not to be performed within a year from its making. *Shacklett v. Cummins*, 178 Mo. App. 309, 165 S. W. 1145. The defendants further claim, however, that after plaintiff's purchase of the land he also, in January, 1919, agreed to rent the farm to them in confirmation of the verbal agreement of Hannum, and that, relying thereon, they further plowed and sowed some land in oats and plowed some for corn. Defendants admit, however, that plaintiff on January 18, 1919, notified them to vacate possession of the farm on March 1, 1919, and at the same time made defendants an offer to cultivate the farm land on such farm, part of it to be sown to oats and the other part planted in corn, "all other possession of farm, buildings, pasture, and land not under cultivation to be returned to me [plaintiff], possession of all land to revert to me [plaintiff] when grain is harvested." Defendants rejected this proposition, claiming that they already had a valid lease of all the farm, including buildings, pasture, and hay land, for the coming year, beginning March 1, 1919, and ending March 1, 1920. The defendants expressly refused to consider or accept anything short of a fulfillment of the verbal agreement to rent them the whole farm for the year beginning March 1, 1919. This suit was begun March 4, 1919. Such also was the defendants' claim and attitude at the trial.

On these facts the court directed a finding for plaintiff. The question of the amount of damages and the monthly rents and profits was submitted to the jury, and the jury found that the damage to plaintiff for defendants' withholding the land was nothing, and the value of the rents and profits was nothing.

[2] The case of *Shacklett v. Cummins*, 178 Mo. App. 309, 165 S. W. 1145, affirmed in 270 Mo. 496, 193 S. W. 562, is decisive of this case. It is there distinctly held that a contract for a lease for one year, to begin at a future date, is void under the statute of frauds forbidding the enforcement of contracts not to be performed within a year from the making of same unless in writing; that where the person making such invalid contract is already in possession of the land under an unexpired valid lease, then such acts of part performance as plowing the land or seeding same for future crops do not remove the barrier of the statute of frauds.

[3] The plaintiff suggests that even if the verbal contract for a year's lease made in December, 1918, or January, 1919, to begin

March 1, 1919, is void, taken in its entirety, that the court should hold it valid so far as it can be performed within a year, and that it should be held valid as to the land to be cultivated, since the crops would be removed within one year from the date of the making of the contract. The plaintiff, however, offered to make just this contract with defendants after this controversy arose, and defendants refused any such limitation of the invalid contract, and insisted on holding the whole farm for a full year after March 1, 1919. This, too, was defendants' attitude at the trial. The only remedy to defendants for plaintiff's violation of his verbal agreement is for damages for work and labor performed thereunder or the right to harvest the crops already sown.

We are aware that at the present time plaintiff's right to the possession of this land is a moot question only, since this case did not reach this court till November, 1919, and was submitted in December, 1919. The one year from March 1, 1919, which is all the defendants claim, is now ended, and plaintiff will doubtless be in possession before the mandate of this court reaches the trial court. No damages were awarded, and nothing given for monthly rents and profits.

[4-6] The deed by which plaintiff became the owner of this land conveyed same to him and his wife. They were therefore tenants by the entirety. *Hough v. Light Co.*, 127 Mo. App. 570, 106 S. W. 547; *First National Bank v. Fry*, 168 Mo. 492, 68 S. W. 348. It is claimed, therefore, that the wife was a necessary party plaintiff. This question was not raised in any way by the pleadings nor at the trial. Such issue must be raised either by demurrer or by answer. Otherwise it is waived. Sections 1900 and 1904, R. S. 1909. It was too late to raise it by the motion for new trial. Besides, under the authorities just cited, the husband is the only party to sue for possession of land held by himself and wife as tenants by the entirety.

The judgment of the trial court is affirmed.

FARRINGTON and BRADLEY, JJ., concur.

BROWN v. UNITED RYS. CO. OF ST. LOUIS. (No. 16096.)

(St. Louis Court of Appeals. Missouri. June 8, 1920.)

Evidence ¶153—Error to exclude testimony of claim agent that none of defendant's employes knew of alleged assault on plaintiff by defendant's conductor.

In an action against a street railway company for an alleged assault by a conductor, court erred in not permitting defendant to

prove by its claim agent, who investigated the case, that the crews on all cars operated on the line where the assault was alleged to have taken place were examined by the witness, and that none of them knew anything of the alleged occurrence.

Appeal from St. Louis Circuit Court; Benjamin J. Klene, Judge.

"Not to be officially published."

Action by John J. Brown against the United Railways Company of St. Louis. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Charles W. Bates, T. E. Francis, and Chauncey H. Clarke, all of St. Louis, for appellant.

Claud D. Hall, of St. Louis, for respondent.

BIGGS, C. This action against the railways company for personal injuries arises out of an alleged assault upon plaintiff by the motorman and conductor of one of defendant's cars while plaintiff was a passenger. From an adverse judgment for \$500 actual damages, defendant appeals, assigning as error the exclusion of evidence by the trial court.

Plaintiff's testimony tended to prove that the assault took place at about the hour of midnight on July 4 or 5, 1910, at or near the corner of Sixth street and Washington avenue in the city of St. Louis, while plaintiff was on a Page avenue car. On May 21, 1915, almost five years after the occurrence, plaintiff filed suit for his damages. The defendant denied the assault, and, after showing that no report of the case was ever made to the company prior to the filing of the suit, offered to prove by its claim agent, who investigated the case in 1915, that the crews on all cars operated on the Page avenue line in 1910 were examined by the witness, and that none of them knew anything of the alleged occurrence.

The evidence thus offered was rejected by the trial court upon objections thereto by plaintiff, and this ruling is the sole ground of complaint lodged against the judgment.

Failure to admit the evidence was plain error. As stated, defendant denied the assault. If none of its employes who were within its control and who were at the time operating the cars on the Page avenue line had knowledge of the alleged occurrence, defendant had the right to show by its witness who had investigated the case such fact, in order to rebut the unfavorable presumption that would naturally arise in the minds of the jury because of the failure of the defendant to produce as witnesses any of its employes who should have been cognizant of the occurrence if it took place. Defendant was not offering to prove by the witness what its employes said about the matter, but only

the fact that such employes had no knowledge of it.

The question has been directly ruled by this court in the case of *Fleishman v. Polar Wave Ice & Fuel Co.*, 163 Mo. App. 416, 143 S. W. 881, where the authorities from other jurisdictions are fully reviewed.

The judgment should be reversed, and the cause remanded.

PER CURIAM. The foregoing opinion of BIGGS, C., is adopted as the opinion of the court.

The judgment of the circuit court is accordingly reversed, and the cause remanded.

REYNOLDS, P. J., and ALLEN and BECKER, JJ., concur.

CONLEY v. JOHNSON. (No. 13586.)

(Kansas City Court of Appeals. Missouri.
June 14, 1920.)

1. Witnesses \Leftrightarrow 158—Administratrix may testify as to bad reputation for truth and veracity of plaintiff's witness.

In an action on a note barred by limitations unless a credit was valid, the defendant administratrix was competent to testify as to the present bad reputation for truth and veracity of a witness in support of the credit, for such testimony did not fall within prohibition of Rev. St. 1909, § 6354.

2. Witnesses \Leftrightarrow 168—Party may testify as to matters occurring since administration.

A party to the action incompetent to testify, under Rev. St. 1909, § 6354, as to transactions and conversations had with the deceased, is competent to testify as to conversations, transactions, and things occurring since the granting of letters of administration.

3. Witnesses \Leftrightarrow 164(3)—Witness disqualified by death of deceased may testify as expert on handwriting.

A witness disqualified on account of the death of the deceased may nevertheless testify as an expert to the handwriting of the deceased.

4. Trial \Leftrightarrow 253(5) — Instruction eliminating defensive issues is erroneous.

In an action on a note, an instruction that if a credit relied on to toll limitations was valid plaintiff was entitled to recover was erroneous, where the question of the execution of the note by the deceased was in issue, as was its indorsement to plaintiff.

Appeal from Circuit Court, Boone County; David H. Harris, Judge.

Action by Laura A. Conley against Jennie G. Johnson, executrix of Spurgeon G. Johnson, deceased, begun in the probate court and appealed by plaintiff to the circuit court.

From a judgment there for plaintiff, defendant appeals. Reversed and remanded.

George S. Starrett and N. T. Gentry, both of Columbia, for appellant.

Harris & Price, of Columbia, for respondent.

TRIMBLE, J. This action, originating in the probate court, is on a demand against the estate of Spurgeon G. Johnson, deceased, founded upon a promissory note dated February 1, 1907, due one day after date, for \$1,216.60, payable to the order of John E. Johnson. The note was credited on the date it was issued with \$600, and a further credit of \$5 appeared on the back thereof, bearing the date of February 1, 1914. The maker of the note, Spurgeon G. Johnson, and the payee thereof, John E. Johnson, were brothers. Both were dead at the time of the trial. The defendant is Spurgeon G. Johnson's widow and his administratrix. The plaintiff was formerly the widow of the payee, John E. Johnson, but is now married to one Conley. She claims that during the life of John E. Johnson he assigned the note to her. Upon a trial in the probate court judgment went in defendant's favor, and plaintiff appealed to the circuit court, where it was tried de novo. Here plaintiff obtained a verdict and judgment for \$1,286.86, and defendant has appealed.

The two brothers lived some seven or eight miles out in the country from Columbia and were engaged extensively together in farming and raising stock. John E. Johnson died in 1910, and, as stated, his widow, Laura A. Johnson, afterward married and is now the plaintiff, Laura A. Conley. Spurgeon G. Johnson did not die till in January, 1919. The suit was instituted on May 18, 1919, and consequently, if the alleged credit of \$5 as of February 1, 1914, was not a proper credit, such as would constitute an acknowledgment of the indebtedness by the maker, then the note was barred by the 10-year statute of limitations. The genuineness and validity of this credit was therefore a very acute and important issue in the case.

The only witness who testified concerning the alleged \$5 payment was one Hopper, who was plaintiff's witness. He did not testify in the probate court, nor was he subpoenaed to appear at the trial in the circuit court until after he had reached the courthouse on the day of the trial. He resided upon plaintiff's farm and worked there. He testified that more than 5 years before the trial, some time in the latter part of January, 1914, he was residing on his brother's place, but happened to be at the John E. Johnson residence, and that Mr. Crane, Mrs. Johnson's father, was there; that Spurgeon G. Johnson came there and said to Mrs. Johnson he wanted to see her on some business, and they went into an

adjoining room where they talked for perhaps ten minutes, and then Mrs. Johnson came to the door and called to her father, Mr. Crane, and he went in, leaving the door open; that he heard them talking about a payment on a note; that Mrs. Johnson told Mr. Crane, Spurgeon made a \$5 payment on the note. Witness did not know what Crane said, but that "it was all right or something"; that Mrs. Johnson went out; witness could see her through the open door as she went; that she went into the west room and then Mr. Crane came to him (the witness) and told him he wanted him to witness that Spurgeon was going to make a payment on the note; that as witness came to the door Mrs. Johnson came by him into the room, holding what looked like a note in her hand; that Mr. Johnson handed her a bill or paper money; he supposed it was \$5; he heard them say "Five dollars," anyhow. Witness did not see the credit put on the note, but says he heard them speak of a note; that Mrs. Johnson told him (Spurgeon) that \$5 was "a mighty small payment on a six hundred and some odd dollar note," and that Mrs. Johnson asked something about what date it was and Mr. Johnson (Spurgeon) told her "it was so near the 1st of February to just put it down the 1st of February; that was the date of the note, or something like that;" that this transaction took place some time in the latter part of January; witness did not know just what date in January it was. Defendant had evidence to the effect that Spurgeon Johnson was not in Boone county on February 1, 1914, but some days prior thereto had left home and gone to his farm in Pettis county.

[1-3] As this witness was a new factor in the case, and defendant had no intimation that he would be a witness, defendant was not prepared with witnesses to impeach him. But defendant's counsel placed defendant herself upon the stand and sought to prove by her that she knew the aforesaid witness' general reputation for truth and veracity in the community in which he lived and that it was bad, that is, that it was then bad at the time of the trial. The court, upon objection, ruled that she was an incompetent witness to testify.

We think she was a competent witness to testify as to that matter. The evidence sought to be elicited from her was the present general reputation of the witness; it was not in regard to anything connected with the making of the contract or in reference to any conversations with either John E. Johnson, the payee, or Spurgeon Johnson, her husband. It was solely with reference to a present existing fact, which she would know herself as a citizen of the community. She

was a party to the suit as administratrix and was qualified to testify, since she was not to be examined upon any of the matters contained in the proviso to section 6354, R. S. 1909. This statute is an enabling rather than a disabling statute, and it is well settled that a party to the action who is incompetent to testify to conversations had with the deceased is nevertheless competent to testify to conversations, transactions, and things occurring since the granting of letters. *Chandler v. Hedrick*, 187 Mo. App. 664, 670, 173 S. W. 93. And a witness who is disqualified on account of the death of the opposite party may nevertheless testify as an expert to the handwriting of the deceased. *Banking House, etc., v. Rood*, 132 Mo. 256, 263, 33 S. W. 816. Letters of administration on the estate of Spurgeon G. Johnson were granted in January, 1919, and the trial occurred in October of that year.

"The disqualification [of the statute] is not general but is limited to transactions between the witness and the party then dead." *Elsa v. Smith*, 273 Mo. 396, 408, 202 S. W. 1071, 1073.

See, also, *Ring v. Jamison*, 2 Mo. App. 586, 592, 593.

"The widow of a decedent may be a witness for or against the administrator * * * of the estate of her deceased husband, whether solvent or insolvent, as to all such facts as the policy of the law does not require to be kept sacred and secret between husband and wife, during marriage." *Stein v. Weidman's Adm'r*, 20 Mo. 17, 21; *Brown v. Patterson*, 224 Mo. 639, 652, 124 S. W. 1.

[4] Plaintiff's instruction No. 4 was erroneous, in that it told the jury "Your verdict must be for plaintiff," if they found that the \$5 payment was made on the note at any time within ten years prior to May 19, 1919. This made the alleged credit the only issue to be determined before a verdict could be returned in plaintiff's favor, whereas there was still another issue in the case and possibly two, namely, the indorsement of the note to plaintiff and the execution of the note by deceased. Said instruction No. 4 therefore conflicted with other instructions given. Hence it was error. *Smith v. Metropolitan R. Co.*, 126 Mo. App. 120, 103 S. W. 593; *Mansur, etc., Co. v. Ritchie*, 143 Mo. 587, 613, 45 S. W. 634; *Shepherd v. St. Louis Transit Co.*, 189 Mo. 362, 87 S. W. 1007.

There is no merit in defendant's contention that the demurrer to plaintiff's evidence should have been sustained.

The judgment is reversed and the cause is remanded for a new trial.

The other Judges concur.

STILL v. GLASS et al. (No. 13680.)(Kansas City Court of Appeals. Missouri.
June 14, 1920.)**1. Appeal and error ¶758(1)—Points and authorities may supply formal assignments of error.**

Points and authorities, distinctly pointing out errors of trial court relied on for reversal, cannot be considered assignments of error; and, where there is no other assignment of errors, the appeal must be dismissed.

2. Appeal and error ¶758(3), 766—Points, not directing attention to erroneous ruling, cannot be considered assignments.

Points and authorities, which merely stated propositions without stating any rulings of the court nor pointing out errors in such rulings, cannot be considered assignments of error; and, where there is no other assignment of errors, the appeal must be dismissed.

3. Appeal and error ¶766—Court must enforce statute and rules.

It is the duty of the appellate court to enforce the statute and rules requiring assignment of errors in brief.

4. Appeal and error ¶883—Directed verdict for defendant held invited by plaintiff.

Where the record showed that plaintiff's counsel stated it would be all right for the court to direct a verdict, error in directing a verdict for defendant was invited, and plaintiff cannot complain thereof.

5. Appeal and error ¶662(1)—Record must be accepted as true.

The appellate court must accept the record as absolute verity; if it is not true, it should have been corrected in trial court.

Appeal from Circuit Court, Jackson County; Thos. J. Seehorn, Judge.

Action by Mathias J. Still against William J. Glass and another. Judgment for defendants on directed verdict, and plaintiff appeals. Appeal dismissed.

Geo. S. Shelton, Wm. T. Alford, and E. A. Scholer, all of Kansas City, for appellant.

Fred S. Hudson, of Kansas City, Chas. Lederer, of Chicago, Ill., and Simrall & Simrall, of Liberty, for respondents.

PER CURIAM. This action was instituted to recover damages for an alleged malicious prosecution. The trial court directed a verdict for defendants by peremptory instruction.

[1, 2] There was no assignment of errors made by plaintiff. But his brief contains "Points and Authorities," which if errors of the trial court relied upon for reversal were distinctly pointed out therein would take the place of a formal assignment of errors. But no rulings of the court are stated,

nor errors pointed out, in such points and authorities. We copy them (omitting authorities cited):

"Points and Authorities.

"I. Respondents' instigation, maintenance, or participation in the prosecution was a question for the jury.

"II. Under the evidence in this case Kenyon's suppression of the facts amounted to instigation.

"III. Kenyon's act in reporting nonpayment to the captain without full disclosure, when he believed plaintiff innocent, was evidence of want of probable cause and malice.

"IV. Kenyon's offer to dismiss the prosecution on payment of \$25 was evidence tending to show want of probable cause and malice.

"V. Respondents' failure to sign the complaint does not, as a matter of law, eliminate them as the procuring cause of the arrest.

"VI. Failure to report purchase under the ordinance does not act as a matter of law constitute probable cause of an arrest three months later.

"VII. Whether Kenyon's acts were within the scope of his authority as general manager of the Kansas City branch was a question for the jury."

The case is controlled by *Frick v. Millers' Natl. Ins. Co.* (Sup.) 213 S. W. 854; *Hayes v. McLaughlin* (Sup.) 217 S. W. 262, 264; *Squaw Creek Drainage Dist. v. Hayes* (Sup.) 217 S. W. 20; *Vahldick v. Vahldick*, 264 Mo. 529, 175 S. W. 199; *Cook v. St. Joseph*, 220 S. W. 693 (decided by us April 5, 1920).

[3] It is the duty of the court to see to the enforcement of the statute and rules. *St. Louis v. Young*, 248 Mo. 346, 348, 154 S. W. 87; *Hutson v. Allen*, 236 Mo. 645, 139 S. W. 121.

[4] There is another reason why plaintiff cannot sustain his appeal. It is a familiar rule that where he invites or requests a ruling he cannot make it a basis for error. We find from the record that plaintiff requested the trial court to give the peremptory instruction of which he is now complaining. At the close of the evidence the defendants requested the peremptory instruction, whereupon the court said:

"The jury will retire to the hall, and remain there until called. (Jurors here retire from courtroom. Here followed discussion between court and counsel.)

"The Court: By agreement of parties, the plaintiff is authorized to amend petition by changing the amount sued for to \$5,000 actual damages and \$2,500 exemplary damages. (Petition here amended by interlineation.)

"The Court: What do you want to do?

"Mr. Alford: Well, you direct the verdict. That will be all right.

"The Court: Call the jury, Mr. Sheriff. (Jurors here return to jury box.)"

And the court gave the instruction.

[5] We must accept the record as absolute verity. If it is not a true representation of the facts, it should have been corrected in the trial court.

The appeal will be dismissed.

METCALF et al. v. RUNNELS. (No. 13661.)

(Kansas City Court of Appeals. Missouri.
June 14, 1920.)

1. Account stated \S 6(1) — Not created by mere payment on account knowing its amount claimed.

A mere payment on an account, the amount of which is known to the debtor, is not an admission that the whole amount is due, and does not create an obligation to pay the balance.

2. Trial \S 296(1) — Omission from plaintiff's instruction held not cured by defendant's instruction.

Omission from plaintiff's instruction of a condition necessary for recovery is not cured by it being put in defendant's instruction.

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

"Not to be officially published."

Action by E. M. Metcalf and another against Moses T. Runnels. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

Joseph S. Brooks, of Kansas City, for appellant.

Metcalf & Brady, of Kansas City, for respondents.

ELLISON, P. J. This action is based on an ordinary itemized account for legal services running through a space of three or more years. Several credits are entered, which, subtracted from the total, leaves a balance of \$299.60, for which sum plaintiffs had judgment in the circuit court, where it had been taken by appeal from a justice of the peace. When defendant's motion for new trial was under consideration, a remittitur of \$50 was entered and judgment rendered for \$249.60.

[1] At the trial the court gave the following instruction for plaintiffs:

"The court instructs the jury that if you find from the evidence that plaintiffs were claiming an amount due them for services rendered to defendant and that Moses T. Runnels, the de-

fendant in this case, on or about the 7th day of June, 1915, paid to Mr. W. W. Brady the sum of \$1 to apply on his account with Metcalf & Brady, if you find there was an account, and that at that time he was informed and told and knew that the balance plaintiffs were claiming as due was \$299.60, your verdict will then be for the plaintiff for the sum of \$299.60."

It is clear that the instruction should not have been given. It announces the proposition that if a creditor presents an account to his debtor for a certain sum and the latter pays \$1 on it, knowing that the creditor was claiming a balance was due him, he became legally bound to pay that balance, whether he agreed to do so or not, and whether the whole amount claimed was correct or not. In other words, a mere payment on the account, the amount of which is known to the debtor, makes a binding and conclusive obligation to pay the balance. Part payment of an account, standing alone, is not an admission that the whole sum is due, nor is it an obligation to pay the whole.

[2] It is true that the court instructed the jury for the defendant that unless the jury believed from the evidence that when defendant paid the \$1 on the account he agreed that he owed the balance of \$299.60 they must find for defendant. But that important condition was omitted from plaintiffs' instruction, and the jury required to find for plaintiffs whether defendant agreed to pay them or not. The fact that the condition was put in defendant's instruction will not cure the error in plaintiffs', for the agreement to pay was a necessary part of plaintiffs' case, which they cannot omit to submit to the jury. *Hall v. Coal & Coke Co.*, 260 Mo. 351, 367-369, 168 S. W. 927, Ann. Cas. 1916C, 375; *State ex rel. v. Ellison*, 272 Mo. 571-583-587, 199 S. W. 984.

The matter of, and the rule in, an account stated has been discussed, but, so far as the instructions for either party are concerned, is wholly ignored. The law as to an account stated is laid down in *Bambrick v. Simms*, 102 Mo. 158, 14 S. W. 935; *Cape Girardeau v. Kimmel*, 53 Mo. 83; *Risk v. Dale*, 188 Mo. App. 726, 176 S. W. 529; and *Stewart v. Railroad*, 157 Mo. App. 225, 137 S. W. 46.

Plaintiffs' brief is entirely made up of a paragraph from *Niehaus v. Gillanders*, 184 S. W. 949, but nothing in that paragraph was submitted in the instruction.

The judgment will be reversed and the cause remanded.

All concur.

\S For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

WALRATH v. CRARY. (No. 13629.)

(Kansas City Court of Appeals. Missouri.
June 14, 1920.)

1. Judgment \S 101(2)—Pleading \S 8(9)—Complaint alleging institution of suit held to state a conclusion and to be insufficient to sustain default.

Complaint for malicious prosecution of a civil action which merely alleged that defendant instituted the suit against plaintiff in a certain county alleged a conclusion, and is insufficient to sustain a default judgment for plaintiff.

2. Pleading \S 8(1)—Facts not conclusions must be stated.

Every fact which plaintiff must prove to maintain his suit must be alleged as a fact and not as conclusion of law.

3. Pleading \S 78, 192(3)—Conclusions pleaded need not be denied and may be reached by general demurrer.

A defendant need not deny conclusions alleged in complaint, but they may be reached by general demurrer.

4. Pleading \S 433(5)—Verdict cannot supply fact not stated.

If the complaint states the cause of action, the verdict for plaintiff will cure defects of statements which must have been proved at the trial, but the verdict cannot supply the statement of the cause of action itself.

Error to Circuit Court, Jackson County; Daniel E. Bird, Judge.

"Not to be officially published."

Action by W. H. Walrath against Beach Crary. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Harry Howard, of Kansas City, for plaintiff in error.

E. A. Scholer, of Kansas City, for defendant in error.

ELLISON, P. J. This action was instituted to recover damages for malicious prosecution of a civil suit against the plaintiff. The judgment in the trial court was for the plaintiff.

Plaintiff owned real property in Kansas City, Mo., and defendant owned real property in the state of Texas. They exchanged properties and afterwards defendant instituted an action in the state of Texas against plaintiff for rescission, and it is for the institution of that suit that plaintiff has brought this action. Plaintiff was put to the expense of employing counsel and attending court in Texas at the time set for trial, when defendant dismissed the case and plaintiff was discharged. Defendant did not appear or offer defense to this suit, and judgment by default was rendered against him. The trial court heard evidence as to the amount plaintiff had been damaged and rendered final judgment therefor. No appeal

was taken, but defendant sued out a writ of error on the record, his complaint being that plaintiff did not allege facts in his petition sufficient to sustain a cause of action, and that is the sole question in the case.

The petition is half made up of a mixture of statement of evidence and argument, going so far in one place as to allege what defendant admitted as to his bad faith in a certain deposition. That part of it purporting to state his case is as follows:

"Plaintiff, for his cause of action against above-named defendant, alleges that at all times hereinafter mentioned defendant was engaged in the business of buying, selling, and trading real estate in Missouri and many other states, and followed said occupation as a business or profession. Plaintiff alleges that some time in February, 1917, he was the owner of a certain 21-apartment flat building located in Kansas City, Mo., and that about said date defendant and plaintiff entered into negotiations for the exchange of properties, defendant offering to trade plaintiff for said flat building 980 acres of land in the Texas panhandle country in Hale county, Tex., such exchange being subject to mutual inspection and investigation; and plaintiff alleges that thereafter defendant inspected the flat, examining its condition, rooms, questioned its tenants, and that thereafter, some time in May, 1917, plaintiff and defendant entered into a contract for the exchange of the properties as hereinbefore mentioned, said transfer to be consummated in August, 1917.

"Plaintiff alleges that thereafter, in December, 1917, defendant, Crary, instituted suit in Hale county, Tex., for the rescission of said exchange of properties, cancellation of notes, and other relief, on the ground of misrepresentation alleged to have been made by this plaintiff and his agent as to the number of rooms and toilet improvement in said apartments, as to the rentals and insurance and location of said property in Kansas City. Plaintiff alleges that each ground of rescission set forth in defendant's petition was false and known to be false by defendant when made. * * * Plaintiff alleges that said suit in Hale county, Tex., was brought by defendant without probable cause, in bad faith, and with malice, for the purpose of harrassing and annoying plaintiff, and for the purpose of extorting from plaintiff, through expenses and hazards of litigation, money that defendant was not entitled to. * * * Plaintiff alleges that defendant, with full knowledge of the falseness of each and every allegation in his petition contained, * * * without probable cause, with malice and bad faith and an intention to injure plaintiff and cause him loss of valuable time, expenses of attorneys' fees, had said suit set for trial for September 10, 1918, at Plainview, Hale county, Tex., when he well knew that he would be unable to maintain his suit, and never intended to actually try the same, and compelled plaintiff with counsel to come from Kansas City to Plainview, Tex., and wait there for several days while said suit was being reached, and then on the final calling of the cause for trial voluntarily dismissed the same.

"Plaintiff alleges that all of defendant's actions as above set forth were malicious and

oppressive; that said suit was instituted in bad faith and without probable cause, for the purpose of harrasing and annoying plaintiff and extorting a money settlement from him, and plaintiff was compelled from the first institution of the suit to engage counsel in Kansas City and at Plainview, Tex., spend money for depositions, was compelled to get a two weeks' lay-off from his work to attend said court. Plaintiff alleges that he has expended in attorneys' fees, traveling expenses, hotel expenses, and loss of time on account of said suit and on account of being compelled to attend said court at Plainview, Tex., the full sum of \$680.20, all of which expenditures were the direct result of defendant's wrongful acts as above described.

"Wherefore, plaintiff prays he may recover judgment against defendant in the full sum of \$680.20 and for his costs herein expended."

[1] In an action for malicious prosecution of a civil suit it is necessary to allege that such suit was instituted and prosecuted, and this must be done by the allegation of such facts as will disclose to the court that a suit was brought in court against the plaintiff. And it is not sufficient to allege merely that a suit was instituted, for that is merely an allegation of the plaintiff's conclusion, which is never allowable. The charge is that "defendant, Crary, instituted suit in Hale county, Tex." What did he do to institute the suit, and did he institute it in a court, and if so, what court? The petition does not enlighten us. What constitutes the institution of a suit is frequently a serious question and one that has been much litigated in this state.

[2, 3] Facts, and not evidence nor conclusions of law, must be distinctly stated. Every fact which the plaintiff must prove to maintain his suit is constitutive, in the sense of the Code, and must be alleged. *Pier v. Heinrichoffen*, 52 Mo. 333. A defendant is under no obligation to deny conclusions set out in the pleadings. They are as if unpleaded, count for nothing, and may be reached by general demurrer. *Mallinckrodt Chemical Works v. Nennich*, 169 Mo. 388, 69 S. W. 355. In that case the complaint was that defendant had become engaged in prosecuting the manufacture of certain chemicals he had agreed not to for a certain length of time. The charge was that he had entered upon the manufacture of chemicals, drugs, and other articles of the same kind and character as those manufactured by the plaintiff, and that he "was utilizing and

applying for his own use the knowledge and information so acquired and obtained by him while in plaintiff's employ." Of this Judge Sherwood said:

"In what way is defendant utilizing and applying for his own use the knowledge, etc.? What are the facts? Surely defendant was entitled to a statement of the constitutive facts which compose plaintiff's cause of action, if it had any, for this is the rule of our Code. *Pier v. Heinrichoffen*, 52 Mo. 333. And equally as surely, such facts plaintiff did not set forth. The allegation quoted is simply the averment of a legal conclusion; not the statement of issuable facts; and not, therefore, either traversable or demurrable, and is to be treated as no statement at all, and consequently obnoxious to attack by general demurrer. [Authorities.] 'The allegation of a conclusion of law raises no issue, need not be denied, and its truth is not admitted by a demurrer to the complaint containing it.'"

In *Lappin v. Nichols*, 263 Mo. 285, 172 S. W. 596, it was alleged that—

The "defendants seized a large portion of the products of said lands, thereby increasing plaintiff's disability to redeem said lands."

The court said that—

"The defendants should be informed by the petition as to the value of said products thus seized in order to determine whether their seizure materially decreased the ability of plaintiffs to pay. Instead of the fact as to such value, the averment is that of the mere conclusion that the plaintiffs were rendered less able to pay."

[4] Plaintiff answers defendant's claims against his pleading by the statement that "The interpretation of the petition must be directed by the law concerning alder by verdict." If a cause of action is stated, a verdict will cure defects of statements which must have been proven at the trial. But it is a fundamental rule that a verdict cannot supply the statement of the cause of action itself. This view makes it unnecessary to discuss defendant's point that alder by trial or verdict cannot apply when the judgment is by default.

Other suggestions by plaintiff have been disposed of in what we have written. The judgment is reversed and the cause remanded.

All concur.

HALVORSON et al. v. COMMERCE TRUST CO. (No. 13665.)

(Kansas City Court of Appeals. Missouri.
June 14, 1920.)

1. Assignments ¶4, 41—Written consent to handing over money that might become due hold a valid assignment.

Where sale of land was made, and check for \$10,000 to be deposited pending close of sale, and a writing were given to the agent making the sale, reciting, "If the sale is finally concluded, you have our consent to pay over to F. [the agent] \$3,750 out of said sum as his commission," and the agent deposited them with a trust company, there was a valid assignment, any language showing intention of owner of chose in action to transfer it being sufficient, and it not being essential that the fund assigned should have an actual existence at the time; it being sufficient if it exists potentially.

2. Trusts ¶38—Acceptance of money and papers without objection an acceptance of trust.

When a trust company without objection received money and papers containing directions as to the disposal of the money, it accepted the trust.

3. Assignments ¶59—Not revocable by assignor.

An assignment of part of a fund in the hands of a third person could not be revoked and ownership reviewed at the pleasure of the assignor.

4. Assignments ¶30—Persons claiming by assignment cannot complain it is partial.

Where a contest is between interpleaders, each contending to be assignees of debtor of a fund in the hands of a trustee, neither of the parties can complain that there was an assignment of only a portion of the debt; neither the debtor nor the trustee making any objection to the division.

Appeal from Circuit Court, Jackson County; Daniel E. Bird, Judge.

"Not to be officially published."

Action by Halvorson & Chappelle against the Commerce Trust Company, in which Fred B. Gillette was required to interplead. Judgment for interpleader, and plaintiffs appeal. Affirmed.

Guthrie, Conrad & Durham and Hale Houts, all of Kansas City, for appellants.

Harkless & Histed and Hogsett & Boyle, all of Kansas City, for respondent.

ELLISON, P. J. The Publishers' Realty Company owned some real estate in Kansas City, which it sold to one Rahe for \$150,000. Rahe was to pay \$10,000 at once, to be deposited in the Commerce Trust Company until it was known that the sale would be consummated. Each of two real estate agents (Halvorson & Chappelle and one Gillette) claimed to have made the sale, and each presented a bill for \$3,750 commission to the Publish-

ers' Company. One of them, Halvorson & Chappelle, brought suit against the trust company for the amount of the commission. The latter company filed an answer, admitting it had the money, but setting up the rival claimants and asking that Gillette be made a party defendant, and that they be required to interplead. Appropriate orders were made, the trust company paid the money into court, and was discharged. A trial resulted in favor of respondent Gillette, and Halvorson & Chappelle appealed.

The foregoing is a mere synopsis, from which it is not possible to understand the merits of the controversy without these further statements: It is conceded by the parties that each of the claimants performed service for the publishing company in the sale of its property, and that that company is liable to both. The question between them is, Which is entitled to the money awaiting one of them in the hands of the court? The importance of this question will be appreciated when it is known that the publishing company is conceded to be insolvent.

The sale was made to Rahe on the 24th of March, 1917, and on the 27th of March the publishing company informed the trust company that \$10,000 of the purchase price was to be deposited with it pending the close of the sale, and "If the sale is finally concluded you have our consent to pay over to F. B. Gillette three thousand seven hundred and fifty dollars out of said sum, as his commission." The conceded fact was that this letter, addressed to the trust company, was written when the sale was made at Gillette's request, as an assurance that he would get his commission. Then Gillette in company with the publishing company and Rahe took the contract of sale, together with this letter and Rahe's check for \$10,000, and deposited them with the trust company, and it accepted them. Rahe then told Halvorson of the assignment, and the latter said, "You are safe enough; but the publishing company owes me a commission."

On the 14th of May the publishing company notified the trust company that the sale was closed, and directed it to pay \$6,250 of the \$10,000 to Mr. Beardsley, but that, since it gave its consent that \$3,750 could be paid to Gillette as his commission, "It had developed that other parties (Halvorson & Chappelle) are contending that they have a right to this sum and have filed suit therefor; you are therefore directed not to pay the sum to any one until further orders from us."

More than a year afterwards (July 30, 1918) the publishing company and Halvorson & Chappelle, parties to the foregoing suit, entered into a written agreement, reciting, substantially, the foregoing facts,

concluding with the agreement that Halvorson & Chappelle would dismiss their suit against the publishing company, and in consideration therefor the "publishing company does hereby assign, transfer and set over to Halvorson & Chappelle the aforesaid sum of \$3,750, and any and all causes of action therefor, or choses in action on account thereof, and any and all rights and causes of action whatsoever which it may at this time have growing out of any of the transactions connected with the said sale and the moneys arising therefrom, against said Commerce Trust Company or said Fred B. Gillette."

On the same day of the last paper, and as part of the transaction, Halvorson & Chappelle executed a contract to the publishing company, whereby, for the latter's indemnity, they agreed that if they recovered anything from the trust company on the assignment to them it should be deposited in a certain other trust company, known as the Pioneer Trust Company, to be held for a time named as indemnity to the publishing company in the event it became liable to the Commerce Trust Company or to Rahe by reason of making the assignment to Halvorson & Chappelle.

The respondent, Gillette, claims the money (\$3,750) owing to him by the publishing company as his commission, and deposited with the trust company, was assigned to him by the publishing company in the letter of March 27th referred to above; and that the attempted revocation of that assignment May 14th and the assignment to appellants more than a year afterwards (July 30, 1918) were nullities as to him, especially when it is considered that he had the order on the trust company to pay him \$3,750 as his commission when the deal should be finally consummated.

[1, 2] Appellants attack respondent's assignment on the ground that it was, by its own terms, a mere consent or direction to the trust company to pay part of the funds in its possession at a future time, and that it was not an agreement for an assignment then made; that it was subject to be, and was, revoked prior to the time at which payment was authorized. We think the written "consent" or "direction" that the money should be paid to Gillette and handed over to the trust company with the deposit of the money was a valid assignment. "Any language, however informal, if it shows the intention of the owner of the chose in action to transfer it, will be sufficient to vest the property therein in the assignee." 5 Corpus Juris, 906, 910, 915, citing *Sanguinett v. Webster*, 153 Mo. 343, 370, 54 S. W. 563; *Macklin v. Kinealy*, 141 Mo. 113, 122, 41 S. W. 893; *Smith v. Sterrett*, 24 Mo. 260. It is said in same authority (page 924, § 85) that—

"It is not essential that the fund assigned should have an actual existence at the time the order is drawn, but it is sufficient if it exists potentially."

But in this case the fund and the order of assignment were, as we have seen, deposited with the trust company together. For when it, the trust company, received the money and papers without objection, it accepted the trust. *Robbins v. Kline*, 60 Ohio St. 199, 54 N. E. 94; *Hackett v. Campbell*, 10 App. Div. 523, 42 N. Y. Supp. 47.

[3] It follows on the most simple principle that, if the assignment to Gillette was valid, it could not be revoked and ownership revived at the pleasure of the assignor. 5 Corpus Juris, 938, sec. 101.

[4] There is a rule of law that one having a single claim against a debtor cannot split it up into many and thus harass the debtor with several actions. This rule is without application to this case, for neither the publishing company, as debtor, nor the Commerce Trust Company, has made any objection to dividing the \$10,000 deposit into two claims. In fact the publishing company, as seen in its letter to the trust company attempting to revoke its assignment to Gillette, itself divided the fund by directing the trust company to pay \$6,250 of it to Mr. Beardsley, thus only leaving \$3,750 in the trust company's hands. We disposed of a like question in *Johnson County v. Bryson*, 27 Mo. App. 341, 349, in these words:

"It is insisted that as this was an assignment of only a portion of the debt, it cannot be enforced. Such is the law in this state as between an assignee and the debtor. *Burnett v. Crandall*, 63 Mo. 410. But it must be borne in mind that the contest here is between the interpleaders, each contending to be assignees of Keene. Johnson county is not making the objection, and it has been held in a recent case that the right to object to splitting a single debt into many is one which the debtor may waive. *Fourth Nat. Bank v. Noonan*, 88 Mo. 372."

The same is said in *Turner v. Lord*, 92 Mo. 113, 117, 4 S. W. 420.

We cannot see any good reason for a discussion of the merits of the "finding of facts" which were submitted by the appellant for the court to find, nor for an extended consideration of the several declarations of law. Some of these declarations would doubtless be proper in a case to which they applied. But here, as we have already said, the undisputed facts—the facts upon which no issue exists—are these: That respondent, Gillette, earned a commission of \$3,750 for his effort in the sale of the publishing company's property to Rahe; that it was agreed that \$10,000 of the purchase money was to be deposited with the Commerce Trust Company at the time of the signing of the contract of sale; that the publishing compa-

ny by writing directed or consented that on the closing or consummation of the sale the trust company should pay to respondent, Gillette, \$3,750 as commission due him; that the contract of sale, together with the \$10,000 payment and the order to pay respondent, Gillette, commission of \$3,750 out of said \$10,000 were all taken by Gillette and handed over to the trust company, which accepted the same; that in a few weeks afterwards the publishing company, by writing, notified the trust company that the sale was closed, and to pay \$6,250 of the \$10,000 on deposit with it to H. M. Beardsley, but not to pay the \$3,750 it had before consented should be paid to respondent, Gillette, until further orders.

Practically all of this was in writing. There is no dispute except as to the law on these conceded facts, and that we have already discussed. It is true that appellant denies the assignment to Gillette, but that is merely a denial that these conceded facts constituted an assignment. And appellants say in closing their brief that—

"Finally, referring to the statement of facts hereinbefore set out and the discussions as to findings of fact under point 1 and declarations of law under point 11, we insist that upon the record appellants, as a matter of law, are entitled to the fund in question. This is so both for the reasons set out in discussion of declarations 3, 4, and 6, to wit, that there was no assignment at all and for the reasons set out in discussion of declaration 5, to wit, that the Exhibit 2, if an assignment, it was at most a partial assignment, and therefore ineffective to pass title as against appellants' assignment."

We see no likeness between this case and *Pickett v. School Dist.*, 193 Mo. App. 519, 186 S. W. 533, *Alexander v. Grand Ave. Ry.*, 54 Mo. App. 66, and *Mo. Pac. Ry. v. Wright*, 38 Mo. App. 141, cited by appellants.

After a careful examination of the record we conclude that the judgment should be affirmed.

All concur.

REVERCOMB v. REVERCOMB. (No. 13416.)

(Kansas City Court of Appeals. Missouri.
June 14, 1920.)

1. Witnesses \S 188(1)—Private communications between husband and wife inadmissible in divorce case.

Private communications between husband and wife are not admissible in a divorce suit.

2. Witnesses. \S 219(2)—Wife held not to have waived incompetency of communications with husband.

Defendant wife in divorce suit held not to have waived incompetency of private communications between herself and husband.

3. Witnesses \S 188(1)—Communications and letters between husband and wife inadmissible.

Evidence as to private communications and letters between plaintiff husband and defendant wife held inadmissible in divorce suit, not being within exception of particular necessity.

4. Witnesses \S 192 — Private communication not made competent by assertion to one other than spouse.

Private communication between husband and wife, incompetent in divorce suit, is not competent because its subject was also asserted on a different occasion by a spouse to some one else.

5. Divorce \S 29—"Indignities" defined.

"Indignities" from wife to husband are such acts as consist of unmerited, contemptuous conduct, contumely, incivility, or injury, accompanied by insult and amounting to a species of cruelty; one or two unconnected acts not being sufficient.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Indignity.]

6. Divorce \S 29—Accusations, to be indignities, must be false and unwarranted.

Accusations by one spouse of the other to be indignities, must be false and unwarranted, made with intent to wound.

7. Divorce \S 132—Evidence of indignities insufficient.

Evidence as to indignities offered him by defendant wife held insufficient to entitle plaintiff husband to divorce.

8. Divorce \S 184(6)—Appellate court in divorce suit must examine record.

In a divorce suit, the appellate court must examine the record for itself and determine the case as it sees it from the evidence.

Appeal from Circuit Court, Schuyler County; N. M. Pettingill, Judge.

"Not to be officially published."

Suit for divorce by Otha Revercomb against Alice Revercomb. From decree for plaintiff, defendant appeals. Reversed.

Harry J. Libby, of Shelbina, for appellant. Higbee & Mills, of Kirksville, for respondent.

TRIMBLE, J. Herein a husband sues for divorce on the ground that his wife has been guilty of such indignities as to render his condition intolerable. The wife files no cross-bill and asks no affirmative relief, but does file an answer admitting the marriage and the settlement of the property rights as alleged in the petition, but denies everything else and contests the suit. The trial court granted plaintiff a divorce as prayed, whereupon defendant appealed, and the question for our determination is whether plaintiff is entitled to a divorce.

The parties were married in Shelby county

September 17, 1904, he being then 23 and she 20 years of age. At that time she was in perfect health and had been so all her life. Each was reared on a farm within five miles of one another, and their courtship had extended over a period of five years. They were poor, the husband having only a horse and a cow and the wife a horse, cow, and \$50 in money. They were ambitious, industrious young people, and both worked and strove to get along in the world, the husband seeking to educate himself, and the wife striving with all her energy to help him in every way she could. The first six months of their married life they lived on the farm at his mother's home. In March, 1905, the couple went to Chillicothe where the husband enrolled as a student in the Chillicothe Normal and Business School and they rented rooms and did "light housekeeping." In June or July following the husband became sick, and on that account the young couple returned to his mother's home. They stayed there until in December, when they moved to an adjoining farm which plaintiff had purchased in the October preceding. Here they lived for two years, during one of which plaintiff farmed, and the other he taught the district school. From this farm they moved in the fall of 1907 to a Mr. Michaels' farm in Marion county, where they lived till February, 1908, the husband teaching school. They then moved to Lakenan, Mo., and lived there two years; from there they went to Hunnewell, where they resided two years; and from there they went to Sturgeon in the fall of 1913. They lived there during the school term for three years and part of the fourth, or until the last of February, 1917, which is an important date, as will hereinafter appear. The parties seem to have striven with a mutual ambition to be economical and save for a home and for the husband's education. This latter aim they appear to have pursued successfully, for during the vacation periods the husband attended the Normal School at Chillicothe and Kirksville and was for a time in Chicago University; and he is at the present time, or was at the time of the trial, teaching mathematics in one of the higher schools of the state.

Except for the time they lived with plaintiff's mother, and for a while at Sturgeon when they were waiting for their household goods to arrive, and for a time after said household effects were destroyed by a fire, the couple kept house, the wife doing all the work thereof, and keeping matters neat and tidy, except during periods of illness which will shortly be mentioned. The witnesses describe the wife as being a good housewife, keeping her home in order, attentive to her domestic duties, economical, industrious, quiet, and retiring in disposition, and apparently devoted to her husband. When they lived at Hunnewell, she taught as one of the teachers in the grade school, receiving the

munificent sum of \$30 or \$35 per month, which, with the exception of one month's warrant which she used to buy clothes, was deposited to her husband's account.

In the spring of 1916 the house in which they lived at Sturgeon was destroyed by fire and their household goods were burned. A part of these goods had been procured by the wife in "taking orders," which we interpret to mean selling something on a commission. These household goods were insured for \$1,200.

Unfortunately, whenever the wife became pregnant she was affected with such violent and continued vomiting that, in order to keep her from dying, physicians were compelled to perform operations on her to relieve the womb of its contents. She seems to have been anxious to have children, but each time she became pregnant the results were as above stated, and five times an operation was performed on her, of which two produced the most serious effects, once in November, 1914, and once thereafter while they lived at Sturgeon. At these times she was rendered very ill, exceedingly so in November, 1914, and even on the last occasion she was confined to her bed for some weeks. The evidence of the physician who treated her during one of these times is that the effect of such disturbance upon the nervous system is one of extreme depression, and that it might or could produce delirium, though he did not notice that she was delirious at the times he waited on her. These abortions, however, produced a marked and lasting effect upon her health. When finally it became certain that it was impossible for her to bear children, she besought her husband to permit her to adopt a child, and this seems to have been agreed upon but was never done.

On account of the wife's health the husband did not want her to teach any more, so when they left Sturgeon for the summer vacation of their second year there the wife did not attend the Normal summer session with her husband, as formerly, but went to stay at her father's while he attended school; the intention being that she could finish her training after he had completed his educational course. They returned to Sturgeon for the school year of 1915-16 and kept house as before. As heretofore stated, the household goods were destroyed by fire in the spring of 1916, and when the parties returned to Sturgeon that fall they boarded for about three weeks at the hotel. The wife says that at this time the husband thought it would be less expensive if she would return to her father's, and she did so. She says that a short while before Christmas of 1916 the husband wrote her that, owing to some gossip concerning him and a woman in Sturgeon, he thought it best for her to come back in order to stop the gossip. She did so, and they got a house and set up a household. They lived thus until in Feb-

ruary, 1917, when, according to the wife's version, the husband again decided it was cheaper to board; and, as they were planning to go to school together the following year, he suggested that she go to her father's and raise a garden and put up fruit in order to lessen living expenses. (The petition alleges that the separation took place in February, 1917, and the husband testified that they separated at that time, and denied that he suggested she go to her father's to save expenses and to can fruit.) The wife, however, did go to her father's, and she says she put up a large quantity of canned goods, intended for their use the next year when they would be in school together. It is conceded that when the wife left Sturgeon in February, 1917, the husband did not tell her he was going to separate from her. She says she had no idea he was going to do so. He says she knew it as well as he did, but just how she knew it is not disclosed. He says they quarreled and their parting was not pleasant. He admits he wrote to her thereafter and sent her \$5 a month, and on her birthday, May 30, 1917, sent her \$5 additional as a birthday present.

In March, 1917, the husband was attacked with appendicitis and went to the hospital in Kirksville to be operated on. He did not notify his wife until a week after the operation was performed, when he had a man friend, a fellow school-teacher, to write her he was doing nicely, getting along all right, would be able to come home in a few days, and that she "should not come on account of the expense." While the husband admits he had the letter written, he attempts, in a way, to deny that he directed her not to come. But the letter was introduced in evidence showing that this direction was in it, the friend who wrote it testified he sent it, and the wife did get it, and the husband, on cross-examination, when asked if he did not tell his friend to write his wife not to come on account of expense, answered, "I am not sure, on account of expenses; I might have said there was no need of it." When pressed if he did not say to tell his wife she ought not to come on account of expense, he said, "I am not sure; it wasn't necessary." We regard it as clear that he did direct her not to come. She had no money of her own, and because of this letter advising her not to come she did not go to him, but wrote.

After he recovered from the operation, he, some time in May, 1917, or near that, went to his mother's and had her to telephone his wife he was there. She came and stayed all night with him, and the next morning took him to the train so that he could return to his work. On the way to the station, and while waiting for the train, they planned their work in school together during the coming winter, and thereafter he continued to send her money until the fall of that year, 1917. The first the wife knew of any intended separation was

when she received a letter, dated October 27, 1917, from a firm of Kirksville lawyers, telling her they had been consulted by her husband with reference to procuring a divorce and asking that a meeting be had to discuss a property settlement.

Upon receipt of this letter the wife called her husband, who was at Kirksville, over the phone, and wanted him to come to her, but he said he was sick, and when she told him she would come to Kirksville, he told her not to come. The wife then went to her husband's mother and besought her to use her influence with her son to get him to live with her, the defendant, but the mother refused. The next day the wife went to Kirksville, found her husband in bed, and when she asked him how long he had been sick he told her to take the first train back home. She sat down and pleaded with him for them to live together, and he told her he did not want a divorce; that all he wanted was a settlement of their property rights. She begged to be allowed to stay and wait on him, but he refused. He promised her that, if she would go home and wait, he would come and talk it over with her. Upon this promise she went to a friend's in Kirksville, to whom he suggested she should go, but when she returned to his boarding house the next morning he was gone, although he had led his wife to believe he was very ill when she left the night before. She stayed in Kirksville several days waiting for him to return to his room, but, as he did not come, she returned to her father's.

Not hearing from him, she asked two of his men friends to use their influence with him. They informed her he was at his mother's. When at Kirksville, in promising her they would meet and talk it over, he had told her they would meet at his mother's, so when she heard he was there she went over to meet him, but he was not there. She stayed most of the day but he did not put in an appearance.

The day after Thanksgiving he sent the two friends, whom she had asked to intercede for her, to arrange for a meeting at Shelbyville. With her father and three friends of both parties they met, and a settlement of their property was finally entered into. The disinterested friends testify that she did not want a divorce, was very much opposed to it, and would not sign any settlement until the husband assured her he did not want a divorce and was not going to seek one. Upon this she signed the contract settling their property rights. This was in December, 1917.

It is in evidence by disinterested witnesses that, both before and after this contract was signed, the wife made repeated efforts to get her husband to live with her. The husband himself conceded on cross-examination that his wife had asked him to live with her, he was unable to say how many times, but would not say it was many. He also admitted that

when the two friends sent by her to intercede with him came to him he told them "they could do no good"; that when she asked him to be reconciled he told her "it was impossible." That when the friends asked him to reconsider, he gave the same answer, "Impossible."

To these two friends, who a number of times talked to him at his wife's request to effect a reconciliation, he did not give any reason for not living with her, but always his statement was that he positively would not live with her.

One evening the wife was at the home of one of these friends and the husband came in. As soon as he saw his wife he turned and went out and asked the friend to come outside as he wanted to see him on business. The wife prevailed upon her host and hostess to get her husband to come back into the house and talk matters over with her. They did so, and he finally came in, and an hour was spent in talking matters over by the four, the friend and his wife and the two parties hereto. The friend, or host on this occasion, testified that in this conversation the wife expressed a desire that they live together again, but the husband said "he positively would not live with her"; that on this occasion he gave as his reasons for not living with her she was "high-tempered and nagged him" and refused to "prepare his meals for him"; "he had lived out of tin cans a week;" and that he had often taken a razor from under her pillow. To this the wife said that she was sick at those times and was not at herself and did not know what she was doing; that she would "do any way in the world to live with him again"; that he gave as additional reasons why he would not live with her that she had threatened to take her life, and that when he was sick in the hospital for several weeks she not only did not come to see him, but did not write to him or send any word; that if she had come to him at that time there might have been a reconciliation. This referred to the time he was operated on for appendicitis, when, as we have already seen, he did not notify his wife of his illness until a week after the operation, and then had a friend to write her not to come on account of the expense. In this same conversation at the friend's house he also said his wife had accused him of being intimate with another woman; whereupon his wife spoke up and said, "Otha, you know there was talk of you and that other teacher down there, and you know I didn't believe that and shielded you in that." (The facts about this matter will be hereinafter stated, from which it will appear that this could not be regarded as any ground for divorce.)

The wife of the aforesaid friend (the hostess on the occasion when the four had the conversation hereinabove related) testified that in said conversation the wife begged her

husband to live with her, but that his only answer to her was he positively would not live with her; that the reasons he gave were that they were not congenial, and he did not think he was sufficiently fed; that she had threatened her life, and he had taken razors from under her pillow; he never said she had threatened his life, but hers; that the only thing the wife said on this occasion which could be regarded as being a veiled accusation that he had had unlawful abortions performed upon her was, "Otha, you know why my health is ruined," and she did not say this in an accusing way, but in a pleading manner.

The husband brought suit for divorce on September 26, 1918; and it is unquestioned that between the time he first had her notified by letter in October, 1917, and the time suit was brought, the wife made repeated efforts to effect a reconciliation and to be allowed to live with him, and, in addition to her own efforts, had friends to intercede for her, but to all her pleadings and to those who were sent to him, he was adamant, giving as a reason for not living with her that it was "impossible."

What was it the wife had done which was so intolerable that nothing could change his settled determination not to have anything further to do with her, and make him turn a deaf and unforgiving ear to all her efforts at wooing him back, and when was it that he arrived at this irrevocable decision?

With regard to the time when he realized matters were intolerable and decided to separate, it should be observed that the petition alleges that the separation took place February 27, 1917; and, as before stated, the husband testified they separated at Sturgeon on that date after a quarrel, that their parting was not pleasant, and that his wife knew he was going to separate from her as well as he did. He admitted, however, that he wrote to her after his wife returned to her father's, and that he sent her money regularly and gave her the \$5 birthday present. He also admitted that when he went to his mother's after his operation he had his mother to telephone his wife he was there. He did not tell his mother they had separated; for the mother says he did not tell her they had separated, and she says that the first she knew of the separation was when the wife came to her with the divorce papers and wanted the mother to induce plaintiff to come back and live with her, his wife, which the mother refused to even attempt to do. (It may be, although it is not altogether clear and beyond doubt, that the "divorce papers" here referred to by the mother was the letter of October 27, 1917, from the Kirksville lawyers, and not the process in the divorce suit after it was brought in September, 1918; but, even so, this was long after plaintiff says he and his wife had separated, she knowing

it as well as he.) Although plaintiff alleged in his petition and testified that the separation occurred in February, 1917, at Sturgeon, and that the wife knew it then, yet, later on in redirect examination, in speaking of his operation for appendicitis, he said it was before the separation. The operation was in March, 1917; consequently, if it was before the separation, the latter could not have taken place in February, 1917.

The evidence offered and relied upon in support of plaintiff's right to a divorce and to justify his claim of "intolerable indignities" consists solely of the testimony of plaintiff and his mother and certain excerpts from letters written by defendant to plaintiff. The matters testified to by plaintiff relate wholly to things occurring when he and his wife were alone, and this evidence, and also the letters, were objected to on the ground that they were privileged communications between husband and wife and were therefore not admissible. It is contended by the respondent that the incompetency of this evidence was waived; but before passing upon this feature of the case we prefer to set out the evidence relied upon to justify the granting of a divorce.

The husband testified that during the first part of their married life his wife did not often get angry, but in the latter part thereof she was frequently "very pouty and angry"; that whenever she had an "angry spell" she would accuse him of burning the house to collect the insurance on the household goods; that she also accused him of falsely performing criminal abortions on her; that at the time of these accusations as to abortions her manner was "angry" and her attitude was "threatening"; that upon one occasion his wife got angry with him because he was going to send his mother some clothes to make a comfort and had bought her a watch for a present the preceding Christmas, and on this occasion she said to him, "I will kill you," and came at him with a knife. He did not know what kind of a knife it was, and says she did not touch him; nor does he say anything was done by him to avoid or prevent the threat from being carried out. In fact, his testimony does not impress us as being a full and complete picture of the various matters complained of, but consists, many times, of sententious answers which carry the impression that only a scant and limited light was to be let in on the matters to illuminate the setting and surroundings.

He further testified that she threatened to kill herself; that sometimes in the night he would be awakened by her groaning, and on putting his hand over on her he would find that she had his razor in her hand which she had put under her pillow when she retired; that on these occasions he would take the razor away; that once she had the butcher knife and once a pair of scissors, and once he was awakened by her groaning, and upon in-

vestigation he found she had tied one end of a rope around her neck and the other end was around the bedstead, and she was pulling on it; that in about a week the same thing occurred again, and he burned the rope; that she threatened to poison herself, and he threw the only poisonous thing they had out of the house and hid the razor; that once, the second year after they were married, they were returning home in the buggy, and she was holding the lines and they got to "scuffling," and "in some way she got hurt, but not bad, just a little slap"; that she, upon getting to the house, said she was going home, and went out to the well curb and sat there for two hours, but when her husband went to her and told her "it was all playful" and he "didn't mean a thing," she got in a good humor.

He further testified that in December, 1916, he went to Moberly to meet a man friend there by appointment at the hotel to talk over some educational work, this friend of his being also a school-teacher, and that after their business was transacted this friend took him to the picture show, and then they went back to the hotel, where he spent the night, he leaving the next morning at 5:30 and going back home; that, upon happening to remark that he had gone to the picture show, his wife "got angry about me spending money and throwing money away on people that just wanted to use me." When asked by his counsel what her appearance was on this occasion, he replied, "Angry," and when asked what she said when angry, his answer was, "She said I was throwing away money on people that didn't care anything for me." He further testified that his wife was jealous of him, and when asked to tell about the jealousy, he said, "She was jealous of my men friends and of my mother, any one that was a friend of mine," and when asked what she ever said that led him to believe she was jealous, he replied, "She said I cared more for other people than her; that I cared more for mother and more for Mr. Cosby." He further testified that she told him he had no loyal friends, his relations and cousins did not care for him, and that she said this "in an angry manner" and repeated it "on different occasions." He further testified that the last year they lived at Sturgeon often when he would leave in the morning she would tell him she would not be there when he got back.

On cross-examination he denied having told his wife it was too expensive for them to board at Sturgeon, and denied having induced her to go to her father's to raise a garden and put up fruit for the next year. He also denied having written his wife to come to Sturgeon for the purpose of quieting the gossip about him and a woman there. He admitted that while he was teaching the first year there one of the directors cautioned him that he was "showing too many favors" to a

lady teacher there, but asserted that these favors were not undue attentions on the part of a man toward a woman, but only the favors of putting her at the head of the school and appointing her to tasks her ability warranted, and that the caution was so as not to make the other teachers dissatisfied. He denied knowing of any gossip connecting him with a lady. But he was pressed to say if, while his wife was at her father's, he did not write her to come to Sturgeon, that there was talk, and if she were there the gossip would cease. He did not answer the question as to whether he so wrote his wife, but went on to say that the last year he was at Sturgeon his wife was at her father's and he was staying at the hotel in Sturgeon, and he "heard gossip about the hotel," and he asked the president of the school board "if there was anything to it," and the president said he "didn't know, but there had been the past year," and he (plaintiff) thereupon asked him "if he didn't think it would be better if we were keeping house," and that then he procured a house from a lady who was going to Kansas City. He denied telling his wife about the gossip when she came. He says that his wife was very sick four times during their married life. He would not say she was "desperately" sick, but on one of the occasions it was thought the likelihood was she would die. He testified that on one occasion, Sunday morning, after he had made the fire and gone for the mail, his wife refused to get up and get breakfast or to get dinner, and he got his meals out of tin cans. His wife says she never failed to get his meals except on the occasions when she was ill, and that they both lived a great deal on canned goods from motives of economy.

Plaintiff's mother testified that once when she was at their home plaintiff wanted to go and nurse a sick neighbor, as it was plaintiff's turn to wait on him, but defendant objected, saying she would lock the door and not let him in when he came back. He went, but his wife did not lock the door. When he returned his wife accused him of being somewhere else, but she, the mother, reassured her by calling her attention to the fact that her husband's clothes smelt like chloroform, the medicine used upon the man he went to nurse. This must have been when the wife was sick, as the mother says in that connection she went to their home when she was called in sickness. However, in another place she says she kept house for them a while when they both were teaching at Hunnewell, but otherwise was with them in sickness. She testified that when she was with them in Sturgeon she knew they were not getting along, but did not know the cause; that on one occasion when a message came over the phone purporting to be from the husband's "Cousin Charley" at the hotel the husband invited "Charley" to come down to the house, but the latter said he could not, and wanted

plaintiff to come to the hotel, and the wife said "It was spending money; didn't think he went to the picture show, and didn't think his cousin was in town."

The mother testified that the wife came to her and wanted her to have her son live with her, his wife, and in this conversation the wife made accusations against her husband. An attempt was made to show by her that the wife in this conversation accused her husband of performing criminal abortions upon her, but her testimony as to what the wife said was that "she took treatment from him that she knew nothing about," or "took treatment from him while she knew nothing about it." The mother further testified that the wife tried to get her to induce her son to come and live with the wife, and upon her refusing to do so the wife said she knew enough about the fire to put him in the penitentiary, and if he did not come to live with her she would use what she knew and his mother would look at him through the bars. It developed on cross-examination that these alleged accusations on the part of the wife were stated by her to the mother when the wife came to her "with the papers for divorce," whereupon a motion was made to strike out the testimony because, being made after the alleged cause of action, if any, had accrued, they could not constitute indignities to be relied on. Before this motion was ruled on, evidence was elicited from the witness tending to show that the occasion to which she alluded "must have been" in 1917, and that what the witness continued to call "the papers for divorce" was in fact the letter from the Kirksville attorneys hereinbefore referred to. Thereupon the motion to strike out was overruled. On recross-examination the witness said that when the wife came to her with the letter she had received was the first time she knew the two had separated; that her son had never told her nor had he ever intimated to her that he was having trouble, nor had the wife said a word to her about it, though she staid awhile at witness' home that spring. The witness said the wife had "pouty spells." With regard to the mother having charged the wife with taking the mother's watch, the mother explained the circumstance from her viewpoint by saying that she, the mother, merely asked her daughter-in-law, "Did you pick up my watch?" and did not charge her with having stolen it. The mother says she, the mother, had been wearing the watch and had left it lying on the dresser in the bedroom, and after her daughter-in-law had been in the bedroom she, the mother, missed it and asked her daughter-in-law the above question, whereupon the daughter-in-law said to her, "You have charged me with stealing," and the daughter-in-law's sister thereupon called her attention to the fact that she, the mother, had the watch on her person.

The wife testified that she had always

treated her husband with the highest respect and the best she knew how; that she was always fond of him and foolish over him; that she did not quarrel with him; that they did have misunderstandings sometimes, but they never let the day go by without making them up, except once, when his mother was there and caused trouble between them; that the mother's attitude was sometimes friendly, but that she would criticize the way the household duties were performed, more particularly the washing. The wife regarded the mother as opposed to her, but she was not allowed to testify as to things the mother did to wound her feelings. The wife testified that there was no quarrel between her and her husband when she left Sturgeon to go to her father's; that she did not make any accusations against him concerning another woman, but only pleaded with him to be careful of his actions so as to give no occasion for gossip; that when she came to Sturgeon in response to his letter to come and thus stop the gossip she did not believe the charges against her husband and refused to allow others to talk to her concerning them; that the reason she did not go to him when he was in the hospital was because of the letter he had caused to be written concerning the expense; that she was advised by the husband's mother not to telephone him as she had started to do, but this was excluded by the court as being immaterial.

The wife denied that she had ever threatened to kill her husband; that at times following the operations when she was seriously sick, and even when she was able to go about the house, her nerves were for a time in such condition that she was not at herself; also that, after she got word from her husband to go to Shelbina to make the contract with reference to the property settlement or he would leave for France and she would never see him again, she was in a delirious condition so that a doctor was sent for, but she knew nothing of it; that her then disturbed mental condition did not get all right until a few days after the settlement contract had been signed; that she did not accuse her husband of setting fire to the house, and did not charge her husband "in an accusing way" of having performed criminal abortions upon her; that after her operation as Sturgeon there were "lots of times" when she did not know what she was doing, but only knew of it from what they told her; that she never knowingly told her husband she would take her life. She says the first she knew of the rope episode was when her husband took it from her; that it occurred after they had retired at night; that she had no recollection of having locked herself in the closet threatening to kill herself, but presumed her husband must have broken the door open, as he says he did, for she saw that the side piece was broken and he told her he broke it;

that her husband did not get angry at her for having attempted to take her life on the occasion mentioned, for he realized her condition and was kind to her except when his mother was there.

With regard to the matter of gossip concerning the husband's relations toward a woman in Sturgeon, the president of the school board testified that he went to the husband at the time and "cautioned him against some criticism I had heard of him," and when plaintiff's counsel, in an endeavor to show that it was not of an improper nature, and that his caution was merely against showing too much favoritism to one school-teacher over another, pressed the witness as to the husband's reputation for morality, the witness said his reputation in that regard the last year he was at Sturgeon was not good. It is true the defendant had announced that she made no attack on plaintiff's morality, and such evidence cannot be accepted for that purpose, but it can be regarded as throwing great light upon her husband's complaint, as one of his grounds for divorce, that his wife accused him with regard to other women. She says she never did accuse him and never believed him guilty, but only pleaded with him not to act in a way to create talk. Even if her statements to him be regarded as accusations, they would not constitute indignities unless they were unfounded.

The foregoing is a résumé, somewhat in detail, of the evidence upon which a divorce is asked, except as to the so-called accusations made in the letters written by the wife to the husband. The plaintiff offered in evidence as Exhibits B, C, D, E, and F certain excerpts from defendant's letters to him. Exhibit B was an excerpt from page 2 of an undated letter; and Exhibits D, E, and F, were excerpts from a letter dated May 17, 1918. These excerpts were offered to show the alleged accusations which the husband claims constitutes some, at least, of the indignities on which he seeks a divorce. These matters relate to the alleged charges of the wife as to intimacy with other women, the burning of the house to get the insurance, and the performing of unlawful abortions upon her.

[1] We have now reached the point where we must take up the question of the admissibility, not only of these letters, but also of the verbal communications taking place between the husband and wife when no one was present. It is well settled that private communications between husband and wife are not admissible. *Berlin v. Berlin*, 52 Mo. 151; *Miller v. Miller*, 14 Mo. App. 418, 421; *Ayers v. Ayers*, 28 Mo. App. 97, 100, 101; *Long v. Martin*, 152 Mo. 668, 674, 54 S. W. 473; *Gruner v. Gruner*, 183 Mo. App. 157, 171, 165 S. W. 865. But the plaintiff says the incompetency of these was waived, and, as we understand it, this claim of waiver

can be classified under three heads: (1) Because defendant cross-examined plaintiff as to other communications; (2) that defendant herself also testified to confidential communications; and (3) that defendant requested the whole of the letters be introduced in evidence. The record, however, discloses that whatever was done by defendant on which plaintiff predicates waiver was done after her objection to the competency of the entire line of testimony concerning confidential communications had been overruled by the court. When the first testimony concerning communications was offered by plaintiff, the defendant elicited the fact that they were private and made when no one was present, and then objected to any testimony on the part of the husband with reference to conversations between them, on the ground they were privileged, and asked that any testimony of that character be excluded. The court said: "The objection is overruled for the present." The defendant excepted, and plaintiff was allowed to answer. Further evidence of communications was elicited, and the record shows this statement, apparently made by the court, though the record does not affirmatively so state: "It is understood that, unless for some other reason, the same objection is made to this line of testimony." A little further on, when evidence of other communications was offered, the defendant, before allowing the question to be answered, elicited that they were made privately and when the parties were alone, and again objected to the testimony as not being competent. But the court overruled the objection, this time without qualification, and again defendant excepted. When the answer was given, the defendant moved to strike it out for the reasons assigned, and this also was overruled, the defendant excepting. A little later, when other evidence of private communications, notably her threats to take her own life, was asked about, the defendant again renewed her objections on the ground that they were private communications between husband and wife. The court overruled the objection, and defendant excepted. Three and perhaps four times thereafter the defendant made the objection, and each time was overruled, and defendant excepted. Whereupon, at the close of a long answer by plaintiff to which the above objection had been made, the court ruled: "I don't know about going too far. I will admit only epithets and verbal acts which amount to indignities." Later on other questions were asked as to communications and defendant again objected "because it is a private communication between husband and wife." The court overruled the objection, and defendant excepted. When the excerpts from her letters were offered, the defendant objected to them several times on the same ground, but the objections were overruled,

and exceptions were saved. And when the excerpts were introduced in evidence, over defendant's objections, her counsel then requested that the whole of the letters be introduced.

[2, 3] Now, the alleged waiver did not occur until after defendant had unavailingly objected to the introduction of that kind of testimony and had been overruled. As to what defendant did to constitute waiver, the record shows that the plaintiff was cross-examined in regard to what he had testified to over defendant's objections, or that defendant gave her version of the communications plaintiff had thus testified to. The only instance where it might seem that defendant had elicited other evidence of that character from plaintiff was when he was asked if he had told all his wife said and did on these occasions about which he had been interrogated by his counsel, and the witness proceeded to relate another communication taking place at another time, and about which he had not testified in chief, whereupon the defendant objected to it, but the court ruled that he should proceed. So far as concerns the testimony of the wife as to what her husband said while apparently sick in bed in Kirksville, the record does not disclose that no one else was present, and all her other evidence as to what he said was either giving her version of what he had testified to or else was concerning conversations at which others were present. Under these circumstances, we do not think the defendant waived the incompetency of these private communications. *McKee v. Ruden*, 222 Mo. 344, 370, 121 S. W. 312, 133 Am. St. Rep. 529. The defendant had at the very outset made the objection and raised the point that all such testimony was inadmissible, and what occurred thereafter was not a waiver thereof, but was a fight made upon the ground to which her adversary, under the ruling of the court, had driven her. The objections and exceptions properly and clearly made were sufficient to preserve the point and defendant did not have to thereafter preserve her rights by continually objecting. *Bailey v. Kansas City*, 189 Mo. 504, 512, 87 S. W. 1182; *Schlerbaum v. Schlerbaum*, 157 Mo. 1, 22, 57 S. W. 526, 80 Am. St. Rep. 604. We think the evidence as to the private communications between the parties should have been excluded; and the letters were in the same category. *Hall v. Hall*, 77 Mo. App. 600, 603; *Brown v. Brown*, 53 Mo. App. 453. These communications were not such as come within the exception to the rule—that is, ex necessitate rei—since the exception is not one of general necessity where no other witnesses can be had, but on a particular necessity, such violence or injury, etc., of one to the other. *State v. Vaughn*, 136 Mo. App. 645, 118 S. W. 1186. The alleged threat to kill the husband, coupled with the coming

at him with a knife, may come within the exception, but none of the other things do. And, as to this threat, the evidence of it is too meager, too inconsistent with the conceded conduct and course of action by both parties, to be regarded as having any real basis in fact. It is manifest that the husband never regarded the wife's putting the razor under her pillow as any threat or danger to him, and it is also clear that whatever was done in this regard was the result of the profound disturbance to the wife's mental and nervous system, which abortions will so often produce. It is clear that he never acted upon any idea that she ever threatened to kill him, but only that she, in her depression, thought of taking her own life. Not only his entire course of conduct, but his reasons for not living with her, given to the two friends at their house and hereinabove related, show that he never at any time considered himself in danger.

[4] If the matters involved in the private communications be eliminated from the case, there is little left upon which to predicate an action for divorce. The alleged threats and accusations made by the wife to the husband's mother were, of course, not privileged. But we do not understand that a private communication which is incompetent is made competent merely because the same things which formed the subject-matter of those communications were also asserted, upon a different occasion, by a spouse to some one else. But, whatever was said by the wife to the mother, it unquestionably was not the cause of the husband's estrangement, for the reason that at the time they are charged to have been said the husband had already decided upon a divorce. The wife had been notified of that fact, and had gone to the mother to enlist her efforts in behalf of a reconciliation. That a wife, striving to get her mother-in-law to bring the husband back to her, would in the same breath make charges and accusations against the husband in such way as to constitute indignities for which a divorce should be granted, is strange indeed. It is wholly inconsistent with the pathetic, earnest efforts which the wife continually made to retain her husband, from the time she was first notified of his intentions clear up to the last. And when we see the alleged charges and accusations relied upon in the letters and read them, not as bare unrelated excerpts, as plaintiff would have us do, but read the entire letters and grasp the spirit, purpose, and intention of the writer, we cannot resist the conclusion that what the wife said to the mother has likewise been misconstrued and misinterpreted as indignities when they should not be so regarded.

The defendant, after her objection to the excerpts were overruled, asked that the whole of the letters be read in evidence, and, if

this be given the effect of a waiver as to the letters, then we may examine them to see what light they throw upon the whole of such alleged charges and accusations which the husband now relies upon as indignities; for his evidence of oral communications in regard thereto are concerning the same charges.

[5, 6] When these letters are read as a whole—there are three of them—they are seen to be, not the manifestations of contemptuous, uncivil, or insulting conduct, or of settled hatred and estrangement, but rather the efforts of a distracted wife frantically trying by every means in her power, even coercion, to get her husband to come back to her. No doubt, ill-advised and incoherent statements are contained therein. No doubt statements were made that are irritating and which were better left unsaid, but, in the light of the manifest spirit in which they were written, they do not constitute indignities. For indignities are such acts as "consist of unmerited contemptuous conduct; any act towards another which manifests contempt for him; contumely, incivility or injury accompanied with insult and amounting to a species of cruelty to the mind." *Lynch v. Lynch*, 87 Mo. App. 32, 37; *Goodman v. Goodman*, 80 Mo. App. 274, 281. See, also, *Lewis v. Lewis*, 5 Mo. 278; *Hooper v. Hooper*, 19 Mo. 355; *Brown on Divorce*, p. 208; *Bishop on Mar., Divorce & Separation*, § 1827. Nor will one or two unconnected acts, or a single indignity, be sufficient; there must be a series of them or a course of conduct as distinguished from an isolated indignity. *Kempf v. Kempf*, 34 Mo. 212; *Dowling v. Dowling*, 183 Mo. App. 454, 167 S. W. 1077; *Gruner v. Gruner*, 183 Mo. App. 157, 165 S. W. 865. Where accusations are relied upon to constitute indignities, they must not only be false, but must have been made without warrant or foundation and with the intent to wound. These letters nowhere contain anything of this character or an element impeaching the wife's good faith in her admonitions to her husband. On the contrary, they show on her part a deep and abiding affection for him, a deep concern for his spiritual welfare, and exhorting him to do right. Listen to this plea in the very opening sentence of the first letter, begging him not to go on with his contemplated divorce:

"Dear, I am writing you once more, although I do not expect to get an answer. I have done everything within my power to keep you from going wrong, but if you still persist you will have to go. I can do no more. If you really want to be rid of me and have tired of me, I shall not try to keep you, though I love you. I do not think you know what you do want; I know you better than you know yourself. Why didn't you come to me and tell me you wanted to do this?"

Although she refers to the operations performed on her and charges him with the "ruination" of her health, yet even this sentence closes with the statement:

"But I always thought you did it to relieve my suffering, though you acted unwisely. Then there are other things. I know you would have something studied out to offer, but remember truth will prevail above all things else. I have always upheld you because you were my husband and I loved you more than anything else, and let me say now I would try to find excuses for you if you repented of this act and made things right. Dear, every one has to live his own life and answer for his own acts, whether right or wrong."

What was this "act" she wanted him to repent of? Not the act of performing a criminal abortion, but the act of leaving her and seeking a divorce.

The alleged charge of his having no loyal friends is made in the course of an argument against his persisting in his determination to leave her, the consequences of which, as well as the spirit and purpose of the writer, are contained in the concluding words of this part of the letter, viz.:

"No one around here who knows this would have confidence in you as before. This will follow you through life; no matter where you go, you cannot get away from it. It will all come home to you. Then God pity you. Otha, how can you take advantage of one who has trusted you as I have?"

In this same letter from which an excerpt only is offered to show "Intolerable Indignities" occurs these passages:

"I sit and cry, but I know that does no good. I am not telling you this to arouse your sympathy if you have any; I only want you to know in what condition you are leaving me, which makes your act seem the more contemptible. It hurts me to think that you may some time suffer as you have before, and will have no one to care for you. For, Otha, no one will ever wait on you as I have. Who would carry your slop jar when you were sick the same as when you were well, etc., as I have always done? But some men do not appreciate such things. Have you ever thought of these things? You and I were each born on Saturday, engaged on Saturday, married on Saturday, you sought the lawyers on Saturday, and we saw one another last on Saturday. Do you wonder that Saturday has become a day of terror for me? * * * I shall not try to force my presence on you if I am not wanted and am in your way. Otha, although people say you want to marry some one, I cannot believe you so dishonorable. I know how you like to have a good time, and as I said before you are sometimes careless in your actions, which may lead people to gossip, but I believe in you in that respect. I know there have been some who exercised an influence over you, but I cannot believe you care for them. It is hard to realize what a mean girl can do once she has an influence over any one. Don't be angry with me if I ask you once again to be careful of your actions. I am in earnest,

for there has been a great deal of gossip about you at Kirksville. I have not let it influence me against you."

Even the letter of May 17, 1918, excerpts from which are relied on as charging him with arson, starts out thus:

"Otha, I am writing you again because I want you to know some things which perhaps you do not know, and also I realize you may have been in such a state of mind as to have misunderstood things I have written before. I understood you to say that you did not request Mr. Cosby to write the letter telling of your operation. He says you did and I think the letter proves that. He also says he did not expect me to write to thank him for sending me the information. Neither did you expect me to come to Kirksville to see you, as you said not to come on account of expense, the same as you told your mother. Did you accuse her of not caring for you because she did not go? And she could have gone on her own money, while I would have had to use yours, and if I had disobeyed you and gone up there you would have been angry. What else could I do, but worry over your condition and wait for you to come home."

In the course of this letter are the following passages:

"But I believe you do care for me, but [I] have just been thrown aside for a time. I do not see how you can but care when you think over our life together. How I have always trusted you, even before marriage. You may think to put me out of your life, me and all that I have been to you, but you will learn something; there are bridges that won't burn. You will sometimes think of me. You said that night I was at Kirksville that I didn't care for you; that I only thought you could make a better living for me than some one else. Dear, why did you say such a thing? * * * If I did not care for you why did I always worry about you if you were late coming home—afraid something had happened to you. Mr. Shouse said, if I was a sister of his, he would not want me to live with you, but I love you and still believe this act of yours is a family weakness and hope you may overcome it. * * * Oh! how I wish I could help you to go the right way. I am praying earnestly and sincerely for you. I remember telling you once that I would not pray for you any more. I was ashamed of saying that and asked forgiveness, for it was said in thoughtlessness and I have never failed to pray for you. I wonder if you sometimes think of how we used to kneel together with an arm around each other while I said my prayers aloud, a part of which was 'forgive us our sins and help us to forgive those who sin against us.' I say us because you were always included and my prayer is the same today. * * * I cannot stand it any longer the suspense, the worry, and worst of all the loneliness. I have tried, but each passing month only makes it harder. I was so happy with you and even as you read this I am thinking of you, loving you, and praying for you, and each night as I go to sleep my heart beats faster and warmer at the thought of all there had been. God bless and keep you, dear."

The reference to the burning of the house is in the nature of an exhortation to him to pay back the insurance; and it clearly appears that whatever she thought he may have done in that regard was caused by what he said to her about it and the way he acted when they left the house prior to its burning.

In a letter of November 20, 1917, she says:

"Dear Otha: I am writing as I could not talk with you, and I want you to read it through, for your sake as well as mine. I did as you said and came home and have not bothered you since, taking your word of honor that you would come home at the end of the year; have talked with a few of our friends, for, Otha, I feel that this is a spell in your life which you cannot help. I never dreamed this would happen to us. I always thought you different and much broader minded. What is education for, if not to help us to overcome family weaknesses and all trials and to be real men and women. I know you are in a weakened and nervous condition, and I can sympathize with you, for you know after my sickness I was under a nervous strain. Little things seem very great and little misunderstandings seem very serious. At times life seemed not worth living, but when you get strong again things will seem different. As for saying you do not care for me, I pay no attention to that, as I think you do not mean it. You said that once before, and it nearly killed me at first, but you got over that, and I forgave you the speech, as I have forgiven you of all unpleasant things in our life. Though, granting you do think that you do not care for me, aren't you man enough to stand by your marriage vow? Otha, you are all I have to live and work for, and I feel that I could forgive you of almost anything. We can let the unpleasant past be forgotten and begin anew. * * * There is but one right way—to live for each other and to make each other happy. I know I have not had an equal chance at schoolwork with you, I having to do housework, washing, and ironing along with my schoolwork, as well as being sick so much, but you know I was always willing to sacrifice that you might go on with your education. Then when we could better afford it I could take up schoolwork under less strenuous conditions, as you always advised your students to do when entering other schools. * * * Otha, when you told me about the gossip about you staying at the hotel, did I question you or appear to doubt you? No, I did not care to know of it, for I believed it false; even when those old gossippers were bold enough to come to me, didn't I turn them down? You know I never let any one talk to me about you. I always upheld you. Then when I tried to talk to you and asked you to be careful of your actions that they would have nothing to base their gossip upon, you resented it, and thought I meant to accuse you.

If I had meant to accuse, I would have lost confidence in you. Can't you see that? * * * Otha, haven't I stood loyal to you in all your trouble? When ——— attacked you through the newspapers, didn't I stand by you and uphold you, though I lost a few friends? Oh! can't you see that this would ruin your life; no matter where you went, it would follow. It would be the very chance the above person would want. He could publish it everywhere because it would be the truth. Oh! don't let it happen. I have always said and still say any two people can get along if both will try. Think this over, and oh, please write to me. "Alice."

[7, 8] We have carefully studied this record, and cannot escape the conviction that plaintiff has not made out a case for divorce on the ground of indignities. We are aware of the deference that should be paid to the conclusion reached by the trial court, but, with all that, it is well settled that the duty rests with us to examine the record for ourselves and determine the very right of the case as we see it from the evidence. *Gruner v. Gruner*, 183 Mo. App. 157, 167, 165 S. W. 865; *Clarkson v. Clarkson*, 22 Mo. App. 236, 246, 247. We need not further analyze the testimony, or the course pursued by the respective parties, to show the construction we place upon the different theories of the case nor the motives actuating the respective parties. Sufficeth it to say that, if the privileged communications be eliminated from the case, there does not remain sufficient evidence to justify a divorce when viewed in the light of the course pursued by the parties hereto. On the other hand, if we consider the case on the whole evidence, including the private communications, we are impressed with the fact that a strained interpretation has been put upon the wife's acts and conduct; that the respective courses pursued by the parties at and after that time show that there was nothing up to the time of the agreed physical separation in February, 1917, which was regarded as "intolerable indignities." There has undoubtedly grown up in the husband a desire to be rid of this wife who, after having striven so earnestly to aid her husband in getting along in the world and whose health is now broken, is now to be put away and divorced, but we are not impressed with the justice and soundness of the reasons advanced therefor.

The judgment is reversed.

All concur.

LUKENS v. INTERNATIONAL LIFE INS. CO. (No. 13677.)

(Kansas City Court of Appeals, Missouri.
June 14, 1920.)

1. Costs —148—Judgment for item of costs on appeal proper under stipulation.

Despite Rev. St. 1909, §§ 2284, 2285, stipulation of parties, venue of which was laid in trial court, providing for settlement of litigation and judgment for plaintiff for a certain sum, together with all court costs, *held* to have authorized judgment for plaintiff for an item of costs consisting of the expense of the transcript made out by the clerk of the Supreme Court on appeal.

2. Costs —282—Independent action does not lie for omitted item.

An independent action does not lie for an omitted item of costs.

3. Costs —207—Evidence held to make prima facie case for plaintiff of payment of item.

On plaintiff's motion for judgment under stipulation for the cost of preparing transcript in the Supreme Court as an omitted item of costs, evidence consisting of the certificate of the clerk of the Supreme Court that plaintiff had paid the item to the clerk *held* to make a prima facie case for plaintiff.

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

"Not to be officially published."

Action by Maggie L. Lukens against the International Life Insurance Company. From judgment for plaintiff, defendant appealed to the Supreme Court, which reversed and remanded the cause (269 Mo. 574, 191 S. W. 418), and plaintiff brought error to the Supreme Court of the United States, the case, while pending in such court, being settled by mutual agreement, and plaintiff filed motion for judgment in the amount of an item of costs. From a judgment for plaintiff, defendant appeals. Affirmed.

Humphrey, Boxley & Reeves, of Kansas City, for appellant.

Scarritt, Jones, Seddon & North and E. C. Mead, all of Kansas City, for respondent.

ELLISON, P. J. This case was originally tried in the circuit court of Jackson county and judgment rendered on April 1, 1913, in favor of the plaintiff and against the defendant for the sum of \$2,690. Defendant appealed the cause to the Supreme Court of this state, and that court reversed and remanded the cause to the circuit court of Jackson county. 269 Mo. 574, 191 S. W. 418. Plaintiff then prosecuted a writ of error to the Supreme Court of the United States, and while the cause was there pending it was settled by mutual agreement to the effect that defendant should pay plaintiff \$750 and all court costs. Thereupon the writ of error in

the Supreme Court of the United States was dismissed. Defendant paid the sum of \$750 and all costs, with the exception of an item of \$54, which the plaintiff paid to the clerk of the Supreme Court of the state of Missouri for a transcript of the record in the cause, sent by him to the Supreme Court of the United States, which item the clerk of the Supreme Court of Missouri omitted to show on the mandate sent by that court to the circuit court of Jackson county when it remanded the cause. The clerk, however, issued a supplemental certificate under his hand and the seal of the Supreme Court, certifying that said item of costs had been paid to him by the plaintiff.

Thereafter, on the 7th day of October, 1919, plaintiff filed her motion in the assignment division of the circuit court of Jackson county to allow as a proper item of costs under the stipulation above set out this item of \$54, and for judgment for said amount in favor of plaintiff and against the defendant in accordance with the stipulation. At the same time there was filed with the motion the certificate of the clerk of the Supreme Court of Missouri, heretofore mentioned, and the stipulation of the parties, wherein defendant agreed to pay plaintiff the sum of \$750 and all court costs, and agreed that, in case such payment was not made within 10 days after the date of said stipulation, judgment should be entered in the cause in favor of plaintiff and against the defendant for \$750 and costs of suit. No contention is made by the defendant that the 10 days had not expired. On the 11th day of October, 1919, the motion came on for hearing in the assignment division of the circuit court of Jackson county and was submitted upon the motion, stipulation, and certificate. No other evidence was adduced. The court sustained the motion and rendered judgment against the defendant and in favor of the plaintiff for \$54.

It is the contention of the plaintiff that, since the writ of error had been dismissed in the Supreme Court of the United States, and the Supreme Court of Missouri had reversed and remanded the cause for a new trial, and its mandate was on file in the circuit court of Jackson county, the said circuit court had jurisdiction to entertain said motion and render judgment in accordance with the stipulation of the parties, and that there was sufficient evidence before the court to sustain such judgment. The stipulation between the parties, referred to above, is as follows:

"In the Circuit Court of Jackson County, Missouri, at Kansas City, January Term, 1919. Maggie L. Lukens, Plaintiff, v. International Life Insurance Company, Defendant. No. 69423. Stipulation.

"It is agreed and stipulated between the parties to this cause that all matters in controversy therein are compromised and settled, and in consideration thereof the defendant shall pay

to the plaintiff the sum of seven hundred fifty dollars within ten days from this date, and all court costs.

"If such payment is not made within the time stated, judgment shall be entered in this case in favor of the plaintiff and against the defendant for seven hundred fifty dollars, with interest from this date at the rate of six per cent. per annum, and costs of suit."

[1] Defendant has presented several objections to the action of the trial court in sustaining plaintiff's motion. It claims that the court was without jurisdiction, citing *Wilson v. Stark*, 47 Mo. App. 116, *Berberet v. Berberet*, 136 Mo. 671, 38 S. W. 551, and *Roberts v. Modern Woodmen*, 146 Mo. App. 71, 123 S. W. 60. Those cases are not applicable. They did not involve costs, such as statutory clerical fees, which go along with the case and are taxed by the proper officer. They were cases where the court must adjudicate the claim for printing abstracts and fix the amount thereof as a part of the judgment, which must be had at the term or not at all. The item of cost involved here was for the transcript made out by the clerk of the Supreme Court of Missouri, and we think it clear should be considered as a part of the costs in the case, made up from the statutory fees allowed for such work. The court did not fix or adjudicate the amount, as in the cases above cited, but merely allowed the sum of items as fixed by the statute.

In a reply brief defendant cites us to section 2284, R. S. 1909, providing that "the clerk shall tax and subscribe all bills of costs arising in any causes or proceedings instituted or adjudged in the court of which he is the clerk," and section 2285, reading as follows:

"Any person aggrieved by the taxation of a bill of costs may, upon application, have the same retaxed by the court in which the action or proceeding was had, and in such retaxation all errors shall be corrected by the court."

It says that these sections make evident that any action taken for correction of the costs should be taken in the Supreme Court. But defendant leaves out of consideration the stipulation of the parties, the venue of which was laid in the court in which the original case was pending and the title to the case set out as it had been from the beginning, in which court (that is, the trial court) a judgment for a certain sum was to be rendered, together with "all court costs." This is a binding obligation. As said by the Supreme Court in *Schwacker v. McLaughlin*, 139 Mo. 333, 343, 40 S. W. 935, 938, "that stipulation is binding upon all competent parties who made it." That case was where they were endeavoring to hold a surety on a cost bond wherein there was a stipulation, and it was claimed the stipulation bound the surety. The court said that:

"The answer to that contention is that such expenses only become chargeable as costs by virtue of contract [stipulation], and only those who join in the contract are bound thereby."

In *Murphy v. Smith*, 86 Mo. 333, 338, the Supreme Court said:

"If a party in his compromise agreement stipulates for an adjudication of costs, in such a matter that a court would feel justified in enforcing it, irrespective of any judgment on the cause of action, such stipulation might afford special authority to the court to render judgment in accordance with its requirements."

In *Thompson v. Union Elevator Co.*, 77 Mo. 520, 522, it is said that—

"If a party would have the costs adjudged against his adversary, who prevails in the suit by reason of a compromise, under which the suit cannot be further prosecuted, he should so stipulate in his compromise agreement."

So in the case before us the parties have stipulated that the trial court shall render judgment for "all court costs." That this included costs in the Supreme Court is made clear by the interpretation of the parties themselves, since all costs have been paid save the one item inadvertently omitted.

[2] But defendant insists that if plaintiff has a claim for the omitted item of costs, it is by an independent action. The Supreme Court has held that such an action would not lie. *McGindley v. Newton*, 75 Mo. 115, 117; *State ex rel. v. Railroad*, 78 Mo. 575, 577. In the latter case the court said:

"The fact that everything else which was taxed by the clerk has been paid does not change the obligation of the defendant to pay the fee now claimed, and which should have been taxed at the time of the judgment. An application upon notice in the original action is the proper method of making the correction. A distinct and independent suit to effect this purpose would not lie."

[3] Finally, it is claimed that the evidence in plaintiff's behalf did not show that the item of cost has not been paid by defendant. We think a prima facie case was made. And it seems defendant must have thought so, too, for it submitted the case without asking a declaration in the nature of a demurrer. But, putting that aside, it is conceded that defendant paid the compromise sum of \$750 agreed upon and all the costs, save the omitted item of \$54. That item was paid to the clerk of the Supreme Court by plaintiff. This was shown by the certificate of the clerk of the Supreme Court, admitted without objection from defendant. We think a prima facie case was made, without regard to the proposition of the onus being on defendant to prove payment.

The judgment should be affirmed. All concur.

CENTRAL NAT. BANK v. WALTER-SCHEID. (No. 13568.)

(Kansas City Court of Appeals. Missouri. June 14, 1920.)

1. Bills and notes \S 92(1)—Liability of defendant to bank on accommodation note supported by cashier's note as consideration.

Though defendant gave plaintiff bank his note for its accommodation, if cashier's firm gave their note to defendant in consideration for note which defendant signed defendant is liable to bank on his note; otherwise if when defendant received note of cashier's firm it was understood it was not to be paid, so that it was not consideration for defendant's note.

2. Bills and notes \S 504—Indorsement of payment admissible as tending to show note was for accommodation.

In action by bank on note executed to it, as defendant maker claimed, for its accommodation only, indorsement of payment of the note as of the day following its date, though stricken out by the bank's attorney after the note was handed him for suit, held admissible in evidence for defendant as tending to show note was accommodation paper.

3. Evidence \S 432—Proof of understanding note not to be paid admissible on issue of no consideration and accommodation.

In action by bank on note claimed by defendant maker to have been given for accommodation, evidence of verbal understanding that note was not to be paid held not inadmissible as contradicting its terms; action being between original parties, and evidence being received on issue of no consideration and accommodation.

Appeal from Circuit Court, Cooper County; J. G. Slate, Judge.

Action by the Central National Bank against John E. Walterscheid. From judgment for defendant, plaintiff appeals. Affirmed.

W. G. Pendleton, of Boonville, and R. D. Williams, of Kansas City, for appellant.

Jerry M. Jeffries, of Moberly, Jeffries & Corum, of St. Louis, and W. V. Draffen, of Boonville, for respondent.

ELLISON, P. J. This is an action on a promissory note for \$3,790.60 due in 60 days from date, given by the defendant to the plaintiff bank. The judgment in the trial court was for the defendant.

The defense was that the note was given without consideration and for the accommodation of the bank. The evidence tended to show that A. H. Stephens was assistant cashier of the bank and controlled the management of its business, and that on the 9th of September, 1915, he requested defendant to sign the note for the bank for its accommodation that it might be shown to the

"bank examiner" as a part of its assets. Defendant did business at the bank and was a close friend to Stephens, but he hesitated about signing the note; yet after Stephens assured him no harm could come of it, that he would not be expected to pay it, and offer to give his (Stephens') own note to him for same amount, not to be paid, but merely to cover or show the transaction, he signed the note. Neither principal nor interest was ever demanded of him, and the note was indorsed as canceled in these words: "June 30—paid July 1, 1916." It was not shown who made the indorsement, but it was made while in plaintiff's possession. A line was drawn through this indorsement after the note was placed in the hands of plaintiff's attorney. No effort was ever made by defendant to collect the Stephens note, and it had been lost.

There was evidence in plaintiff's behalf that Stephens and his son, as partners, were operating a garage in Boonville with an overdrawn account at plaintiff bank, and that the note was given by defendant for the accommodation of Stephens & Son and was used by them in the bank as a credit on the account of Stephens & Son. The issue in the trial court was whether the note was given for accommodation of plaintiff bank or the firm of Stephens & Son, and the court gave instructions for each party on the respective theories. Instruction A for plaintiff was amended by the court by inserting an addition as to defendant accepting the note signed by Stephens & Son, just preceding the words "in consideration for the note which defendant had signed to the bank," and striking out a phrase at the close of the instruction. This action of the court did no possible harm to plaintiff and made the instruction clearer. A clause as to consideration was stricken out of instruction B, which, in view of the direction following, was useless.

[1] But the court also instructed the jury that, although the note may have been given for the accommodation of the bank, yet, if Stephens & Son gave their note to defendant in consideration for the note which defendant signed for the bank, the verdict must be for the plaintiff. On the other hand, the court instructed the jury to the effect that, although when defendant executed the note to the plaintiff bank for its accommodation he received from Stephens & Son their note for the same amount, with the understanding that it was not to be paid and was given and received merely to show the entire transaction, there was no consideration, and the verdict should be for defendant. These instructions, as shown by the authorities hereinafter cited, properly declared the law, and we must abide by the verdict of the jury.

[2] As has been already stated the note is

indorsed as "paid July 1, 16." This was done while in plaintiff's possession. A line was afterwards drawn through the indorsement by plaintiff's attorney after the note was handed to him for suit. But no explanation is given why it was done; and, in the absence of explanation, the indorsement, while not showing payment in a case where it is conceded no payment, in the ordinary meaning of that term, had really been made, yet it is very strong evidence that the note was not regarded as an obligation against defendant and that it was in plaintiff's hands merely as accommodation paper. The indorsement was clearly admissible in evidence in defendant's behalf.

[3] So we think the point made by plaintiff that evidence of a verbal understanding that a note was not to be paid could not be received to contradict its written terms is not well made. This action is between the original parties, and the evidence was well received on the issue of no consideration and accommodation. *First National Bank v. Freeman* (W. Va.) 98 S. E. 558, and authorities cited below.

That the case was properly tried and that the result is justified by the law is abundantly sustained by authority. *Chicago Title & Trust Co. v. Brady*, 165 Mo. 197, 85 S. W. 303; *Messmore v. Meyer*, 56 N. J. Law, 32, 27 Atl. 938; *Citizens' Trust Co. v. McDougald*, 132 Tenn. 323, 178 S. W. 432, L. R. A. 1917C, 840; *Woodbury v. Glick*, 151 Iowa, 648, 132 N. W. 67; *Central Bank v. Ford* (Tex. Civ. App.) 152 S. W. 700; *Bank v. Keith*, 85 Mo. App. 409.

The judgment is affirmed.

All concur.

VERNON et al. v. AMERICAN RY. EXPRESS CO. (No. 2721.)

(Springfield Court of Appeals. Missouri.
June 5, 1920.)

1. Pleading §418(2)—Objection of inconsistency in counts waived by answering and going to trial.

Objection by demurrer that petition contained inconsistent counts was waived by answering and going to trial after the demurrer was overruled, under Rev. St. 1909, § 1804.

2. Carriers §108—When insurer of freight.

A common carrier is an insurer of freight, except as against an act of God, the public enemy, and the inherent nature of the freight.

3. Carriers §119—Extraordinary hot weather an act of God.

Extraordinary hot weather is an act of God, and a carrier is not liable for injury to freight caused thereby.

4. Carriers §123—Extraordinary hot weather must be sole cause of damage to goods.

Extraordinary hot weather, as an act of God, does not relieve a carrier from liability for damage to a shipment of dressed poultry, if the carrier's negligence contributed to the loss.

5. Carriers §120—Liable for damage to perishables caused by negligent delay.

If goods are lost or damaged on account of their inherent perishable nature without fault of the carrier, there is no liability; but a carrier is liable where it negligently delays in delivering a shipment and permits the inherent tendency to have its natural effect.

6. Carriers §134—Evidence sufficient to show negligent delay in delivery of perishable goods.

In an action for loss or damage to a shipment of dressed poultry, evidence held sufficient to sustain finding that the carrier was guilty of negligent delay in delivering shipment at destination.

7. Carriers §118—Express company liable for negligence of railroad.

A railroad is the agent of an express company when carrying goods for it, and the express company must respond for the negligence of the railroad in transporting a shipment.

8. Carriers §89—May sell perishable goods on consignee's refusal to receive.

A carrier which is not negligent has the right to sell and dispose of a shipment of damaged perishable goods to the best advantage, where the consignee refuses to receive it, in which case consignor can only recover the amount for which the shipment sold.

9. Trial §386(2)—No error in refusing instruction.

In action against carrier for loss or injury to perishable goods, where court found that defendant was negligent, case being tried before court without a jury, there was no error in refusing a declaration of law as to the measure of damages where a carrier is not negligent.

10. Carriers §132—Burden on carrier to account for unreasonable delay in making delivery.

Where shipper by express showed arrival of dressed poultry in consignee's city in the early morning of a very hot day, and failure of defendant express company to deliver to consignee until six hours later, the burden then shifted to the defendant to account for the unreasonable delay in making delivery; the facts relating thereto being peculiarly and exclusively within its knowledge.

Appeal from Circuit Court, Laclede County; L. B. Woodside, Judge.

Action by James Vernon and W. R. Mayfield against the American Railway Express Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

A. M. Hartung, of New York City, and A. W. Curry, of Lebanon, for appellant.

I. W. Mayfield & Son, of Lebanon, for respondents.

STURGIS, P. J. Plaintiff's cause of action is based on defendant's failure as a common carrier to well and safely carry eight barrels of dressed poultry from Lebanon, Mo., to St. Louis, Mo., and there deliver the same to the consignee, Levy Bros. Commission Company. This poultry was delivered to defendant for shipment on the evening of December 7, 1918, and it is alleged should have been delivered to the consignee on the morning of December 8th, but was not delivered till the middle of the afternoon of that day, when it was found to have been spoiled and so damaged that the consignee refused to accept same. The defendant thereupon sold such poultry for the best price it could obtain and tendered the proceeds to plaintiff. This amount plaintiff refused to accept in full settlement. On trial without a jury in the circuit court, plaintiff obtained judgment for the full value of the shipment, and defendant appeals.

The evidence shows that Lebanon is some 180 miles from St. Louis, and that defendant used the trains of the St. Louis & San Francisco Railroad in making its shipments. The first train carrying express after plaintiff delivered this poultry to defendant at Lebanon left there near midnight and arrived at St. Louis at 6:55 the next morning. The other trains carrying express left Lebanon later that night and arrived at St. Louis about 8:30 and 9 o'clock, respectively, the next morning. The consignee testified that the weather was very warm for that time of year and, expecting this poultry and knowing that it might spoil, he called the defendant's St. Louis office in regard thereto about 7:15 in the morning and was informed that the shipment was then there. This shows that it arrived on the first train. The consignee offered to himself send for the shipment, but was informed that it would be sent out at once. The general foreman of the defendant's commission department said that the train carrying this shipment was due about 8 a. m., so that there is abundant evidence that the poultry arrived in St. Louis early in the morning of December 8th. The evidence of the clerk of defendant's superintendent that the express cars were not delivered till a later hour on December 9th is of no importance, as that was a different date. All the evidence shows that this poultry shipment was not delivered to the consignee till 3 p. m. of December 8th, and there is no question as to its being delivered in a damaged condition. The uncontradicted evidence also is that, while the weather was unusually warm for that time of year, the poultry had been carefully packed in ice in good condition, and would easily stand the

ordinary trip from Lebanon to St. Louis and delivery there. It was also shown, and this seems obvious, that after the ice has melted dressed poultry will spoil by standing five or six hours uncared for. That plaintiff made a case on the facts seems too plain for argument.

[1] The petition is in two counts; one alleging a conversion of plaintiff's poultry by defendant in failing to deliver it to consignee, and the other for damages based on the negligent delay in shipping and delivering. The petition was demurred to on the ground of inconsistency in the two counts, and on the ground that one was based on tort and the other on contract. By answering and going to trial after the demurrer was overruled the defendant waived this point. Section 1804, R. S. 1909. Besides this, plaintiff was required to elect, and did elect, to stand on the second count of the petition. That count and the cause of action there stated is all that is before this court.

[2-4] A common carrier is an insurer of freight, except as against an act of God, the public enemy, and the inherent nature of the freight. *Singer v. Amer. Express Co.*, 219 S. W. 662. It is claimed that the damage to this shipment of poultry was due to the first exception mentioned, in that the weather was unusually warm for December. Extraordinary hot weather at a particular time would come within such exception, but to excuse the carrier on such ground the extraordinary weather condition must be the sole cause of the loss. If the carrier's negligence contributes to such loss, then there is liability. Such is the holding in the cases cited by defendant. *Vail v. Railroad*, 63 Mo. 230; *Hance v. Railroad*, 48 Mo. App. 179. While the weather was unusually warm, the uncontradicted evidence is that this poultry was carefully packed in ice, so as to easily stand the time required for shipment and delivery at destination. The unusual and unexplained delay of at least six hours in making delivery combined with the warm weather in causing the loss. Defendant knew of the warm weather and the perishable nature of the shipment, demanding prompt delivery.

[5] We agree, also, that a carrier is not an insurer of perishable goods as against loss due solely to such cause. If goods are lost or damaged on account of their inherent perishable nature without fault of the carrier, there is no liability. *Singer v. Amer. Express Co.*, 219 S. W. 662. In *Funsten Fruit Co. v. Railroad*, 163 Mo. App. 426, 437, 143 S. W. 839, 842, the law is well stated thus:

"No one can doubt that the carrier is not liable for such damages as may result solely from an inherent infirmity in the goods in his care, no more than is he liable for loss entailed solely by the act of God, the public enemy, or the carelessness of the shipper. See *Hutchinson on*

Carriers (2d Ed.) § 216a; *Libby v. St. L., I. M., etc., R. Co.*, 137 Mo. App. 276, 117 S. W. 659. But, though such be true, it is true as well that the carrier is liable to respond for the results of his own negligence, and if it appears that his negligent conduct conduced to set the inherent infirmity of the goods in motion, to the damage of the owner, it will suffice; in other words, the exemption on account of the infirmity of the goods obtains only where the loss is solely attributable to such infirmity, for if the carrier's negligence commingles with the infirmity and contributes in part to the damage, liability is entailed therefor against the carrier for its tortious conduct."

Had the defendant permitted the consignee to call for and take the poultry early in the morning of its arrival in St. Louis, or had itself delivered same promptly, as it promised to do, there would have been no damage, or, if there had been, defendant would not be liable. The delay in delivering permitted the inherent tendency of dressed meat to decay in warm weather to have its natural effect, and where such delay is negligent the carrier is liable.

[6] It was claimed that there was no evidence as to what was a reasonable time in which to make delivery to the consignee after the shipment arrived in St. Louis. We think there is. The address of the consignee is 707 North Fourth street in that city. It is also shown that, on the same morning this shipment came to St. Louis, another shipment came from the same town of Lebanon over the same route to the same consignee, and this other one was delivered by defendant at an early hour in the forenoon. That the other shipment was delivered early in the day is evidence that this one could have been so delivered also, and that the failure to deliver this one till some six hours later was negligence.

[7] A number of declarations of law were asked by defendant and refused. As the case was tried by the court without a jury, these are of no importance, except to show that the court decided the case on the wrong theory of the law. What we have said shows that the defendant had a wrong theory of the law rather than the court. One or more of said declarations of law exempted defendant from any negligence of the railroad which it used in transporting the goods delivered to it for carriage. To this we do not agree, as the defendant made the railroad its agent in car-

rying goods, and must respond for the negligence of such agent. But there was no evidence of negligence here in transporting the shipment to St. Louis. The negligent delay occurred after the shipment reached St. Louis. The delay was in the delivery rather than the transportation.

[8-10] The declaration of law that defendant was not liable unless it was negligent, and in that event had a right to sell and dispose of the shipment to the best advantage after the consignee's refusal to receive same, and that in such case plaintiff could only recover the amount such poultry sold for, might well have been given. But, as the court found that the defendant was negligent, there was no need of instructing on the measure of damages on the contrary theory. After reading all the refused instructions, we find nothing to indicate that the court's finding was due to any misconception of the law. In fact, all the material facts of this case are uncontradicted, and make a prima facie case for plaintiff. The burden then shifted to defendant to account for the unreasonable delay in making delivery to the consignee, since the facts relating thereto were peculiarly and exclusively within its knowledge. *Hance v. Express Co.*, 48 Mo. App. 179, 184. Quoting again from *Funsten Fruit Co. v. Railroad*, 163 Mo. App. 426, 439, 143 S. W. 839, 842, this is said:

"For when the relation and situation of the carrier and shipper are considered, but slight evidence in respect of such matters will suffice, as the parties are in no sense on equal footing. It would be difficult, indeed, for the shipper to point out the precise cause of delay and that it was a negligent one, and the law reckons with this by casting the burden of proof on the carrier, who is possessed of all the facts which may explain its otherwise seeming default, when the shipper has been shown collateral facts and circumstances sufficient to suggest a reasonable inference of neglect on the part of the carrier."

See, also, *Hunt v. Railroad*, 187 Mo. App. 639, 173 S. W. 61, 63. No such explanation of the delay was forthcoming.

The judgment for plaintiff is for the right party, and is affirmed.

FARRINGTON and BRADLEY, JJ., concur.

MONTI v. McCAUGHEN. (No. 16077.)

(St. Louis Court of Appeals. Missouri.
June 8, 1920.)

Appeal and error \Rightarrow 301, 719(6), 1078(4)—
Submission of question to jury not considered
where not complained of.

Whether court erred in submitting an issue to jury will not be considered on appeal where appellant did not complain in motion for new trial, assignments of error, brief, or argument before appellate court of instruction submitting the issue or of court's refusal to give any other instruction asked by him.

Appeal from St. Louis Circuit Court; Kent K. Koerner, Judge.

"Not to be officially published."

Action by Martin Monti against William McCaughen, doing business as McCaughen & Burr. Judgment for defendant, and plaintiff appeals. Affirmed.

Edward J. Monti, of St. Louis, for appellant.

Thos. E. Mulvihill and R. M. Nichols, both of St. Louis, for respondent.

NIPPER, C. This is a suit to recover rent. The petition seeks to recover \$1,204.26.

The answer, after denying generally the allegations of the petition, pleads an oral agreement, whereby it is alleged that appellant agreed in September, 1915, to reduce the rent from \$266.66 a month to \$200 per month. Although not set out in the record it is stated that respondent also filed a counterclaim.

The reply admitted respondent's claim for \$179, and asked judgment for \$1,024.26.

At the trial in the court below, there was a verdict and judgment for defendant, from which plaintiff appeals.

There is but little controversy about the facts in this case. Appellant is the owner of the premises located at 919 Locust street, in the city of St. Louis. Respondent occupied these premises under a written, ten-year lease, dated April 15, 1905. This lease expired April 15, 1915, and respondent continued to occupy these premises and pay the same monthly rental that he did under the terms of the lease, namely, \$266.66 per month, until some time about the month of September, 1915.

Respondent testified that after the expiration of the lease he frequently made complaints to appellant about the amount of the rent, until finally, about September, 1915, he told appellant that he could not pay more than \$200 per month for these premises, and gave his reasons therefor. He says that appellant's only answer was, "Oh, pshaw!" or some expression of that kind. He further stated that he was not able to pay his rent in advance, and that he made the payments when he could. His contention is that ap-

pellant, by his words and conduct, led him to believe that appellant had agreed to these terms. He says that, when sending checks to appellant's agent for the payment of this rent, he did not specify on the checks the months for which the payments were to be applied, but that the money was to be applied on his account for rent, and that the receipts he received from appellant's agent for the money so paid receipted for the payments merely as "payment on account."

Respondent vacated the premises about November 4, 1916.

Appellant states that he at no time agreed to accept \$200 per month, nor did he enter into any such agreement, verbally or otherwise.

At the close of all the evidence, appellant asked for a peremptory instruction in the following words:

"The court instructs the jury that your verdict must be for plaintiff in the sum of \$1,203.26."

This instruction the court refused to give. The court then, at the request of plaintiff, gave to the jury the following instruction:

"The court instructs that, if you find from the evidence that the defendant did occupy the premises known as 919 Locust street from the 15th day of September, 1915, to November 4, 1916, and if you further find from the evidence that defendant held over at the expiration of the lease and continued to pay the rent as specified in said lease, you are hereby instructed that there was an implied agreement and that the said agreement created the relation of landlord and tenant, at the rental specified in said lease, and if you find the relation of landlord and tenant existed, you must find for the plaintiff, the sum of \$1,024.26, unless you find the facts to be as stated in instruction No. 2."

The court then, of its own motion, gave to the jury instruction No. 2, which told the jury that, if plaintiff and defendant entered into an agreement during the months of September or October, 1915, whereby the rent to be paid for said premises was to be \$200 per month, then the verdict must be for the defendant. Instruction No. 3 was on the burden of proof.

Appellant, in his motion for new trial, gives five reasons why the same should be granted, which we here copy:

"(1) The verdict and judgment in said cause is against the evidence, against the weight of the evidence, and against the law under the evidence.

"(2) The said verdict and judgment is for the wrong party.

"(3) The said verdict and judgment is the result of prejudice and passion of the jury.

"(4) The court erred in refusing to give the peremptory instruction, offered by plaintiff at the close of the entire case.

"(5) Because under the pleadings and evi-

dence the verdict and judgment should have been in favor of the plaintiff."

In appellant's "Assignment of Errors," in his printed brief, only two errors are complained of. We copy these:

"I. The court erred in refusing to give plaintiff's peremptory instruction at the close of the whole case.

"II. That the verdict is against the law and the evidence."

There was no error in refusing to give plaintiff's peremptory instruction to find in his favor, for the reason that the instruction asked directed the jury to find for appellant in a greater amount than he would be entitled to, as shown from the evidence and his instruction given at his request, as he would not have been entitled to more than \$1,024.26 under the pleadings and the evidence.

Appellant saved his exceptions to the giving of instructions Nos. 2 and 3 by the court of its own motion, but he makes no complaint of them in his motion for new trial, nor in his assignment of error, nor any other place in his brief and argument before this court. Neither does he make any complaint as to the refusal of the trial court to give any other instruction asked by him. Therefore we are precluded from considering whether or not it was reversible error to submit to the jury the question of whether or not there was any agreement made between the parties, fixing the rent at \$200 per month. In this condition of the case, the Commissioner recommends that the judgment be affirmed.

PER CURIAM. The foregoing opinion of NIPPER, C., is adopted as the opinion of the court.

The judgment of the circuit court is accordingly affirmed.

REYNOLDS, P. J., and ALLEN and BECKER, JJ., concur.

McCAUGHAN v. JOHN HILL CONST. CO. (No. 16031.)

(St. Louis Court of Appeals. Missouri. June 8, 1920. Rehearing Denied June 25, 1920.)

I. Evidence ¶215(1)—Affidavits for tax returns admissible as admission to show value of damaged goods in negligence case.

In a case of trespass and negligence for damages to a stock of oil paintings, etc., which plaintiff testified were worth over \$20,000, the court erred in excluding affidavits of plaintiff made for his tax returns in which he swore that the gross amount of goods owned by him was \$4,000.

2. Pleading ¶211—General charge of negligence held good as against demurrer ore tenus at trial.

A count charging that defendant's agents carelessly, negligently, and unskillfully committed certain acts to plaintiff's damage at least contained a defectively stated cause of action embodying a general charge of negligence, and was good as a basis for proof, unless proper objections were made before the trial, and demurrers ore tenus on the ground that negligence and unskillfulness were inconsistent and could not be united in one charge, made on the trial, were properly overruled, under Rev. St. 1909, § 1804.

3. Damages ¶188(1)—Plaintiff should be required to prove damage with all certainty case permits.

In an action for damages to numerous photographs and carbons, numerous statuary casts, numerous gold and gilt frames, etc., plaintiff should be required to prove the damage with all the certainty the case permitted, and it was not sufficient to allege and prove that numerous articles were damaged without specifying of what the articles consisted and the number.

4. Evidence ¶155(8)—Letters of plaintiff admissible in trespass and negligence case.

In an action of trespass and negligence, there was no error in admitting in evidence letters from plaintiff to defendant complaining of defendant's acts of trespass and negligence and requesting compensation therefor; defendant's reply denying the acts and refusing to recognize the claim being admitted.

5. Negligence ¶134(1)—Finding of negligence in damaging property sustained by evidence.

In an action for damages to oil paintings caused by breaking through of ceiling, held that the jury could infer from the evidence that one of defendant's employes while working in the attic over plaintiff's room, stepped between the joists, and that such act was negligent.

Appeal from St. Louis Circuit Court; Victor H. Falkenhaimer, Judge.

"Not to be officially published."

Action by William M. McCaughan against the John Hill Construction Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Marshall & Henderson, of St. Louis, for appellant.

Thomas E. Mulvihill and R. M. Nichols, both of St. Louis, for respondent.

BIGGS, C. Defendant appeals from an adverse judgment for \$4,796 rendered against it, based upon various alleged acts of trespass and negligence committed by it against plaintiff's rights and property while defendant was constructing a building on Locust street, in the city of St. Louis. Plaintiff was the lessee of property known as 919 Locust street, and there conducted an art store and

salesroom. Defendant, by contract with the owners of the adjoining property on the east, known as 915 and 917 Locust street, was constructing a 12-story building on said property in the years 1913 and 1914. Plaintiff alleges that during the period of construction the agents and servants of defendant committed various alleged acts of negligence and trespass against plaintiff's property, resulting in damage to a number of oil paintings and other art goods of plaintiff.

The petition is in 12 counts, the odd-numbered counts being bottomed upon trespass and the even-numbered ones upon negligence, there being six alleged causes of action, each stated in the alternative of trespass and negligence. Upon the filing of a general denial there was a trial before a jury, resulting in a verdict for plaintiff on the second count for \$1,110, on the third count for \$437, on the sixth count for \$1,461, on the seventh count for \$1,625, on the ninth count for \$88, and on the twelfth count for \$75. Judgment was rendered for a total of \$4,796.

The court nisi sustained demurrers to the first, fourth, eighth, tenth, and eleventh counts, and put the fifth and sixth counts, both causes of action therein stated arising out of the same acts of defendant, to the jury, leaving it to decide if they found for plaintiff, whether the said acts constituted a trespass or were acts of negligence.

The defendant assigns 25 reasons why the judgment should not be allowed to stand. A reading of the record convinces us that reversible error was committed by the lower court in excluding certain evidence herein-after referred to, which calls for another trial, and hence it will be unnecessary to consider the various specifications of error, as most of them, if meritorious, are unlikely to again occur upon a second trial. Such as we think may occur again will be given consideration in this opinion.

[1] The court erred in excluding the affidavits of plaintiff made for his tax returns for the years 1913 and 1914, and in which plaintiff swore that the gross amount of goods, wares, and merchandise owned by him at any time between the first Monday of March and the first Monday of June of each year was \$1,000. The affidavits were excluded on the theory that they tended to impeach the plaintiff upon a collateral issue. The plaintiff claimed that defendant's acts of negligence and trespass caused damage to his personal property consisting of a line of art goods, principally valuable oil paintings. One of the main issues was the question of the value of these paintings, which was a very material inquiry, for manifestly in case a very valuable painting is marred or otherwise injured by the acts of defendant the damage to plaintiff would be greater than if the painting was of small value. Plaintiff

went upon the theory that the paintings were of great value, and prima facie established that fact by his testimony and that of his manager, Lange. Plaintiff testified that the property that was damaged was worth \$20,870. Lange placed the aggregate value at \$22,655. Plaintiff claimed damages in the sum of \$7,151.50, and, as stated, recovered a judgment for \$4,796, for damage to a portion of his property. All of plaintiff's paintings were not damaged, as he testified that, in addition to a number of framed oil paintings on the walls of his art gallery, he had in 1913 some 400 unframed oil paintings on shelves on the south wall of the third floor. Plaintiff claimed that about 40 paintings were damaged, so it appears that a small portion of plaintiff's goods were damaged. That portion he valued in his testimony at over \$20,000. In the affidavits offered in evidence he placed the value for taxation purposes at \$1,000 for his entire stock.

The affidavits offered tended to contradict plaintiff's evidence as to value by showing that he had placed a different value on his property at another time. The evidence was admissible as an admission by plaintiff of the value of his property under the well-established rule of evidence that the admissions and declarations of a party made against his interest may be given in evidence against him.

The above rule, as stated by Judge Brace in *Bogie v. Nolan*, 96 Mo. loc. cit. 91, 9 S. W. 16—

"has had no respect for time or place, always presuming that a man's statements as against himself are truthful, whether made in court or out of court, on oath or in casual conversation, orally or in writing. They all rest on the same principle, that a man is not apt to declare a fact against his own interest unless it be true."

Plaintiff's counsel assert that the general estimate of \$1,000 made in the affidavits was for the purpose of taxation only and was not evidence of value, and therefore without probative force. Cases are cited from other jurisdictions to the effect that assessments for taxes are not competent evidence to aid the jury in fixing the value. We are not concerned with the law as declared elsewhere when our own courts have settled the problem, especially when we think it correctly settled.

In the case of *St. Louis O. H. Ry. Co. v. Fowler*, 142 Mo. 670, 44 S. W. 771, a condemnation suit in which the question of the value of defendant's land was in issue, the assessment list made by defendant in which he placed a value on his land was admitted in evidence as an admission of the defendant and as affecting his interest.

So in the case of *Wilcoxson v. Darr*, 139 Mo. loc. cit. 671, 41 S. W. 228, the court held

that a certified copy of the garnishee's tax list was properly received in evidence on the question as to whether the garnishee owed a debt to the defendant. The court there says:

"It would certainly have been competent for the jury in an investigation in which the very existence of a debt is the issue, to have known that the person who claimed to owe the debt had sworn in a proceeding required by law, that he had no such debt or had evaded the fact by a sworn list, omitting said debt."

In the case of *Steam Stonecutter Co. v. Scott*, 157 Mo. loc. cit. 526, 57 S. W. 1076, being a suit against stockholders of a company, by reason of a grossly excessive valuation placed upon lands turned over to the company in payment of its capital stock, it was held that defendant's assessment lists placing a value upon the property were properly received in evidence on the question of value. In fact the only objection made to the assessment lists were that they were not sworn to.

In the case of *Copper & Iron Mfg. Co. v. Manufacturers' Ry. Co.*, 230 Mo. loc. cit. 81, 130 S. W. 294, the Supreme Court says:

"The usual ground on which assessors' books have been admitted in evidence is that they constitute record admissions made by the opposite party in listing his lands for taxation."

Other cases in point are *Boyer v. Tucker*, 70 Mo. loc. cit. 459, and *Probst v. Ins. Co.*, 64 Mo. App. loc. cit. 412.

[2] Defendant's demurrer *ore tenus* to the second, sixth, and twelfth counts was well ruled under the circumstances of the case. These are negligence counts and charge that the defendant's agents carelessly, negligently, and unskillfully committed certain acts to plaintiff's damage. Defendant contends that negligence and unskillfulness are inconsistent and cannot be united in one charge, and, further, that the charge is general negligence, whereas plaintiff should be compelled to charge specific negligence. No motion to elect or to make more definite and certain or other objection was made prior to the trial. At least the counts contained defectively stated causes of action embodying a general charge of negligence and were good as a basis for proof unless proper objections were made before the trial. Such a petition is to be distinguished from one that states no cause of action at all. Section 1804, R. S. 1909; *Allen v. Lumber Co.*, 171 Mo. App. loc. cit. 506,

157 S. W. 661; *Machinery Co. v. Roney*, 185 Mo. App. loc. cit. 474, 171 S. W. 681; *Collingsworth v. Zinc & Chemical Co.*, 260 Mo. loc. cit. 703, 169 S. W. 50.

[3] As to the seventh count, plaintiff alleges that numerous photographs and carbons, numerous statuary, casts, numerous gold and gilt frames, and numerous other articles were damaged, including a large quantity of material and unframed oil paintings. The proof was not much more definite than the allegation. Plaintiff should be required to prove the damage with all the certainty the case permits. It will not do to allege and prove that numerous articles were damaged without specifying of what the articles consisted and the number. The jury should not be allowed to transfer money from the pocket of the defendant into that of plaintiff by guess or specification.

[4] We do not think error was committed in admitting letters from plaintiff to defendant written at the time complaining of defendant's acts of trespass and negligence and requesting compensation therefor. Defendant's reply denying the acts and refusing to recognize the claim was also admitted. *Houts v. Dunham*, 162 Mo. App. loc. cit. 489, 142 S. W. 806.

[5] The objection made by defendant to instruction No. 1 given for plaintiff, in that there was no evidence of defendant's negligence, we think untenable. While no one testified that they saw defendant's employé break through the ceiling of the room on the third floor, it was shown that defendant's employes were in the attic of plaintiff's building at the time, and plaintiff testified that defendant's foreman admitted that his employes broke through the ceiling. The jury could infer from the evidence that one of defendant's employes stepped between the joists while at work in the attic and that such act was negligence.

For the error noted, the Commissioner recommends that the judgment be reversed and the cause remanded.

PER CURIAM. The foregoing opinion of BIGGS, C., is adopted as the opinion of the court.

The judgment of the circuit court is accordingly reversed and the cause remanded.

REYNOLDS, P. J., and ALLEN and BECKER, JJ., concur.

O'DONNELL v. KANSAS CITY LIFE INS. CO. (No. 13620.)

(Kansas City Court of Appeals. Missouri. June 14, 1920.)

1. Insurance §391—Admission after death of insured that policy was in force admissible as evidence of waiver.

Though an admission by an insurance company, made after the death of insured, that the policy was still in force, is not a waiver of forfeiture, it is admissible in an action on the policy as evidence that the company had, before the death of insured, waived the forfeiture.

2. Insurance §310(2)—Policy providing for forfeiture for failure to pay note void after nonpayment.

Where the policy provides that failure to pay when due any premium note shall, without further action on part of the company, work a forfeiture of the insurance, a default in the payment of the premium note renders the policy void.

3. Insurance §361—Charging note against agent does not defeat forfeiture, where policy requires note to agent to be given company.

Where a life insurance policy provided that any premium note given to the company or its agent should be deposited with the company and applied on the premium, and that the policy should be void for failure to pay any premium note when due, the fact that the company charged the amount of a premium note against its agent does not show that it looked solely to the agent for payment of the note, so as to lose the right to forfeit the policy for nonpayment thereof.

4. Insurance §654½—Evidence that note to agent was indorsed to company held admissible.

Where a life insurance policy provided that any note, whether to the agent or the company, should be deposited with the company and applied on the premium, evidence by the agent that he immediately indorsed to the company the premium notes made payable to him was admissible.

5. Insurance §668(15)—Evidence held to raise jury question as to waiver of forfeiture for nonpayment of note.

In an action on a life insurance policy, evidence that after default in payment of the premium note the company notified insured that the next premium was due, and after the death of insured stated to beneficiary that the policy was in force, held sufficient to take to the jury the question whether the company had waived forfeiture for nonpayment of the premium note.

Appeal from Circuit Court, Jackson County; Harris Robinson, Judge.

"Not to be officially published."

Action by Sallie B. O'Donnell against the Kansas City Life Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for new trial.

George Kingsley, of Kansas City, for appellant.

Gilmore & Brown, of Kansas City, for respondent.

TRIMBLE, J. This is an action upon a policy of insurance issued September 14, 1915, by defendant upon the life of James H. O'Donnell for \$5,000, payable upon his death to the plaintiff, beneficiary therein. Insured died on August 19, 1916. There is no controversy over these facts. They are admitted. The defense is that for the first annual premium due on the policy the insured gave his two promissory notes; that the insurance contract provided that failure to pay any premium note when due rendered the policy null and void without action or notice on the part of the company; that insured did not pay said notes and same were never paid, and in consequence thereof the policy was void. The reply denied this, and pleaded that if there was a default in the payment of the notes when due the company waived the forfeiture. A trial resulted in a verdict and judgment for plaintiff, from which the defendant has appealed.

The application upon which the policy was issued contains the following provision:

"And I further agree that any money, note, or other thing of value given to this company or its agent taking this application on account of the first premium charge on the policy applied for, in whole or in part, shall be held by this company as a deposit merely and not as payment, until such time as this application shall be accepted or rejected; if same be accepted, such money, note, or other thing of value shall be applied on such first premium charge; if rejected, same shall be returned to me, my heirs, administrators, or assigns."

The policy contained these provisions:

"Upon failure to pay a premium on or before the date when due, or upon failure to pay any premium note when due, this policy will become null and void without any action or notice by the company, and all rights shall be forfeited to the company, except as hereinafter provided. * * *

"In case of default in the payment of any premium hereunder or of any premium note when due, the company will reinstate the policy, if not previously surrendered, at any time upon written request by the insured to the company at its home office, accompanied by evidence of insurability satisfactory to the company and the payment of all premium arrears and the payment or reinstatement of any indebtedness existing at the date of default, together with interest thereon at the rate of 5 per centum per annum."

There is no question but that insured did not pay cash for the first annual premium of \$123.45, but executed two promissory notes, both dated August 27, 1915 (the date of the application), both due six months after date,

both payable to the order of T. F. Walsh, with 8 per cent. interest from maturity, compounding annually if not paid annually. One of said notes was for \$74.07 and the other for \$49.38, the two aggregating the amount of the annual premium, to wit, \$123.45. T. F. Walsh was the agent who solicited the insurance, obtained the application, and procured the making of the insurance contract.

Plaintiff introduced the policy in evidence, proved the death of her husband, and introduced a letter from defendant's secretary, dated August 24, 1916, which read as follows:

"We hold in this office the note of Mr. O'Donnell for the premium on this policy, which note is long past due and which he failed to pay, and therefore said policy, by its terms and conditions, is not in force, for the reason that he did not pay the premium thereon."

Defendant admitted plaintiff had been paid nothing on the policy and thereupon plaintiff rested. A demurrer to the evidence was offered and overruled, whereupon defendant introduced evidence in behalf of its defense of forfeiture. This was to the effect that nothing was ever paid on the policy; that the two notes were taken at the time of the application and were, by the payee, Walsh, indorsed and sent in to the company along with the application; that nothing had ever been paid on them or either of them, and that they were still in the possession of the defendant; and the two notes were offered in evidence.

It was elicited from the witnesses offered by defendant that the amount represented by one note, to wit, \$74.07, was the amount which was due the agent as his commission out of the first annual premium, and that the \$49.38 represented by the other note was the net amount due the company out of the first annual premium. The secretary of the company testified on cross-examination that the amount of the two notes was not charged against the agent upon the books of the company, but he did admit that the agent was charged with the difference between the amount of the notes and his commission, that is to say, he was charged with \$49.38, the amount represented by the second note above mentioned, and which was the net amount due the company out of the said first year's premium. He further testified that the notes were carried as the property of the company; that the notes fell due February 27, 1916; that when they fell due they notified insured, and after that the company "held them waiting settlement." He further admitted on cross-examination that on the books of the company a running account with the agent was kept and that the items involved herein would show on that account; but he insisted that the charge against the agent of the net premium due the company was

made only as a matter of bookkeeping, and that Walsh's account was credited with the amount of the unpaid note; but he was unable to say when this was done, whether before or after insured's death, and admitted that the books would show. At this point plaintiff had him identify a card as being the notice of payment of next premium sent out by the regular renewal premium department of the company, and plaintiff offered it in evidence to show that, long after the default in the payment of the notes, the company notified insured that the next premium would be due September 14, 1916, but this offer was denied and the evidence excluded by the court.

Although the secretary testified that only the difference between the amount of the notes and the agent's commission was charged against the agent's account, and that he was given credit for that at some time, either before or after insured's death, yet, later on, the following occurs in his cross-examination:

"Q. When did the company come into possession of these notes? A. At the time the application was taken.

"Q. Did Mr. Walsh ever get credit on his account for the payment of this premium? A. Yes, sir; for his interest."

[1] The witness further admitted that they kept a record of the lapses and defaults, and thereupon the plaintiff offered to prove that after the death of insured one of plaintiff's counsel, over the phone, called him in his office and, without telling him insured was dead, asked him what condition the policy was in, and that the secretary, after asking for a moment in which to look at the books, returned and reported that the policy was in force. This was, of course, long after default in the payment of the notes, and while such occurrence would not, of itself, constitute a waiver, since the insured was then dead, yet it would seem to be a circumstance which would throw light on the question whether the company had theretofore regarded or treated the policy as forfeited because of the default in the payment of the notes when due, which default had occurred months before and which default was known to the company when it occurred. In other words, it was a circumstance the jury were entitled to know in passing upon the question whether the company had theretofore waived the default and were still considering the policy in force, looking to the agent for the premium if the insured did not pay it. If such was the fact, then the company was, from the time of the default, occupying an equivocal position, in this, to wit: As long as the insured was alive and the policy was a possible premium getter, the company would regard it as in force so far as its being a source of possible premiums was concerned,

but the moment insured died, then the policy would be treated as being long since forfeited because of the default in the payment of the notes when they became due. Such equivocal position is not permitted or looked upon with favor. *Thompson v. St. Louis Mut. Ins. Co.*, 52 Mo. 469, 472; *Hanley v. Life Association*, 4 Mo. App. 253, 258. The evidence as to this was, however, excluded by the court upon objection that insured was dead and the status of the parties to the insurance contract had become fixed and the company could not then waive since they did not know insured was dead. As stated, we do not say this would constitute a waiver at that time, but it was a circumstance tending to throw light on whether the default had been theretofore waived.

The defendant put the agent, Walsh, on the stand. He testified that the two notes were taken for the first year's premium; that the note for the \$74.07 was for his commission and the one for \$49.38 was the net premium going to the company; that he did not tell this to the insured, and so far as the latter was concerned both represented the premium. He further testified that after the notes became due one of them, the \$74.07 note, was sent to him by the company and he spoke to the insured about it and insured said he could not pay it; that some three months after the notes were due he saw insured about it and insured said he could not pay him then but would let him know later about it, and the last time insured was spoken to he said the agent "would hear from him"; that at two or three of those times the agent told insured he "could go across the street to their (the company's) office and pay the \$49.38." (It will be noticed that the company did not return to the agent the net premium note for \$49.38, which they naturally would not do if they intended to hold the agent for that.)

The agent further testified that, while the net premium note was charged to him on the books of the company, it was only as a matter of form. And yet he testified as follows:

"Q. Did you ever pay the company their share of the insurance premium? A. No, sir; I never paid them anything.

"Q. You never did? A. No, sir; I turned them over the notes for security."

He said that of all the notes he had ever taken and turned over to the company only one, aside from these, was not paid, and when asked, in reference to that one:

"Q. The company's share of the premium—did you pay that? A. Yes, sir; I still owe the company for it."

In cross-examination concerning the \$49.38 charged to him "as a matter of form" he was asked:

"Q. When the note is not paid, what happens then with reference to that account, is your

account changed, is that amount remitted to you or how is it? A. Well, they charge it. * * *

"Q. Well, who bears the loss, you or the company—you know what arrangement you have with them—tell us? A. Well, I don't know.

"Q. Well, you do not go as far as to say the company bears the loss and you do know they have charged you on the books in either case? A. Where I did not pay the cash."

He then testified that he never had been held by the company for a note that was not paid, and he "judged" he was given a credit on the books for the net premium note in this instance. He stated the books would show the situation, but he had no particular remembrance of the credit to his account of the unpaid note and did not know when his account was thus credited whether before or after September 1, 1916.

The secretary was then recalled and an attempt was made to show by him when the credit was made, but, upon objection that the books were the best evidence, the evidence was excluded. An attempt was then made to show the nature of the real liability of the agent to the company upon a note taken by him which is not paid, but in the course of this attempt it developed that the witness was not the one who hired the agent, or who hires any of the agents, and that the contract of Walsh's hiring was in writing, whereupon plaintiff objected to the testimony on the ground that the contract would be the best evidence, and the objection was sustained. The case was tried in Kansas City, the home office of the company, where presumably the books are kept, and yet the books were not offered in evidence nor was any request made for an opportunity to get them. Nor was the bookkeeper offered as a witness.

At the close of the evidence the defendant again demurred, but was overruled. Thereupon the case was submitted to the jury upon an instruction for plaintiff to the effect that, if the jury believed from the evidence that "the defendant charged the net premium due it for the first year on the policy sued on to its agent, T. F. Walsh, and held said Walsh alone responsible for the company's share of said premium, and the said Walsh extended his personal credit to Jas. H. O'Donnell for the amount of the premium and took said O'Donnell's notes payable to himself for the amount of said premium, then the fact that said premium notes were not paid, if you find from the evidence that such is the fact, will be no defense to this action, and your verdict will be for the plaintiff" for the amount of the policy with interest from date of demand.

[2] It is well settled that where the insurance contract provides, as in this case, that failure to pay when due any note given for the premium shall, ipso facto, and with-

out further action on the part of the company, work a forfeiture of the insurance, then such default in the payment of the premium note renders the policy void. *Leeper v. Franklin Ins. Co.*, 93 Mo. App. 602, 87 S. W. 941; *Kazee v. Kansas City Life Ins. Co.*, 217 S. W. 339; *Iowa Life Ins. Co. v. Lewis*, 187 U. S. 335, 23 Sup. Ct. 126, 47 L. Ed. 204; *Stephenson v. Empire Life Ins. Co.*, 139 Ga. 82, 76 S. E. 592; *Iles v. Mutual Reserve, etc., Ins. Co.*, 50 Wash. 49, 96 Pac. 522, 18 L. R. A. (N. S.) 902, 126 Am. St. Rep. 886; *Sexton v. Greensboro Life Ins. Co.*, 157 N. C. 142, 72 S. E. 863.

[3] And it has also been decided that where the note, made to the agent, has been treated as the agent's property and the company has looked to the agent as its debtor for the credit the agent has extended to the insured by taking his note, then the failure of insured to pay the note to the agent cannot be relied on by the company to defeat the insurance. *Wytheville Ins., etc., Co. v. Teiger*, 90 Va. 277, 281, 18 S. E. 195 (in which case, however, there was no clause rendering the policy void without further action); *Mooney v. Home Ins. Co.*, 80 Mo. App. 192, 197 (in which case the premium due the company had been paid to it by the agent, and if the clause in the insurance contract was also for the benefit of the agent it could not be relied on since he had waived prompt payment); *Jacobs v. Omaha Life Ass'n*, 146 Mo. 523, 542, 48 S. W. 462 (in which case the agent paid the premium due the company in cash and the only credit extended was by the bank to whom the agent discounted the note); *Lebanon Mutual Ins. Co. v. Hoover*, 113 Pa. 591, 8 Atl. 163, 57 Am. Rep. 511; *Union Life Ins. Co. v. Parker*, 66 Neb. 395, 92 N. W. 604, 62 L. R. A. 390, 103 Am. St. Rep. 714.

In the case at bar, however, one clause of the insurance contract provided that "any * * * note * * * given to this company or its agent taking this application, on account of the first premium charge on the policy applied for, in whole or in part shall," etc., be deposited with the company and applied on the premium if the insurance is accepted. And then the other clauses provide that the policy shall become null and void upon failure to pay any premium note when due. Thus it would seem that, since the contract provided that a note, whether given to the agent or to the company should be deposited with the company and applied on the first premium charge if the insurance was accepted, and that a failure to pay any such note when due would nullify the policy, such provision would apply even if the company did charge the amount of the net premium coming to it against the agent. In other words, the clause in regard to default would cover the note even if it was given to the agent, especially where the agent, in ac-

cordance with the above-quoted clause, endorsed the notes over to, and deposited them with, the company. See the remarks of Judge Gill in the first opinion in the *Mooney Case*, 72 Mo. App. loc. cit. 97.

[4] In the case at bar defendant tried to show by Walsh that, although the notes were made payable to him, yet he immediately endorsed them over to the company, and in reality took them as agent for the company, and that he had no interest in the one for \$49.38. This, however, was excluded. In *Thies v. Mutual Life Ins. Co.*, 13 Tex. Civ. App. 280, 35 S. W. 676, it was held error to refuse to allow the plaintiff therein to show that a note, similarly given, belonged to the agent and that the company had no interest in it. But that was in keeping with, and not contrary to, the terms of the note as such evidence would have been in the case at bar. However, in view of the provision that any note taken, whether to the agent or the company, should be deposited with the latter, and, if the insurance was accepted, would be applied on the premium, we think the evidence as to whose property the note, at least the net premium note, really was, should have been admitted.

So that, so far as the default in the payment of the notes (or at least the net premium note) is concerned, that would render the insurance null and void, in the absence of any other facts counteracting that result, even if the company did charge the net premium against the agent in addition to holding the note against insured. The company could avail itself of the benefit of the note as well as of the agent's credit for the payment of the premium due; and, if the contract provided that default in the payment of any note given for the premium would render the policy null and void, we see no reason why this provision of the contract would not operate to cancel the insurance, if the provision was not waived. Hence we do not see how the plaintiff herein can recover upon any theory that the taking of the premium notes was an extension of credit to the insured on the part of the agent, Walsh, and that the company "held said Walsh alone responsible." There is no evidence that the company looked to him alone, or that the notes given were regarded as the agent's individual property. On the contrary, the clause first above quoted in the contract, together with what was actually done, all point directly the other way, namely, that the notes, or at least the net premium note, could not be regarded as the property of the agent, and that the company did not look to the agent alone for the payment thereof; and hence the company would not be precluded from insisting upon the forfeiture on account of the default, unless that was waived. In other words, plaintiff's right to recover cannot be predicated upon any

theory that the default in the notes was a matter merely between insured and the agent and not affecting the relations between insured and the company. So that there was no ground for submitting plaintiff's case upon the theory contained in the instruction hereinabove set out, and hence this was error.

[5] But, although the contract provided for a forfeiture in case of default, yet the effect of that may be nullified if the same be waived; and it would seem that in this case there is room for a jury to find that the prompt payment of the notes was waived by the company and by the agent also, if the forfeiture clause be for his benefit too. For this reason we do not reverse the case outright, as defendant so earnestly insists, but reverse the judgment and remand the cause for a new trial on the theory of waiver if the plaintiff chooses to do so.

The other Judges concur.

COWAN v. HYDRAULIC PRESS BRICK CO. (No. 16086.)

(St. Louis Court of Appeals. Missouri. June 8, 1920.)

1. Master and servant ⇨109—Master must furnish team reasonably safe for the purposes.

The master must furnish his servant with a team reasonably safe for the purposes intended, in determining which the age and experience of servant must be considered.

2. Master and servant ⇨286(11)—Negligence in furnishing team to boy held question for jury.

In an action for injuries to a 16 year old boy who was thrown from a wagon when the mules he was driving shied, evidence that the mules were apt to shy and were hard to hold, and that plaintiff had complained he could not manage them, held to warrant submission of the case to the jury.

3. Trial ⇨191(10)—Instruction held to assume mules were vicious.

In an action for injuries to an employé thrown from a wagon when the mules he was driving shied, an instruction predicated recovery on a finding that defendant furnished plaintiff with a team of mules with vicious and dangerous habits, known to defendant, was erroneous as assuming that the mules were vicious and dangerous.

4. Trial ⇨252(11) — Instruction predicated recovery on fact not supported by evidence is error.

An instruction predicated recovery by an employé upon finding by the jury that the mules furnished by the master were vicious and dangerous, which there was no evidence to support, was erroneous.

5. Appeal and error ⇨1086—Instruction predicated recovery on fact not supported by evidence held prejudicial.

An instruction predicated recovery upon a finding that the mules furnished servant were vicious and dangerous, which was unsupported by evidence, was prejudicial, notwithstanding that servant might have recovered because the mules were not suitable for him to drive, since the jury might have inferred from the instruction that the court considered there was evidence that the mules were vicious and dangerous.

Appeal from St. Louis Circuit Court; Samuel Rosenfeld, Judge.

"Not to be officially published."

Action by Frank Cowan, a minor, by Mrs. Ida Cowan, his next friend, against the Hydraulic Press Brick Company, a corporation. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Werner & Penney, of St. Louis, for appellant.

Charles A. Lich, of St. Louis, for respondent.

BIGGS, C. From an adverse judgment for \$3,000 in a negligence case arising out of the relation of master and servant, defendant appeals, specifying as error the failure of the court nisi to direct a verdict for defendant and error in giving plaintiff's main instruction to the jury, which covered the whole case and upon which a liability was predicated.

On October 18, 1916, when plaintiff was 16 years of age, he was employed by defendant as a driver of a team of mules delivering brick about the city of St. Louis. It is alleged by plaintiff, that defendant, in disregard of its duty to furnish plaintiff with a proper, suitable, and safe team, did furnish him with a team of mules of vicious, dangerous, and incorrigible habits and tendencies, which habits and tendencies were known to the defendant, or might by the exercise of ordinary care on its part have been known to it; that on account of his youth and inexperience in driving said team of mules, and while acting under the orders of defendant's foreman and in the usual course of his employment, and while driving said team across the Compton avenue bridge, said team became vicious, unmanageable, incorrigible, and unruly and with a sudden jerk started to run away, and that as a result of the sudden jerk of said team, and the severe jolting of the wagon caused by the speed at which said team was going, plaintiff was thrown from his seat on the wagon to the street, dragged for about 10 feet, and severely injured.

It is further alleged that plaintiff complained to the defendant's foreman about the

habits of said team, with the statement that plaintiff could not manage the team on account thereof, and that plaintiff was assured by the foreman that the team was not vicious and dangerous and that he could safely handle them, and that plaintiff was told by the foreman to proceed with his work; that plaintiff thereupon, relying on the foreman's superior knowledge, continued his work with the team.

The case as made is bottomed entirely upon plaintiff's version of events. In considering the demurrer to the evidence we must concede plaintiff's statements to be true and draw from them every inference that may reasonably be drawn in his favor.

Plaintiff started to work for defendant when 12 years of age, driving a small (donkey) mule to a cart. In September prior to the accident, which happened October 18, 1916, plaintiff commenced driving a brick wagon drawn by two mules. The wagon was without brakes, but was equipped with a chain to lock the wheels when going down grade.

In the language of the witness:

The team they furnished me in the beginning was a gentle young team of mules; a small team they had been driving on the clay hill a long time. They were gentle and weren't mean and shy or anything like that. Their names were Buckskin and Frank, and I drove them from August up to October 11th. On October 11th I was 15 minutes late. There was nothing but that big team in the stable. The stable boss said I had to take that team. I went out that morning with that team and I came back at 5 o'clock in the evening. This team I continued to drive up until the time of the accident. I had to; they wouldn't give me another team. I complained to Ed Haag, the foreman at the yard, and told him two or three times about that team. I told him in the morning again and I told him in the evening I couldn't handle them because I could not make more than one or two loads a day, because I couldn't handle them. I made this complaint the first time that evening when I came in on the first day that I had them out.

When I complained to Mr. Haag he said: "Go ahead and drive it. It's a gentle team; there isn't anything the matter with them." I went out. It was near the end of the pay roll and I was trying to make up the pay roll. The first complaint was made on the evening of the first day. The next time I complained was the next day at 12 o'clock. I told him if I couldn't get my team I would have to quit. He said by him being short to go ahead and drive them; he would try to get my team back as soon as he could. That evening when I came in I asked the stable boss, John Farrier, I asked him: "What did he say about that team?" He said he had gone and I would have to take the team out the next morning. The next morning I took the team out. I did not see Haag after that.

On the 18th, prior to the time of the accident, I was going to Compton and Chouteau, hauling a load of brick. While I was going over the

Compton viaduct or bridge. the mules were shy and what you call a team spreads, when you go down a hill they open like that (illustrating). I couldn't handle them; they were too big and hard. When I was about 10 feet away from the curb there was a depression on the right side of the bridge. There was some trains and a lot of noise, and the mule on the right side had been shy all that day and ever since I had him. When I got near the hill, going down hill, it was hard to hold back and they would spread and slip and slide on the blocks. This mule on the right side got afraid of the whistle and he jumped like that (illustrating) —I mean the train whistles around there, trains underneath the viaduct—this mule jumped on the sidewalk and the wagon ran in the depression and he caused the other mule to spread as much as he did. He pulled the wagon over to the sidewalk and the front wheel went into the depression; the front wheel on the right side went into the depression. He did this suddenly. I was going south.

When it went into that depression I was sitting in the middle of the board. I fell off the wagon and my leg caught between the wheel and the iron curb. I had for a seat on this wagon an ordinary board. When I started out that morning I had a spring seat, my property. I paid \$2.50 for it, and when I came back from my second load I had to get a drink of water, and when I came back my seat was missing and I picked up an ordinary board I saw, going out of the yard. I got my leg caught between the curb and the front wheel on the right side. After that this mule on the left side was held back and the other one was trying to run. He was walking fast. I was dragged about 10 feet.

On cross-examination plaintiff testified:

I started to drive this last team on October 11th in the morning and drove it all day the 11th and 12th and the 13th up to the time of the accident at 3 o'clock in the afternoon. I had driven across the bridge and over the crown and had commenced to go down the southern incline, and going down that incline the viaduct is paved with wooden blocks and it was a little hard to hold the team back going down hill. They were inclined to spread, by that I mean separate, and as I was going down the front right-hand wheel, as I went south, dropped into a depression on the side of the paving. There is a footway or place for foot passengers across that viaduct, and there is just a lining of iron along the corner. That depression is square, about that big and that wide (illustrating). It is a sewer. It is about 2 feet, the same length all the way around, 2 feet square and running up to this curb, and it is about 6 inches deep. Then there is an iron grating and my wheel dropped into that hole and that bounced me off.

The foot fell first and the wheel caught it between the curb and the wheel. Before the team came to a stop they moved about 10 feet. Then somebody stopped them. I don't know who. I was sitting on a loose board and the board was laid right on top of the bricks, so that I didn't have anything to hold onto. I didn't call anybody's attention to that before I left the yard that morning. That was the first

time I had been over the Compton avenue bridge with a team. I had walked over there.

Plaintiff called a police officer, who did not witness the accident but who arrived at the scene shortly afterward. He testified that he found the team standing about 200 feet north of Chouteau avenue close to the curb; that the team was perfectly still when he arrived there, and that they were standing attached to the brick wagon and no one was holding them; and that he could see where the wagon had been dragged along the curb about 10 feet.

We do not believe that the foregoing evidence even tends to prove that the mules had vicious, dangerous, and incorrigible habits and tendencies as charged in the petition. It did tend to prove that the mules (especially the right mule) were shy at times and that they were too big and hard of mouth for plaintiff, a boy of 16, to manage and handle. Such a team in the hands of a grown man of strength and experience would doubtless have been safe, and to furnish that character of team to such a man could not be said to be negligence on the part of the master.

[1] The duty of the master is well settled, and that is to use ordinary care to furnish the plaintiff a reasonably safe and suitable team for the purpose for which they were to be used. And in measuring the duty the age and experience of plaintiff must be considered, for it may be negligence to furnish a 16 year old boy with a team to work when to furnish the same team to a grown man would not constitute negligence. *McCready v. Stepp*, 104 Mo. App. 340, 78 S. W. 671; *Stutzke v. Ice & Fuel Co.*, 156 Mo. App. 1, 136 S. W. 243.

[2] While the evidence failed to establish the dangerous habits of the mules as alleged, it was sufficient, in our judgment, to authorize the court in sending the case to the jury on the theory that defendant had violated its duty to furnish a reasonably safe team under the circumstances of the case, when it furnished plaintiff, a 16 year old boy, with this big team of mules that were shy and so hard of mouth that plaintiff could not handle and control them. Knowledge of the inability of plaintiff to handle the team was sufficiently brought home to defendant by the complaints made by plaintiff to the foreman and stable boss. We accordingly hold that there was a case made for the jury, but not the case as submitted by the instructions.

Plaintiff's main instruction reads thus:

"The court instructs the jury that if you find and believe from the evidence that on or about October 13, 1916, and prior thereto, plaintiff was employed by the defendant; that his duties required him to drive a team of mules belonging to the defendant; that on or about October 13, 1916, his duties required him to deliver a load of bricks and that in order to deliv-

er same it became necessary for him to drive said team of mules across the Compton avenue bridge, in the city of St. Louis, Mo.; that the defendant furnished plaintiff with a wagon and team of mules, said mules having vicious, dangerous, and incorrigible habits and tendencies, which said habits and tendencies were known to the defendant, or might by the exercise of ordinary care on its part have been known to it; that while plaintiff was driving said team of mules across the Compton avenue bridge that said team of mules became vicious and incorrigible and that plaintiff because of his youth and inexperience in driving said team of mules could not handle them; that said team of mules took fright, became vicious and incorrigible, and ran away, throwing plaintiff from the wagon to the street, causing plaintiff to suffer certain injuries; and that the vicious, incorrigible, and unmanageable actions of said mules or either of them directly caused the plaintiff's fall from the wagon in question—if you find these facts, then your verdict must be for the plaintiff."

[3,4] This instruction, under the facts of the case, is wrong: (1) Because it may reasonably be said to assume that the mules were vicious and dangerous and incorrigible, and (2) because it predicates a liability on something which there is no evidence to support, namely, that the mules had vicious, dangerous, and incorrigible habits; that they at the time of the accident became vicious and incorrigible and ran away, throwing plaintiff from the wagon, and that the vicious, incorrigible, and unmanageable actions of said mules, or either of them, directly caused plaintiff to fall from the wagon.

In the case of *Small v. Ice & Fuel Co.*, 179 Mo. App. 456, loc. cit. 465, 162 S. W. 709, 712, this court says:

"And it is error to submit, as a predicate of liability, something which there is no evidence to support, or which in no way gave rise to or contributed to produce the injury or loss for which a recovery is sought. See *Sallee v. McMurry*, 113 Mo. App. 253, 88 S. W. 157; *Houck v. Railway Co.*, 116 Mo. App. 559, 92 S. W. 738; *Huston v. Railroad*, 129 Mo. App. 576, 107 S. W. 1045; *Shannon v. Abell*, 155 S. W. 62; *Kendrick v. Harris*, 156 S. W. 490.

"And to submit matters which, under the evidence, could in no way have contributed to produce plaintiff's injury, is undoubtedly reversible error. In *Huston v. Railroad*, supra, loc. cit. 586, it is said: 'We find that prejudicial error was committed by the learned trial judge in submitting to the jury the issue of whether the injury was caused in whole or in part by the failure of defendant to maintain and use a toggle on the machine. The absence of this appliance did not and could not in any way have contributed to the injury. * * * In submitting this issue to the jury the court, in effect, declared that there were facts adduced by evidence from which the jury reasonably might infer that the absence of the toggle had a direct effect in the production of the injury. A declaration of this character which is unsupported by substantial evidence must be

presumed to have had some effect on the minds of the jury and, consequently, to have been prejudicial to the defendant."

[5] While it may be said this instruction merely went further than required and called for a finding of more facts than necessary on which to base a liability, we hold the instruction prejudicial to the defendant, for to submit to the jury the question whether the mules were dangerous, vicious, incorrigible, etc., necessarily led the jury to believe that the court considered that there was evidence to establish such fact. The court by its instruction, in effect, declared that there was evidence adduced from which the jury might find that the mules had the habits and characteristics alleged against them in the petition.

It follows from the foregoing that it is unnecessary for us to say whether the fact that the instruction assumes as true facts which were in issue in the case constituted reversible error.

For the error specified, the Commissioner recommends that the judgment be reversed and the cause remanded.

PER OURIAM. The foregoing opinion of BIGGS, C., is adopted as the opinion of the court.

The judgment of the circuit court is accordingly reversed and the cause remanded.

REYNOLDS, P. J., and ALLEN and BECKER, JJ., concur.

MANNING v. KANSAS CITY. (No. 13626.)

(Kansas City Court of Appeals. Missouri.
June 14, 1920.)

1. Municipal corporations ⇨812(7)—Notice of injury held to sufficiently fix place of accident.

Notice to city of injury as required by Laws 1913, p. 545, sufficiently fixed the place as on the sidewalk between two streets a block apart, where there was mud and slime at only one place and covering only about ten feet of the walk.

2. Appeal and error ⇨232(1)—Objection for first time on appeal to notice to city of injury not available.

Objection to difference between name of plaintiff, "Alice H. M.," and that signed to notice to city of injury, "Mrs. J. H. M.," not being included in those made below to the notice, is not available on appeal.

3. Municipal corporations ⇨777—Liable for injury to pedestrian slipping on mud on sidewalk.

A city allowing slippery mud to a depth of one-half to two inches to remain at a place on a sidewalk is a sufficient obstruction to render it liable for injury to a pedestrian therefrom.

Appeal from Circuit Court, Jackson County; William O. Thomas, Judge.

"Not to be officially published."

Action by Alice H. Manning against the city of Kansas City. Judgment for plaintiff, and defendant appeals. Affirmed.

E. M. Harber and Francis M. Hayward, both of Kansas City, for appellant.

Ed. E. Aleshire and Sharp & Sharp, all of Kansas City, for respondent.

ELLISON, P. J. Plaintiff received personal injury by falling on one of defendant's granitoid sidewalks. She recovered judgment in the trial court.

[1] Plaintiff gave notice to the city within 90 days of the injury as required by the Laws 1913, p. 545, but its sufficiency as to location is objected to by defendant. The notice fixes the place in these words:

"I sustained injuries by falling to the sidewalk while walking over and along the public sidewalk on the north side of Forty-First street between Garfield and Brooklyn streets, Kansas City, Mo.; said falling being caused by an accumulation of water, sewerage, mud, and other refuse on said sidewalk at said place."

It is claimed that to fix the place as between two streets, a block apart, is too indefinite for compliance with the statute, and *Krucker v. City of St. Joseph*, 195 Mo. App. 101, 190 S. W. 644, is cited as authority. The cases are not alike. That case was where the whole face of that section of the city was covered with snow and ice, and nothing appeared in the notice to particularize the place between the two streets named where the person was hurt so that the city might identify it. We said in that case that—

"Naming the place as between two streets over 400 feet apart would not be fatal looseness of description, if plaintiff had stated something more which would have served as a guide to the city when it came to examine."

In this case we have what the other lacked. For here there was mud and slime at only one place and covering about 10 feet of the sidewalk, so that the city could find and examine the very spot with great ease. *McCabe v. City of Cambridge*, 134 Mass. 484.

[2] Another objection made to the notice in this court is that it is signed by "Mrs. J. H. Manning," while the plaintiff is "Alice H. Manning," without evidence that the two

names are one person. It is probable she signed by the initial of her husband's first name. But it is enough to say that when defendant specified its objections to the trial court it did not include that now made.

[3] Defendant claims that mud on a sidewalk is of "too trifling a nature" to be termed an obstruction for which a city may be held liable. The evidence tended to show the mud to be from one-half an inch to two inches deep, of slick or slippery kind, and we think the city liable to allow that condition to exist on its sidewalks. We have held a city's liability to extend to mud on sidewalks; *Milledge v. Kansas City*, 100 Mo. App. 490, 74 S. W. 892; *Strange v. City of St. Joseph*, 112 Mo. App. 629, 87 S. W. 2.

Defendant cites *O'Reilly v. City of Syracuse*, 49 App. Div. 538, 63 N. Y. Supp. 520. The case is not in point. It did not involve a sidewalk. The plaintiff in that case fell on a muddy street crossing, and the court held that a city could not be held for failing to keep its streets free from mud, or because they became slippery. The syllabus reads that:

"A city is not liable to a pedestrian who slips and falls on a street simply because $1\frac{1}{2}$ to 2 inches of mud is permitted to accumulate and remain on the pavement, spread evenly over its entire surface."

The judgment must be affirmed.
All concur.

STAFFORD et al. v. JOHNSON.

(Court of Appeals of Kentucky. June 18, 1920.)

1. Judgment \Leftrightarrow 720—Judgment conclusive on every point actually and necessarily decided.

A judgment is conclusive in a subsequent action upon every matter actually and necessarily decided in the former suit, though not directly the point in issue.

2. Courts \Leftrightarrow 90(6) — Practice laid down by decisions will be followed under doctrine of stare decisis.

Rule as to whether question of title is involved in certain action so as to give Court of Appeals jurisdiction laid down in certain cases and followed by a number of other cases will be followed by the Court of Appeals under the doctrine of stare decisis, though the rule appears illogical to the court.

3. Appeal and error \Leftrightarrow 38—Allegation of title in plaintiff not sufficient to give appellate court jurisdiction.

Judgment for \$150 in action for possession of passway and for damages for interference therewith is not appealable to Court of Appeals, the question of title to land not being involved, even though defendant denied plaintiff's allegation of title in himself.

Appeal from Circuit Court, Johnson County.

Action by Mason Johnson against F. M. Stafford and others. Judgment for plaintiff, and defendants appeal. Appeal dismissed.

W. H. Vaughan & Sons, of Paintsville, for appellants.

Wells & Wells, of Paintsville, for appellee.

THOMAS, J. The appellee and plaintiff below, Mason Johnson, filed this suit in the Johnson circuit court against appellants and defendants, F. M. Stafford and W. T. Stafford, alleging that he was the owner and entitled to the possession of an easement over and across the lands of the defendants, which easement he particularly described, and that the defendants were obstructing the passway and withholding its possession and use from him, which they had done for a period of three years, and that he was thereby damaged in the sum of \$100 per year, and he sought judgment against defendants for the possession of the passway and for \$300 damages.

The answer was a general denial, containing no affirmative averment of title to the passway, in defendants or any one else. At the trial there was a verdict in favor of plaintiff for the sum of \$150, for which amount judgment was rendered, but there was no adjudication of the title to the passway. Seeking a reversal of that judgment, defendants have appealed, relying upon a number of grounds for a reversal, none of which are

we able to consider, since under the rule announced in a number of cases from this court we are without jurisdiction to consider the case upon its merits.

[1] Section 950 of the Kentucky Statutes denies the right of appeal to this court under any conditions when the value in controversy is less than \$200, unless the title to real estate or to an easement therein or the enforcement of a statutory lien thereon is involved. The general rule as to what issues are involved in the litigation is that "a judgment is conclusive upon every matter actually and necessarily decided in the former suit, though not then directly the point in issue." Freeman on Judgments, § 258. In section 257 of the same work it is said:

"It is not necessary to the conclusiveness of the former judgment that the issue should have been taken upon the precise point which it is proposed to controvert in the collateral action. It is sufficient if that point was essential to the former judgment. 'Every point which has been either expressly or by necessary implication in issue, which must necessarily have been decided in order to support the judgment or decree, is included.'"

It would seem to logically follow that the denial by the defendants of plaintiff's ownership of the passway in question would put that fact in issue and therefore involve the question of plaintiff's title to it. No other conclusion to our minds would possess the elements of soundness, but this court, in the case of *Ponder v. Lard*, 102 Ky. 605, 44 S. W. 138, 19 Ky. Law Rep. 1649, held that in an action of trespass to realty, where the plaintiff alleged title in himself, which was only denied by defendant, the question of title to the land trespassed upon was not involved. The judgment in that case was for only \$25 damages for the trespass complained of, and the appeal was dismissed for want of jurisdiction. That case has been followed by those of *I. C. R. R. Co. v. Major*, 121 S. W. 646, Cook v. Rockhouse Realty Co., 159 Ky. 710, 169 S. W. 480, and *Lexington & Eastern Railway Co. v. Grigsby*, 178 Ky. 727, 197 S. W. 408.

The Major and Grigsby Cases involved the right of plaintiff to a passway and damages for its obstruction or destruction by the defendant. In neither of them was the title to the passway contested through a claim of ownership by defendant, though the answer in each case denied plaintiff's title. In asserting the insufficiency of the answer in the Major Case to create an issue as to the title so as to involve the right to the easement as contemplated by section 950 of the Statutes, the opinion says:

"Appellant merely denied the title of appellee, and that it damaged the passway. * * * The answer nowhere claims the land as that of defendant; and, while it denies the right of recovery, the answer does not bring into ques-

tion the title, so that a judgment herein would bar an action in ejectment."

In the Grigsby Case this court construed the answer of the defendant to be only a denial of the appellee's title to the easement, and, the judgment being for only \$150 damages, the appeal was dismissed. In the course of the opinion the court said:

"The pleadings nowhere asked the court to adjudge the rights of the parties to the pass-way, and the judgment made no attempt to do so. It is the character of the judgment that controls the right of appeal. *Haynes v. Adsit*, 167 Ky. 443."

[2, 3] These cases, if followed, are conclusive of the question. Whatever may be said of their soundness as an original proposition, the question of practice which they announce has become too firmly fixed in this jurisdiction to attempt to overthrow it now. The doctrine of stare decisis compels us to adhere thereto, since we conclude it is better for the rule to remain as it is than to attempt to unsettle it at this late day.

We do not regard the opinion in the case of *Central Kentucky Natural Gas Co. v. Stevens*, 134 Ky. 306, 120 S. W. 282, as being in conflict with the cases cited. The matter involved there was the title to the royalty due from the operator of a gas well drilled in land about which there was a dispute as to its ownership. The plaintiff sued the operator of the well, who answered that another claimed the title to the land and made the answer a cross-petition against him, but the court overruled the motion for that purpose and plaintiff recovered judgment for the amount of royalty claimed by him. It was held that the court should have allowed the cross-petition to be filed and the title to the royalty determined, and the trial court erred in declining to do so. It was furthermore held in that opinion that the title to the royalty not only involved the value of that portion of it due at the time of the filing of the suit, but that which might become due from future operations. From these facts it will clearly appear that that opinion is not in conflict with the other cases.

The only matter involved, then, on this appeal being the judgment for \$150, and it being insufficient to give this court jurisdiction, the appeal is dismissed.

CRAVENS v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. June 18, 1920.)

1. Constitutional law §70(3)—Legislature sole judge of policy.

Statutes of limitations are founded in public policy, and the Legislature which enacts them is the sole judge of that public policy, un-

less, perhaps, the limitation is so short as to constitute a practical denial of justice.

2. Limitation of actions §31—Action by husband to recover for loss of services of wife injured while passenger barred in one year.

An action by a husband to recover for the loss of the services and society of his wife, injured while a passenger, is barred after the expiration of one year, under Ky. St. §§ 2515, 2516; it being immaterial that the injuries grow out of a violation of a contract of carriage.

Appeal from Circuit Court, Nelson County.

Action by T. W. Cravens against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Ernest N. Fulton and Osso W. Stanley, both of Bardstown, for appellant.

Benj. D. Warfield, of Louisville, and Jno. S. Kelley and Jno. A. Fulton, both of Bardstown, for appellee.

THOMAS, J. The sole question involved on this appeal is whether a husband's right of action to recover damages for the loss of services of his wife and his loss of consortium is barred by the one-year statute of limitation prescribed in section 2516 of the Kentucky Statutes, or whether the five-year limitation prescribed by section 2515 applies. The injury to the wife resulting in the loss of her services and the loss of her consortium to the husband, to recover for which this suit was brought, was sustained by her, as alleged, on December 20, 1917, and was the result of the negligence of the defendant and appellee, Louisville & Nashville Railroad Company, while the wife was a passenger on one of its trains. She sustained the loss of a leg and was otherwise injured, and her husband sought by his petition to recover the sum of \$15,000 as damages for the loss of her services and of her society resulting from such injuries.

Among the paragraphs contained in the answer was one pleading the one-year statute of limitations, the suit having been filed more than one year after the infliction of the injuries to the wife. A demurrer filed to that plea was overruled, and plaintiff declining to reply thereto, his petition was dismissed, and he appeals. Another paragraph of the answer relied on a settlement made with the plaintiff husband and his wife, whereby they were paid the sum of \$8,750 in full satisfaction of their respective damages growing out of the injuries complained of. A reply was filed to that paragraph, but there was no adjudication of the issues raised thereon, and we will make no further reference to it.

Section 2516 of the Statutes says:

"An action for an injury to the person of the plaintiff, or of his wife, child, ward, apprentice,

or servant, or for injuries to person, cattle, or stock, by railroads, or by any company or corporation; an action for a malicious prosecution, conspiracy, arrest, seduction, criminal conversation, or breach of promise of marriage; an action for libel or slander; an action for the escape of a prisoner arrested or imprisoned on civil process, shall be commenced within one year next after the cause of action accrued, and not thereafter."

It is the contention of counsel for plaintiff that while the cause of action for the wife growing out of the personal injuries she sustained would be barred by that section after the expiration of one year, it does not necessarily follow, as argued, that the cause of action in favor of the husband to recover for the loss of her services and of her society would be so barred; it being an independent and separate cause of action, and that it is more properly "an action for the injury to the rights of plaintiff, not arising on contract," which, by the provisions of section 2515 of the Statutes, is not barred until the expiration of five years after the cause of action accrued. In support of this contention the cases of *Menefee v. Alexander*, 107 Ky. 279, 53 S. W. 653, 21 Ky. Law Rep. 980, and *Irwin v. Smith*, 150 Ky. 147, 150 S. W. 22, with some others announcing an analogous principle, are relied on.

The *Menefee* Case was a malpractice suit, and the only question decided was that the negligence sued for grew out of the violation of an implied contract whereby the physician defendant agreed with plaintiff to exercise the requisite skill in performing his professional services, and being a violation of a contract, "express or implied," the limitation came within the express terms of section 2515 of the Statutes.

[1, 2] The contention is made that the injuries to the wife in this case grew out of a violation of the contract of carriage, and that the case comes within the doctrine of the *Menefee* Case. Every one will admit that statutes of limitations are founded in public policy, and that the Legislature in enacting them is the sole judge of that public policy, unless the limitation prescribed is so short as to constitute a practical denial of justice. The quoted words of section 2515 relied on by plaintiff's counsel as bringing this case within the five-year period of limitation are immediately followed by the expression "and not hereinafter enumerated." Section 2516 is "hereinafter enumerated" in the chapter and in the same article of the entire statute of limitations. So that if it contains any provision in conflict with the quotation from section 2515, relied on by plaintiff, such provision must prevail, which brings us to a consideration of the language of section 2516. Reading it with such eliminations as do not apply to the concrete case, it says:

"An action for an injury to the person of plaintiff, or [to the person] of his wife * * * or for injuries to person * * * by railroads

* * * shall be commenced within one year next after the cause of action accrued, and not thereafter."

This language clearly indicates that the personal injuries to plaintiff or to his wife contemplated by the statute include injuries inflicted by railroads, thus eliminating counsel's contention that this case should be governed by the doctrine of the *Menefee* Case, since the Legislature in the section under discussion placed personal injuries inflicted by railroads, so far as limiting the time within which suits might be brought therefor, in the same category as personal injuries exclusively tortious. Aside, perhaps, from expenses of physicians, medicine, and nursing, the elements of damage which a husband sustains because of personal injuries to his wife are loss of services and loss of consortium, and unless the one-year statute fixed by section 2516 would include the cause of action for these latter elements of damage to the husband, there would be two periods of limitations applying to different elements of his damages; one to his expenses for physicians, medicine, etc., and the other to damages for the loss of services and the society of his wife. For if the five-year statute applies to the latter element of damage, the only remaining elements which section 2516 could include would be the first ones enumerated; otherwise there would be no damages to which the terms of the statute could apply, and the language "or of his wife," meaning injury to the person of the wife, would be meaningless.

This interpretation is not to be discarded because, as argued, there might be loss of the wife's services or loss of her society sustained by the husband when no personal injuries were inflicted upon her; as, for instance, if she should be kidnapped, or her affections alienated from her husband. But what would be the limitations applicable to the husband's cause of action in such cases is a matter with which we are not now concerned, since the assumed facts present only a hypothetical case. Our concern is to determine the concrete case which the facts present, and which are dealt with in section 2516, the language of which, to our minds, is too plain for discussion.

We are fortified in these conclusions by the case of *Hancock v. Wilhoite*, 1 Duv. 314, which was an action by the father to recover for the loss of services of his daughter because of her seduction, and the one-year limitation was held to apply; but it was also held that the cause of action did not accrue to the father until the birth of the child, when the loss of services commenced.

It being perfectly clear to our minds that the court properly overruled the demurrer to the paragraph of the answer pleading the one-year statute of limitations, it results that the judgment must be, and it is, affirmed.

COX v. ALLEN.

(Court of Appeals of Kentucky. June 18, 1920.)

1. Appeal and error \S 1—Right of appeal one of grace only.

The right of appeal is one of grace only, and, for one to avail himself of it, he must at least substantially comply with the law granting it.

2. Appeal and error \S 390—Invalid bond not amendable under statute.

If an appeal bond required by Civ. Code Prac. \S 461, is so insufficient as to render it wholly invalid, it is more than a defective bond such as may be amended under section 682.

3. Judges \S 15(1)—County judge can appoint judge pro tem., but cannot appoint deputy or substitute judge.

The only purpose of Ky. St. \S 1059, was to authorize a county judge to appoint and designate a judge pro tem. to preside over the county court when the regular judge was absent from the county, or from any cause was unable to attend and perform the duties of the office, or to preside at any particular trial or prosecution, and a county judge cannot appoint a regular deputy or substitute county judge with power and authority to act in all matters the same as the regular county judge, in the absence of such disabilities.

4. Appeal and error \S 386(1)—Illegally appointed deputy county judge could not accept appeal bond.

One illegally attempted to be appointed a regular deputy or substitute county judge under Ky. St. \S 1059, by a county judge who was neither absent from the county nor from any cause unable to attend to the duties of his office or to discharge the particular duty, could not approve or accept an appeal bond required by Civ. Code Prac. \S 461, and a bond accepted or approved by him would be ineffective for any purpose.

5. Appeal and error \S 390—Bond taken before unauthorized officer not correctable under statute.

An appeal bond required by Civ. Code Prac. \S 461, taken before one attempted to be appointed by a county judge, under Ky. St. \S 1059, as a substitute or regular deputy, was so invalid that it could not be corrected under Civ. Code Prac. \S 682.

Appeal from Circuit Court, Floyd County.

Action by T. J. Allen against A. J. Cox. Judgment for plaintiff, and defendant appeals. Affirmed.

B. M. James, of Prestonsburg, for appellant.

W. P. Mayo and B. F. Combs, both of Prestonsburg, for appellee.

THOMAS, J. On March 10, 1919, the appellee, T. J. Allen, instituted before Ed. Hill, the county judge of Floyd county, forcible

detainer proceedings against the appellant, T. J. Cox. A trial in that court on April 7 following resulted in a verdict in favor of Allen. On the same day Cox filed a traverse before the county judge, but he executed no bond at that time, as required by section 461 of the Civil Code; but on April 9 he appeared at the courthouse in Prestonsburg and executed a paper before one W. W. Williams, whom he found in the county judge's office, and who proposed to be acting as county judge pro tem. That paper is in the usual form of a traverse bond as prescribed by the section of the Code supra, except that in lieu of the name of the surety therein the word "cash" is written, and Cox deposited \$200 with Williams at that time.

When the case was called for trial in the circuit court, the attorney for appellee moved to dismiss the appeal, upon the ground that no bond had been executed before the judge or justice who tried the case. Appellant entered a motion to permit him to execute the bond in the circuit court as provided by section 682 of the Code in case of defective bonds; but that motion was overruled, and the court sustained the one made to dismiss the appeal, and entered a judgment to that effect, to reverse which this appeal is prosecuted.

[1] In the recent case of Milliken v. Hatter, 177 Ky. 31, 197 S. W. 511, we had occasion to consider at some length the right of appeal and the necessary steps to be taken in order to preserve that right. It was there shown that the right to an appeal is one of grace only, and for one to avail himself of it he must at least substantially comply with the law granting it. It was therein held that, where a part of the provisions providing for an appeal is the execution of a bond before the proper officer, it must be done within the time required by the statute, and before the designated officer, and that the provisions relating to the execution of the bond were mandatory, and unless substantially complied with the appeal would be lost. A number of authorities are referred to in that opinion.

The case of Burchett v. Blackburn, 4 Bush, 553, was one of the same character as this one. A proper bond was executed, but no traverse was filed, and a motion to dismiss the appeal in the circuit court was sustained, the court holding, in substance, that if a proper traverse had been filed with an insufficient or defective bond, the latter might be corrected in the circuit court.

In the case of Alderson v. Trent, 79 Ky. 259, the traverse was duly filed and the bond taken before the proper officer, but it was limited in amount to the sum of \$100. The circuit court sustained a motion to dismiss the appeal on the ground that the limitation of the amount in the bond rendered it void,

but this court held that such fact only rendered the bond defective, and therefore it could be corrected under the provisions of section 682 of the Civil Code.

In the case of *Hargis v. Pearce*, 7 Bush, 234, the appellant and his sureties signed a blank paper giving the clerk authority to write above their signatures an appeal bond appropriate to the case. The clerk neglected to do this, and the appeal was dismissed, the court saying: .

"The difference between an imperfect or defective bond and no bond at all is fatal to the appellant, and left the circuit court no jurisdiction."

The case of *Slaughter v. Crouch*, 64 S. W. 968, 23 Ky. Law Rep. 1214, was one of forcible detainer. The name of the traversor was signed to the bond by his attorney, within the proper time, and the name of E. M. Salin was subscribed thereto as surety. It was made to appear on a motion to dismiss the appeal that Salin signed the bond conditionally with the knowledge of the county judge who tried the case, and that others afterward signed the bond, but not within three days from the rendition of the judgment, although they agreed to do so within that time. This court, in reversing the case and directing a dismissal of the appeal, said:

"The facts in this case show that no valid bond was ever in fact executed. The only surety who signed the bond within the three days was Salin, and his signature was conditional upon the execution to him of a mortgage by Crouch, which was never executed, and he was therefore never bound thereon. The names of the other sureties were added after the expiration of the time in which they could, under the Code, have been signed and without any application having been made to the circuit judge to permit such additional signatures. We are therefore of the opinion that no valid or enforceable bond was ever executed by the defendant, and that the court erred in not sustaining the motion to dismiss the appeal."

The case of *Kotheimer v. L. & I. R. R. Co.*, 89 S. W. 104, 28 Ky. Law Rep. 298, was a condemnation proceeding. The statute creating the remedy required an appeal bond to be executed by the appellant within 30 days after the rendition of the judgment if an appeal was taken from it. No bond was executed within that time, and the circuit court dismissed the appeal, which judgment was affirmed by this court, the opinion saying:

"As the bond was not executed within 30 days in this case, the appeal under the statute was not taken. It is not one of these cases where a defective proceeding may be amended under the Code. If a defective bond had been executed, then the Code provision would apply, but when no bond was given there is nothing to amend. The fact that the statement of the parties and the transcript of the orders was filed in the circuit court does not help the matter."

The case of *Berry v. Trice*, 179 Ky. 594, 201 S. W. 37, was a forcible detainer proceeding. The traversor failed to file the traverse within the three days required by the section of the Code, *supra*, although proper bond was executed. This court sustained the circuit court in dismissing the appeal because the requirements of the statute authorizing it had not been complied with. The right to amend or correct defective steps looking to the completion of an appeal is a statutory one, and it cannot be exercised unless authorized by the statute; hence the appellate court is without authority to allow an imperfect appeal to be cured under the power of amendment when the omission consists in an entire failure to take a necessary step, or when the action taken was wholly void. 3 *Corpus Juris*, 1191, and cases *supra*.

[2] The text in the volume of *Corpus Juris* referred to on page 1116 states that the acceptance of a deposit of money or other property in lieu of an appeal bond is not allowable unless authorized by the statute granting the right of appeal. It says in part:

"But, where such a deposit is not provided for, it has been held that a deposit is not a sufficient compliance with the statute which requires a bond or undertaking as a condition precedent to the right of appeal."

Many cases from a number of the states are referred to in the note supporting the text. Clearly, then, if the bond in this case was for any reason so insufficient as to render it wholly invalid, it was more than a defective bond such as may be amended under the provisions of section 682 of the Code.

[3, 4] In determining the question it becomes necessary to briefly notice section 1059 of the Kentucky Statutes, under which the authority of Williams, who approved the paper claimed to be a bond is supposed to have been conferred. That section, in so far as applicable to the question, reads:

"Whenever the county judge shall be absent or unable from any cause to attend or hold the county court or preside at any trial or prosecution, he shall appoint and designate by order entered on the order book of the county court, a county judge pro tem. Said county judge pro tem. shall possess all the qualifications required by law of the regular judge, and the regular county judge shall be liable upon his bond for the actions of said appointee: Provided," etc.

The proviso in the section relates to the swearing off the bench of the regular judge, the election of one by the members of the bar to preside at the particular trial, and the right of the parties to agree upon a judge to try their case.

Construing that portion of the section which we have quoted as conferring the authority upon him, the regular county judge of Floyd county, on February 12, 1919, entered an order upon his records in these

words: "Upon motion of Ed. Hill, county judge of Floyd county, it is ordered by the court that W. W. Williams be and he is hereby appointed county judge pro tem. of Floyd county, who, being present, accepts said office and thereupon took the constitutional oath and the statutory oath, as required by law." It will thus be seen that the county judge, under the supposed authority of the section, appointed a regular deputy or substitute county judge, with power and authority to act in all matters the same as the regular county judge. Manifestly no such authority was ever intended to be conferred by the Legislature in enacting the statute. Its only purpose was to authorize the county judge to appoint and designate a judge pro tem. to preside over the county court when the regular judge was absent from the county, or from any cause was unable to attend and perform the duties of the office or to preside at any particular trial or prosecution. Whether a general appointment as was made in this case would be sufficient to authorize the appointee to discharge those duties, even under the conditions named, or whether the appointment should be made as the occasions arise, are questions not presented, and which we will not now determine. The purpose of the Legislature was to provide a method by which the public business to be discharged by the county judge might not be postponed or obstructed because of necessary absence from the county of the regular judge, or his prevention from the performance of his duties on account of sickness or other valid causes. To construe the section as the county judge did in this case would result in having two or more county judges in the same county at the same time, but only one of whom was chosen by the people as provided by law. They might perchance be making contradictory orders concerning the same matter at the same time, and thus not only obstruct the orderly administration of the office, but create endless confusion. We therefore conclude that W. W. Williams, the supposed county judge pro tem., had no more authority to approve or accept the supposed bond in this case (waiving the defect of accepting cash instead of personal security) than would any loafer who might have been in the office of the county judge at the time; for it is shown that the county judge was neither absent from the county nor for any cause unable to attend to the duties of his office, or to discharge the particular duty of taking and accepting the bond in this case. he being well and at his residence but a short distance from the courthouse.

[5] Since the cases, *supra*, and particularly that of *Milliken v. Hatter*, hold that a bond taken before an officer not authorized to take it is void, we conclude that the bond in this case was ineffective for any purpose,

and was not one that could be corrected or amended under the provisions of section 662 of the Code.

The judgment being in accord with these views, it is affirmed.

MOORE v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 15, 1920.)

1. Burglary \S 41(1)—Evidence held to sustain conviction of breaking dwelling house and stealing therefrom.

In a prosecution for breaking a dwelling house and stealing a watch and money therefrom, circumstantial evidence held sufficient to sustain a conviction.

2. Criminal law \S 369(15), 372(10)—Other offenses held admissible to prove identity of accused and systematic plan.

In a prosecution for breaking a dwelling house and stealing a watch and a sum of money, evidence of other offenses of the same kind committed in the neighborhood held competent to connect defendant with the crime charged, and to show a systematic plan of criminal action, all fairly attributable to the same person.

Appeal from Circuit Court, Kenton County.

Henry Moore was convicted of feloniously breaking a dwelling house and stealing therefrom, and he appeals. Affirmed.

John L. Cushing, of Covington, for appellant.

Chas. I. Dawson, Atty. Gen., Thos. B. McGregor, Asst. Atty. Gen., and W. P. Hughes, of Frankfort, for the Commonwealth.

HURT, J. The appellant, Henry Moore, was indicted, tried, convicted, and sentenced to confinement, in the penitentiary, for a term of two years, for the crime of feloniously breaking the dwelling house of one Foster, and feloniously taking away and stealing therefrom a watch and 50 cents in money. He appeals and asks that the judgment be reversed upon the following grounds: (1) "The verdict is against the evidence and is not sustained by a sufficiency of evidence." (2) The court erred in admitting incompetent evidence against him.

[1] (a) The evidence upon which the conviction was had consisted altogether of the proof of circumstances, but, when it is all considered together, the verdict is not against the weight of the evidence at all, and in our opinion is sufficient to sustain the verdict. The chief circumstances which went to make up the evidence of his guilt are that on the morning of the 1st day of February, at about 4 o'clock a. m., some one entered the dwelling house of Foster, by forcing open a window

with a chisel or "jimmy," and stole and carried away a watch, of the value of \$35, and 50 cents in money, the property of Foster. Early in the morning a footprint was discovered, in the mud at Foster's yard, as if a person had jumped and alighted upon the foot. The heel of the shoe, as appeared from the track, was of a very peculiar and uncommon shape and character, and such as had not been seen or used about Covington, where the crime was committed. Between 4 o'clock and 5 o'clock a. m., upon the same morning and in the same immediate neighborhood, in West Covington, a man corresponding in height with the accused and wearing a soft, slouch hat, well pulled down over his eyes, entered the house of Mrs. Miller, and began to ransack the building, but upon discovery fled out of the house. Near the same time some one pried open a window to the house of Ross Sullivan, with the use of a "jimmy" or similar article, but took nothing, though the burglarious intention was evident from the fact of evidence of searching for valuables. About the same hour a window of the dwelling of Hutchens was forced open in the way above described, and there was evidence of an attempt or an entry into the house through the window. These dwellings were all near to each other. When the party fled from the house of Mrs. Miller, she immediately notified the police by telephone, and a policeman responded, and when near the house of Hutchens a man corresponding in height and size to the accused, with a soft, slouch hat pulled low over his face, sprang over the wall from Hutchens' yard, and ran. The policeman pursued and discharged a revolver at him, but he escaped. The policeman found an overcoat upon the wall, where the man sprang over it, and in the pocket of the overcoat was found a letter addressed to a woman, and requesting that she communicate with the writer by letter, and giving his address as 806 Barr street, Cincinnati, and subscribed with the name of the accused as the writer. The police officers of Cincinnati were notified, and, going to 806 Barr street, the accused was found in bed and asleep at 10 o'clock a. m. He claimed to have been engaged in a card party at the house until 8 o'clock a. m., when, after having said his prayers, he had retired. He was brought to Covington and requested to write his address and a portion of the note found in the overcoat pocket at Hutchens' yard. These specimens of his handwriting were used as evidence upon the trial, and a striking similarity, in the shape of the letters and style of writing, appears between the writing done by the accused and the letter which was in the pocket of the overcoat found upon Hutchens' wall. A very strong odor of perfume was upon the overcoat, and an odor of the same perfume was conspicuous upon the

clothing of the accused, when arrested. He had upon his feet a pair of shoes which bore the strange and unusual character of heel, which would make the footprint discovered at Foster's yard, and the accused deposed that he purchased the shoes in Alabama, where it was recommended to him that the character of heels upon them would prevent him from "running them over." It was only a distance requiring 10 to 15 minutes in which to cover it on foot, from the end of the bridge over the Ohio river, at West Covington, to 806 Barr street, in Cincinnati. There was an absence of any reasonable explanation to remove the convicting force of the above-detailed circumstances. The evidence was sufficient to require the submission of the cause to the jury and to sustain the verdict.

(b) The evidence, which is complained of as being prejudicial is the proof of the breaking of the dwelling houses of Mrs. Miller, Sullivan, and Hutchens, and the rule of criminal procedure is invoked which prohibits the proof being made against one on trial for a crime of the guilt of other crimes. This is a general rule, which applies to the admission of evidence in a criminal trial, and its violation is always prejudicial, when the propriety of its admission does not fall within one of the exceptions to the rule; but, when the state of case allows one of the exceptions to the rule, the exception has the same force and is as valid as the rule itself, and in fact the exceptions constitute a general rule of evidence. The rule embodying the exceptions is thus stated in *Clary v. Commonwealth*, 163 Ky. 48, 173 S. W. 171:

"When one is being tried for a crime, the relevancy of the proof of other crimes of which he has been guilty is only in case where a crime has been proven, and proof of some other crime is necessary to identify the accused as the person who committed the crime proven, as above stated; or where it is necessary to show guilty knowledge in the accused, it is relevant to prove that at another time and place, not too remote, the accused committed or attempted to commit a similar crime to the one of which he is accused; or where it is necessary to show a particular criminal intent in the person on trial, or to show malice in him, or the motive for the commission of the crime, or to show that the crime for which he is being tried is a part of a plan or system of criminal actions, it is relevant to prove against the accused, under proper instructions of the court to the jury, other crimes of which the accused has been guilty."

In *Music v. Commonwealth*, 186 Ky. 45, 216 S. W. 110, it was held that it was also relevant to admit evidence of a crime, other than the one for which the accused was on trial, when the crime charged is so interwoven with other offenses, that they cannot be separated.

[2] In the instant case the proof of the crime of breaking into and stealing from the

dwelling of Foster was proven, but it was necessary to a conviction to prove that the accused was the individual who did it. The breaking into the house of Hutchens was done in a similar way and for a similar purpose to the breaking into the house of Foster. The crimes were all committed, in point of time, within the space of an hour and in the immediate neighborhood of each other, showing a systematic plan of criminal actions, and all fairly attributable to the same person. The evidence was relevant and competent, as conducing to prove the identity of the perpetrator of the crime at Foster's, with that at Hutchens', whom the evidence conduced to prove was the accused. The principle above stated has been upheld by this court, in addition to the two cases mentioned, in *Thomas v. Commonwealth*, 1 Ky. Law Rep. 122, *Tye v. Commonwealth*, 3 Ky. Law Rep. 59, *O'Brien v. Commonwealth*, 115 Ky. 608, 74 S. W. 666, 24 Ky. Law Rep. 2511, *Jenkins v. Commonwealth*, 167 Ky. 544, 180 S. W. 961, 3 A. L. R. 1522, and *Richardson v. Commonwealth*, 166 Ky. 570, 179 S. W. 458. That none of the evidence admitted was prejudicial to appellant's substantial rights is readily apparent, when it is observed that the jury fixed his punishment at the minimum allowed by law.

The judgment is affirmed.

VALLANDINGHAM v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 18, 1920.)

Seduction \S 40, 42—Questions to prosecutrix as to birth of child and previous intercourse with other men prejudicial error.

In a prosecution for seduction under promise of marriage, prejudicial error was committed in asking prosecutrix as to length of time after first intercourse that baby was born, and whether she had sexual relations with any other man up to time of intercourse with defendant.

Appeal from Circuit Court, Bath County.

B. Vallandingham was convicted of seduction under promise of marriage, and appeals. Reversed, with directions for a new trial.

G. C. Ewing, of Owingsville, and W. B. White, of Mt. Sterling, for appellant.

Chas. I. Dawson, Atty. Gen., C. W. Goodpaster, of Owingsville, and W. O. Hamilton, of Mt. Sterling, for the Commonwealth.

CARROLL, C. J. The appellant, Vallandingham, was found guilty of seducing Grace Purvis under a promise of marriage, and from the judgment of the verdict he appeals.

The only witnesses who testified as to any material fact in the case were Grace Purvis, the prosecuting witness, who was about 20 years of age, and the accused, a young man of 22. She testified that Vallandingham accomplished her seduction after he had promised to marry her; while he denied that he had promised to marry or had sexual intercourse with the accused.

On the trial the prosecuting witness was asked and answered over the objection of counsel for defendant these questions:

"Q. Did you ever have any sexual relations with him? A. Yes, sir. Q. How long after the first time that you had sexual relations with him was it before your baby was born? A. It was seven or eight months, or something that way. Q. Up to the time that you had sexual relations with him had any other man had carnal knowledge of you? A. No, sir."

And it is now insisted that the court committed prejudicial error in permitting these questions to be asked and answers made.

In the case of *Jordan v. Commonwealth*, 180 Ky. 379, 202 S. W. 896, 1 A. L. R. 617, we had the competency of evidence of this nature before us, and held that it was incompetent and prejudicial. To the same effect is *Cline v. Commonwealth*, 186 Ky. 429, 216 S. W. 594; *Hoskins v. Commonwealth*, 188 Ky. 80, 221 S. W. 230. The evidence here introduced is substantially the same as that held inadmissible and prejudicial in the *Jordan Case*.

It is also complained that the attorney for the commonwealth in his closing argument was guilty of misconduct in referring to this incompetent evidence. The court, however, admonished the jury not to regard it, and, as this error will not again occur, nothing more need be said about it.

For the error mentioned, the judgment is reversed, with directions for a new trial not inconsistent with this opinion.

BOOTH v. AKIN.

(Court of Appeals of Kentucky. June 15, 1920.)

1. Boundaries \S 37(3)—Evidence held to sustain decree quieting title in a suit involving a boundary line.

In a suit to quiet title to a strip of land involving the location of a boundary line, evidence held to support a decree quieting plaintiff's title to such strip as claimed by him.

2. Boundaries \S 6—Method of ascertaining intersection of line by reversing course stated.

Where land was conveyed by metes and bounds, beginning at a certain corner, "thence with the south side of said M. street, 25 feet, to a stake or stone, thence south across a lot of ground of B., 127 feet, to the north side of an alley, thence east with the north side of

said alley 25 feet to the M. E. Church house lot, thence north with the west line of the M. E. Church lot to M. street," to determine where the west line of the lot conveyed should intersect the alley south of the lot, the point of intersection was properly ascertained by measuring by the calls of the deed along the north line of the alley a distance of 25 feet from the west line of the M. E. Church lot.

Appeal from Circuit Court, Caldwell County.

Suit by J. A. Akin against Kate G. Booth. Decree for plaintiff, and defendant appeals. Affirmed.

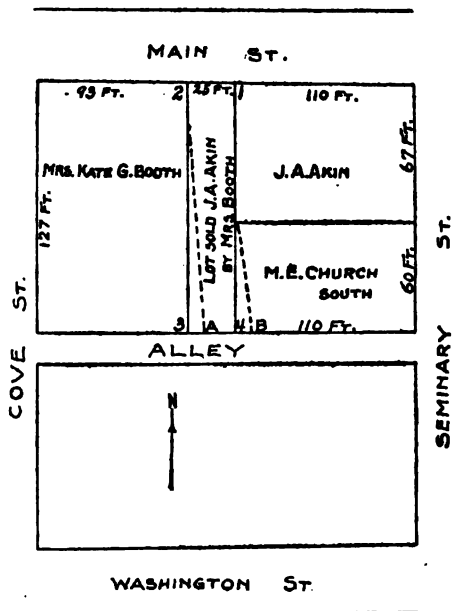
John G. Miller, of Princeton, for appellant.
J. E. Baker, of Princeton, for appellee.

SETTLE, J. In this action, brought in equity, is involved the title and right to the possession of a small strip of ground in the city of Princeton particularly described in the petition, of which the appellee, J. A. Akin, claims to be the owner and in possession, and to which ownership and the right of possession is likewise claimed by the appellant, Mrs. Kate G. Booth. The petition, as amended, in substance alleges appellee's title to and possession of the ground in controversy; appellant's wrongful claim of title to same and to the possession thereof; her attempt to inclose it by a fence for the purpose of adding it to an adjoining lot of which she is the owner; and that by this alleged trespass to the property, and her wrongful claiming of title thereto she had unlawfully interfered with his possession and enjoyment thereof, and cast a cloud upon his title to same. By the prayer of the petition an injunction was asked to restrain appellant from completing the fence inclosing the ground in controversy, otherwise trespassing thereon, or setting up claim thereto, and, further, that appellee's title to the property be quieted.

The appellant's answer admits the appellee's ownership under a deed of conveyance from her of a 25-foot lot immediately adjoining the strip of ground in controversy, but denies his title to the strip of ground, any right in him to the possession thereof, or to the injunctive or other relief prayed in the petition, and alleges such title and right of possession in herself. After completing the issues by the filing of further pleadings by way of response, and the entering of orders controverting some of them of record, the cause was submitted under an agreement of the parties, also entered of record, by which the evidence introduced by them, respectively, was received by the circuit court through the oral testimony of the several witnesses, instead of in the form of depositions, as required by the rule of practice obtaining with respect to actions in equity. The evidence thus heard in the case is contained in a bill of exceptions, approved and signed by the

circuit court and made a part of the record. By the decree rendered that court adjudged appellee the owner of the strip of ground described in the petition, permanently enjoined appellant from erecting a fence or other structure thereon, or in any way interfering with the appellee's use or enjoyment thereof, and gave appellee judgment against appellant for his costs expended in the action. The latter complains of the judgment, and by this appeal seeks its reversal.

While the judgment of the circuit court does not in terms expressly declare appellee's title to the ground in controversy quieted, such is clearly its meaning and legal effect. Indeed, the entire relief sought by the petition is such as appertains alone to an action quia timet. The map here furnished, substantially reproduced from one contained in the bill of evidence as a part of the testimony of a competent surveyor, by whom it was made, will give a fairly accurate description of the lot of which the strip of ground in controversy is a part, and of the several lots and streets adjoining it; also the location and dimensions of the strip in controversy and the lines and objects by which, according to the respective contentions of the litigants, its ownership should be determined.



May 13, 1915, appellee at the agreed price of \$1,500, cash in hand paid, purchased of appellant a lot 25 feet in width its entire depth of 127 feet. As shown by the map, this lot lies between a lot on the east of it owned by appellee, upon which he has resided many years, the lot of the Methodist Episcopal Church south of appellee's lot, and on the west its full depth by a lot yet owned by appellant. The lot also fronts on

Main street and extends to an alley south of it, which runs east and west from Seminary street to Cave street. On the date of its purchase by appellee the lot was conveyed him by a deed from the appellant which was duly acknowledged and put to record. The lot is thus described in the deed:

"A certain lot, piece, or parcel of ground, situated, lying, and being in Prince's addition to the city of Princeton, Caldwell county, Ky., and described as follows: Beginning at the northwest corner of a lot of ground now owned by Dr. J. A. Akin [appellee], on the south side of Main or College street, thence with the south side of said Main or College street 25 feet to a stake or stone, thence south across a lot of ground of Mrs. Katie G. Booth [appellant] 127 feet to the north side of an alley, thence east with the north side of said alley 25 feet to the M. E. Church house lot, thence north with the west line of the M. E. Church lot, and also with the west line of Dr. J. A. Akin's lot, to Main street, the beginning; this being 25 feet off of the eastern lot of the same piece or lot of ground as conveyed by Wiley Jones and wife to Mrs. Katie G. Booth by deed dated November 2, 1908, now of record in D. B. No. 29, pages 606, 607, Caldwell county court clerk's office."

It conclusively appears from the above deed made by appellant to appellee that the lot as described therein has a width of 25 feet from front to rear and was sold and conveyed from the eastern side of appellant's lot shown on the map as fronting on Main street, and which, as an original whole, was conveyed her November 2, 1908, by Wiley Jones and wife, and that its eastern boundary from the alley to Main street runs with the west line of the Methodist Episcopal Church lot and that of the lot upon which appellee resides. In the deed from Jones and wife to appellant, a copy of which appears in the record, the entire lot conveyed her is described as lot No. 45 in Prince's addition to the city of Princeton, that it fronts Main street 117 feet and runs back east of Cave street 127 feet to an alley, and is what remained of a lot after the conveyance of a part of it by deed from Jones and wife to M. J. Groom and wife, made August 21, 1907. It also appears from a deed found in the record from M. J. Groom and wife to appellee, by which the lot whereon the latter resides was conveyed him January 31, 1908, that it is therein described as the northern half of lot 39 in Prince's addition to the city of Princeton, fronting 110 feet on Main street, extending back west of Seminary street 67 feet to the M. E. Church lot. It further appears from a deed of date June 6, 1878, from M. A. Mays, president of the board of trustees of Princeton Seminary, conveying to Jas. F. Ingram and others, trustees of the M. E. Church South, Princeton, the lot occupied by its church building, that the lot is simply described as—

"situated in Prince's addition to said town and is the entire southern half of lot No. 39 in said addition, and the same upon which now stands the seminary building."

The boundary of the 25-foot lot conveyed appellee by the deed from appellant, as claimed by the former, is shown on the map as beginning on Main street at figure "1," the northwest corner of the lot on which appellee resides; thence west with the south side of Main street 25 feet to a stake or stone at figure "2" on the south line of Main street; thence south 127 feet to the north side or line of an alley at figure "3"; thence east with the north side or line of the alley 25 feet to the west line, or southwest corner, of the M. E. Church lot at figure "4" on the north line of the alley; thence north with the west line of the M. E. Church lot, and also with the west line of appellee's residence lot (the entire distance being 127 feet), to the beginning on Main street at figure "1."

The boundary of the lot as given above accords with that contained in the deed by which it was conveyed appellee by appellant. We do not find that appellant complains of any error in the boundary of the lot as set forth by the deed, but she insists that the west line thereof, extending from Main street south to the alley properly intersects it at the letter "A" on the map, and, if correctly run eastwardly a distance of 25 feet from where it reaches the north side of the alley at "A," will intersect the west line and corner of the M. E. Church lot at the letter "B," a point 2 or 2½ feet beyond and east of where appellee claims and the map shows the point of intersection to be. It will thus be seen that the ground in controversy is a narrow strip, only 2 or 2½ feet in width, at the rear or south end of the lot which as it extends northward, lessens so rapidly in width as to become practically infinitesimal in dimension and value long before the front of the lot is reached.

While the deed by which appellant conveyed appellee the 25-foot lot does not mention the fact, it appears from the evidence, and is admitted by appellant, that at the time of its execution one Frank Cash, a tenant of appellant, was in possession of the lot under a lease which did not expire until some time in April, 1918, and under the terms of his purchase of the property appellee did not get possession of it until the lease terminated. But before putting him in possession of the lot appellant, as seems to have been agreed by the parties when it was sold, in person measured, laid off, and designated its boundary assisted by appellee who acted in the matter at her request; she in doing the measuring holding one end of the tape line and he the other. In performing this work appellant determined all lines, fixed all corners, and directed the driving of such stakes as were used in designating them.

By this action of appellant the lines and corners of the lot in question admittedly were laid off and fixed as indicated by the figures "1," "2," "3," and "4," shown on the map, and as thus fixed appellant delivered to appellee the possession of the property, immediately removed therefrom, as provided by the contract of sale, a building which had been used by her former tenant, Cash, and proceeded to erect a fence separating the lot sold from the lot retained by her, which was built on the line running, as previously measured and fixed by her, from "2" to "3," as indicated on the map. Later, however, appellant seemed to conceive the idea that she had set her fence too far west, commenced the digging of new post holes, and to remove the fence farther east, so as to make it reach the alley at the letter "A," instead of the figure "3," thereby depriving appellee, as claimed, of 2 to 2½ feet of the 25-foot lot she had conveyed him. This conduct on the part of appellant caused appellee to institute the present action.

[1, 2] Without entering upon a discussion in detail of the evidence found in the record or undertaking an analysis of the testimony of any of the numerous witnesses, we deem it sufficient to say that we have reached the conclusion that the judgment of the chancellor is supported by the weight of the evidence. It is manifest that, in order to determine where the west line of the lot conveyed appellee by appellant should reach or intersect the alley south of the lot, the point of intersection must be ascertained by measuring by the calls of the deed along the north line of the alley a distance of 25 feet from the west line of the M. E. Church lot, the corner of which, according to the great weight of the evidence, is at the point on the alley represented by the figure "4" on the map, where there is a cedar post recognized, as shown by the evidence, for more than 25 years as the southwest corner of the church lot; in addition to the existence of this cedar post, the place where it stands was recognized as the corner of the church lot from 1878, the date of the deed conveying the lot to the trustees of the church, down to the erection of the cedar post and attached fence by the church.

It is true appellant and certain of her witnesses testified to the presence of another cedar post some farther north of the alley and 2 or 2½ feet east of a line running north from the cedar post at figure "4," which they believed to be the true corner of the church lot; but this testimony seems to have been successfully contradicted by that of appellee and two other witnesses, officers or members of the church, to the effect that the second cedar post was placed many years after the one on the alley for attaching to it a barrier to prevent the employees of a plant

operated on the lot south of the alley from crossing it onto the church lot and using same immediately back of the church as a privy or ural, the odors of which annoyed those who met in the church for worship. Another potent fact establishing the point at figure "4" as the true location of the church lot corner, is that it gives the line of the church lot from there running east to Seminary street its correct length of 110 feet, corresponding with the length of the south line of appellee's residence lot, running the same course. Moreover, by establishing the southwest corner of the church lot at figure "4" makes it end a straight line from Main street to the alley, and likewise seems to make the line from Main street to the alley separating the 25-foot lot from that of appellant a straight line, and gives the 25-foot lot a uniform width of 25 feet from Main street to the alley. Finally, the further fact that the chancellor, in company with the parties to the action, went himself upon the premises, and viewed all ground, lines, and corners in dispute, for the purpose of satisfying himself of the situation, gives great force to the correctness of the judgment.

On the whole, we find no ground for disagreeing from his conclusions, and the judgment is therefore affirmed.

R. E. O'FLYNN & SON v. EBELHAAR et al.

(Court of Appeals of Kentucky. June 15, 1920.)

1. Appeal and error \S 1096(3)—Opinion on former appeal is law of the case.

The opinion on former appeal is the law of the case, and matters which might have been brought to the attention of the court, but were not, are concluded by the opinion.

2. Appeal and error \S 1096(3)—Insufficiency of reply cannot be urged on defendants' second appeal.

Where defendants obtained a reversal on their first appeal on another ground than that the reply was insufficient and did not present a defense to their counterclaim, but might also have relied on the insufficiency of the reply, the former opinion was conclusive as to the sufficiency of the reply.

3. Appeal and error \S 1068(4)—Instruction as to interest held not prejudicial.

In seller's action for purchase price of goods, an instruction allowing the jury, in their discretion, to award plaintiffs interest from a certain date, held not prejudicial in stating too early a date, where the jury in fact allowed interest only from a later date, nor prejudicial in authorizing the allowance of interest in the jury's discretion; plaintiffs being entitled to interest as a matter of right.

Appeal from Circuit Court, Daviess County.

Action by Elizabeth Ebelhaar and another against R. E. O'Flynn & Son. From judgment for plaintiffs, defendants appeal. Affirmed.

W. P. Sandidge, of Owensboro, for appellants.

L. I. Igleheart, of Owensboro, for appellees.

CLAY, C. Elizabeth Ebelhaar and Tom Fenwick, her tenant, sold their crops of tobacco, consisting of about 9,000 pounds, to R. E. O'Flynn & Son, who refused to pay the contract price for the third delivery. Thereupon Elizabeth Ebelhaar and Fenwick brought this suit to recover the amount claimed to be due. O'Flynn & Son counterclaimed for damages in the sum of \$520 because the plaintiffs failed to deliver tobacco of the quality contracted for. On the first trial the court instructed the jury to find for plaintiffs. On appeal this court held that defendants were entitled to go to the jury on their counterclaim and reversed the judgment for a new trial. O'Flynn & Son v. Ebelhaar, et al., 182 Ky. 152, 206 S. W. 284. The second trial also resulted in a verdict and judgment for plaintiffs. Defendants appeal.

We deem it unnecessary to detail the evidence. In our opinion there was such a conflict in the evidence as to make the issue raised by the counterclaim a question for the jury, and we are not prepared to say that its finding is flagrantly against the evidence.

[1, 2] Another contention is that defendants' motion for a judgment notwithstanding the verdict should have been sustained, because the reply did not contain a sufficient denial of the allegations of the answer and counterclaim. It is the settled rule in this state that the opinion on a former appeal is the law of the case, and matters which might have been brought to the attention of the court, but were not, are concluded by the opinion. Nashville, C. & St. L. Ry. Co. v. Henry, 168 Ky. 453, 182 S. W. 651. While the defendants obtained a reversal of the first appeal on the ground that the evidence on the counterclaim was sufficient to take the case to the jury, they might also have relied on the fact that the reply was insufficient and did not present a defense to the counterclaim. That being true, the former opinion is conclusive as to the sufficiency of the reply, and that question is not open to further consideration. Drake v. Holbrook, 92 S. W. 297, 28 Ky. Law Rep. 1319; Lexington Ry. Co. v. Woodward, 118 S. W. 965.

[3] Instruction No. 3 is as follows:

"If the jury find in favor of the plaintiffs, they may, in their discretion, award plaintiffs interest from January 26, 1917, and so state in their verdict."

The first complaint of this instruction is that it authorized interest from January 26,

1917, instead of February 15, 1917, when plaintiffs delivered the tobacco. As a matter of fact, however, the jury allowed interest only from February 26th. Hence defendants were not prejudiced by the error relied on. Another contention is that the damages were liquidated, and the court erred in telling the jury that they might award interest in their discretion. Since plaintiffs were entitled to interest as a matter of right, we are unable to say how defendants were prejudiced by an instruction authorizing the jury to allow interest in their discretion.

Judgment affirmed.

MORGAN et al. v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 11, 1920.)

1. Homicide \S 276—Existence of prior combat question for jury.

Whether on the evening of the killing there was a prior combat between some of defendants and deceased's party in which the members of the latter were the aggressors *held*, on conflicting testimony, a question for the jury.

2. Criminal law \S 1036(1), 1044—Evidence admitted without objection must be met by motion to exclude.

Defendants were not in a position to complain of the introduction of testimony of the details of an occurrence on the day before the homicide, not objected to when it was given, unless it be one who afterwards moved to exclude it from the jury's consideration.

3. Criminal law \S 369(3), 371(12)—Evidence of prior occurrence held admissible on question of motive and conspiracy.

The details of what occurred on the night before the homicide, when defendants called at the house where deceased's brother was stopping, *held* admissible, not merely to show motive, but to establish an alleged conspiracy to kill the brother, who was a member of the group fired on by defendants at the time of the killing.

4. Criminal law \S 422(6)—Utterances by conspirators tending to show conspiracy admissible against a conspirator not present.

Utterances of alleged conspirators before the accomplishment of the common purpose, tending to establish a conspiracy between them and another not present to commit a crime, are admissible against him.

5. Criminal law \S 834(3)—Instruction on self-defense is properly qualified to present commonwealth's theory supported by evidence.

Qualification of defendant's instruction on self-defense by a clause unless certain facts be found, so as to present the theory of the commonwealth, which its testimony tended to establish, is proper.

6. Criminal law §957(5)—New trial not authorized by affidavit of counsel as to a juror telling him of an occurrence during consideration of case.

Under Cr. Code Prac. § 272, forbidding examination of a juror to establish ground for a new trial, except to show that the verdict was arrived at by lot, affidavit of counsel that he was told by a juror that another juror during the consideration of the case made a statement contradictory of testimony for defendant does not authorize a new trial.

Appeal from Circuit Court, Laurel County.

Leonard Morgan and others were convicted of manslaughter, and appeal. Affirmed.

Hazelwood & Johnson, of London, for appellants.

Chas. I. Dawson, Atty. Gen., and Thomas B. McGregor, Asst. Atty. Gen., and W. P. Hughes, of Frankfort, for the Commonwealth.

THOMAS, J. The appellants, Leonard Morgan, John Forman, Felix Forman, Steve Forman, and William Poe were convicted in the Laurel circuit court of the crime of voluntary manslaughter, on their trial under an indictment charging them with murdering James Baker. The verdict fixed the punishment of Leonard Morgan, John Forman, and William Poe at confinement in the penitentiary for 21 years; that of Felix Forman 5 years; and of Steve Forman 2 years. Their motions for a new trial having been overruled, they each appeal.

The killing occurred in Clay county on the night of February 12, 1919, near the hour of 8 o'clock. The first count in the indictment charged the defendants with jointly committing the murder, while the second count alleged a conspiracy entered into between the defendants whereby they agreed, conspired, and banded themselves together to commit the murder, which they afterward did in pursuance thereof. But three grounds are urged as alleged errors to secure a reversal of the judgment, they being: (1) The admission of incompetent testimony introduced by the commonwealth; (2) erroneous qualification of the instruction on self-defense; and (3) misconduct of the jury while in the room considering their verdict. The record in the case is a large one, and it would unnecessarily incumber this opinion and serve no useful purpose to make a detailed statement of all of the facts. We will therefore give only a brief synopsis of the more prominent ones which we deem sufficient for the determination of the questions raised.

The two factions engaged in the fight in which the killing of James Baker occurred may be said to have been headed the one by

the deceased, who was at the time a deputy sheriff, and the other by the defendant William Poe. The deceased and his crowd, consisting of seven or eight persons, including his brother, Hugh Baker, were stationed at a schoolhouse for the purpose of arresting some members of the Poe crowd, which included the defendants, under a warrant which Hugh Baker had procured from a justice of the peace about 4 o'clock that afternoon. The warrant had been issued at the instance of Hugh Baker because of depredations committed by Poe and his crowd the night before at the home of Vernon Hensley, where Hugh Baker was spending the night. It is the introduction of the details of what occurred at Hensley's house on the night before the killing that forms the principal basis of ground (1) urged for a reversal.

The defendants Leonard Morgan, Felix Forman, William Poe, Steve Forman, and Jim Hatchett Baker, Merida Smith, Tine William, and Bud Tegarden composed the Poe crowd, who went to the home of Vernon Hensley on the night of the 11th. The defendant John Forman was not present. All of them knew that Hugh Baker was spending the night there, and they claimed that they went there to see him in response to an invitation sent by him to William Poe for the purpose of talking about a lost moonshine still worm. All of the crowd armed themselves with shotguns, pistols, and rifles of various calibers and powers for the visit in response to this alleged invitation, and they explain their being thus armed by saying that they intended on this trip to catch some chickens which Leonard Morgan had sold to Jim Hatchett Baker, but since they neither carried nor could find a lantern they abandoned that idea after they left Hensley's house.

As to what occurred there, the witnesses for the commonwealth, some six or seven in number, practically agree, and, since Vernon Hensley is a disinterested witness, we have concluded to incorporate his statement as to what happened. He says that a while after supper some one hallooed at the gate; that he went to the door and asked what they wanted, when William Poe inquired if Hugh Baker was there, and, being informed that he was, the following occurred, according to the witness:

"He told me to tell Hugh to come out there; he wanted to see him; and I went back into the house and told Hugh that William Poe was out there; he wanted to see him; and he said to tell him to come in the house, and I stepped back and told William that Hugh said to come in—I invited him in, and he spoke to Hugh and he says, 'Hugh, old brother, come out here; I want to talk to you a minute.' Hugh got up and came out. Orville Hensley and Charley Collins come pretty close to him, and I was out in the yard. We all walked up to the front

gate, and Hugh was a little in front. He walked up and put his hands upon the palings, like this (indicating to the jury). William reached out like he was shaking hands with him with his left hand; Poe did; and Hugh asked him what he had in his hand, and he says, 'I have got a 45.' He says, 'I understand you are going to report me for moonshining, and I have come up here to tell you one thing, there is no God damned man can do that and live.' He says, 'Who told you that?' and Hughie says, 'Jim Hatchett Baker told me;' and Hughie says, 'I never said it,' or something like that, and about that time Jim Hatchett Baker come around from behind the little millhouse on the left of the gate, that was on the right, and I was standing about the road. A part of this millhouse was boxed up and he come around with a pistol in his hand and he says, 'Hugh Baker, you are a God damned black-hearted son of a bitch of a liar;' and he threw his pistol on Hughie. I heard a little noise back there on the outside, and I thought I would go around the mill—lower side of the millhouse—something struck me that there might be somebody else there, and as I was crossing the fence at the far end of the millhouse from the yard Jim Hatchett Baker says, 'Vernon Hensley, by God, you get back into the house.' I says, 'I am at home;' and he says, 'You God damned son of a bitch, get back there or I will shoot your brains out if you don't.' I made another step and I heard something like guns clicking, and I looked up and seen Tine Williams, Steve Forman, Felix Forman, and Bud Tegarden had guns on me, and Merida Smith was standing there with a gun, and Leonard Morgan run back with a pistol in his hand kindly down by his side, and I says, 'What are you doing there?' None of them would speak, and I started to go back in the yard, and as I crossed the fence Leonard Morgan following me to the engine, and left him standing between myself and Hugh Baker, and after I walked back to where I was—Jim Baker was cursing and calling me all kinds of bad names and cursing me, and they was cursing Hugh and calling him all kinds of bad names, and Leonard Morgan come on down around directly and says, 'Boys, we had just as well go now;' and they started on up the road."

It is shown that several others, including Mrs. Hensley, were present and heard and testified to that conversation and the latter importuned William Poe and his crowd with tears not to shoot or kill any one, but to go away and let them alone. William Poe's version of what occurred on that occasion is that he called for Hugh Baker, who came out, and he, discovering that Poe had a pistol, asked the latter to lay it down, which he did, whereupon the parties shook hands. Poe then asked Baker, "Who told you that I had anything to do with your still worm in any way?" when the latter replied, "Jim Hatchett Baker;" and thereupon Jim Hatchett performed his part as testified to by Hensley. Witness then says that he and Hugh Baker felicitated each other over the amicable understanding reached and extend-

ed mutual invitations for visits between their respective families. The Poe crowd, on leaving the Hensley house, went to the residence of a brother of William Poe, and after a considerable time the members scattered to different places to spend the night. According to the testimony of Poe, Williams, and Smith, they and Tegarden were traveling along Ayler Lick branch the next evening on their return from inspecting a rented place which they were going to cultivate that year, when about 6:30 p. m. Hugh Baker and his brother Bob shot at them from a mountain side, wounding Tegarden, from which wound he died a few days thereafter; that immediately after this shooting William Poe went to the home of one of his brothers and from thence to the home of the defendant John Forman, and began gathering a crowd for the purpose of looking after and taking care of Tegarden, Smith, and Williams, all of whom he thought, as he testified, had been wounded. He collected his crowd and they were on their way to the scene of the alleged shooting when they arrived at the schoolhouse, where the fight occurred in which Jim Baker was killed. Poe seems to have had but little trouble in assembling his crowd on that occasion, and each of them, when found by him, was either armed or immediately armed himself. Hugh and Bob Baker deny that any shooting took place on Ayler Lick branch, or at any other place except during the fight at the schoolhouse; the two occasions being about 1 or 1½ hours apart, according to the testimony of the defendants.

[1] It is the theory of the commonwealth that the wounding of Tegarden occurred at the schoolhouse, and there are a number of circumstances indicating that such was the fact. Upon this issue there was, as is usual in such cases, a contrariety of testimony, as well as conflicting circumstances. No one of the Poe crowd was wounded in the schoolhouse fight, unless it was Tegarden, and it is indisputably established that blood was found in the path or road leading from the schoolhouse to William Poe's house, where Tegarden lived, and it is likewise testified to that soon after the schoolhouse shooting there were lamentations of both men and women in the direction of William Poe's house. On the other hand, defendants introduced testimony corroborating their story about the shooting on Ayler Lick branch. So whether there were two combats on that evening or only one at the schoolhouse was a question for the determination of the jury.

[2] The commonwealth's witnesses, consisting of those who had been summoned by the deceased to help him execute the warrant upon some of the defendants, testified that when the Poe crowd approached the schoolhouse the deceased stood on the steps and said, "Hold on, boys, don't do that; I want

to talk to you;" when immediately he and all his posse were fired upon and he received the wounds from which he died. He made a dying statement to this effect, in which he was corroborated by the testimony of all of the others of his crowd who were present. The defendants say that as they got about in front of the schoolhouse they were fired upon without any words being uttered, which firing they returned. The whole front of the schoolhouse was filled with shot and bullets, and evidently a fierce battle was fought. It is the theory of defendants that there was never any warrant obtained by Hugh Baker; but that, on the contrary, he, his brothers, and others whom they had gathered together had banded themselves together for the purpose of assaulting, and perhaps killing, the members of the Poe crowd. There was no objection to the complained of testimony concerning the details of what occurred at the home of Vernon Hensley at the time it was given, but afterwards the defendant John Forman moved the court to exclude it from the consideration of the jury, presumably upon the ground that he was not present at the time. So that, whatever might be said as to the relevancy of that testimony, none of the defendants is in position to complain of its introduction, unless it be the defendant John Forman.

[3] The chief case relied on by defendants in support of their objection to this testimony is that of *Martin v. Commonwealth*, 93 Ky. 189, 19 S. W. 580, 14 Ky. Law Rep. 95. In that case the deceased had caused the defendant to be indicted for robbery. The court not only permitted the introduction of the indictment, upon which appeared the name of the deceased as a witness, but allowed the introduction of details of the alleged robbery. Such details manifestly had no connection at all with the crime for which defendant was being tried. When the robbery was over, if it occurred at all, defendant's full purpose in committing it was accomplished. The only relevancy of the indictment even was to show motive for killing the deceased, in order to dispose of him as a witness on the robbery indictment.

It is the general rule that neither testimony of the commission of another independent crime nor testimony of its details may be given in evidence upon the trial of another charge; but there are exceptions to this rule, as when it is necessary to establish by the independent crime the identity of the accused, or where it is necessary to show guilty knowledge on his part, or where it shows the particular criminal intent of the defendant or motive or malice for the commission of the crime for which he is being tried, or where the independent crime is so interwoven and connected with the one on trial as that they cannot be separated, or to prove a charged conspiracy. These general

rules will be found stated in the case of *Music v. Commonwealth*, 186 Ky. 51, 216 S. W. 116; *Romes v. Commonwealth*, 164 Ky. 334, 175 S. W. 669; *Graham v. Commonwealth*, 174 Ky. 645, 192 S. W. 683; *Jenkins v. Commonwealth*, 167 Ky. 544, 180 S. W. 961, 3 A. L. R. 1522; *Clary v. Commonwealth*, 163 Ky. 48, 173 S. W. 171; *Thomas v. Commonwealth*, 185 Ky. 226, 214 S. W. 929; and *Shotwell v. Commonwealth*, 65 S. W. 820, 23 Ky. Law Rep. 1649.

The text in 10 R. O. L. 940, in stating one of the exceptions to the general rule, says:

"It [the rule] does not apply where the subject-matter under investigation is of such a nature that it may consist of several stages or continuous acts, all constituting one transgression."

Manifestly it would not be a violation of the rule where the particular acts constituting the alleged independent crime were relevant in establishing a conspiracy where such a charge is made in the indictment.

This court, in the case of *Gambrell v. Commonwealth*, 130 Ky. 513, 113 S. W. 476, said that—

"A conspiracy is almost necessarily established by the welding into one chain of a number of links, each in itself inconclusive and insufficient to prove the conspiracy, but, when connected and examined as a whole, sufficient to show it."

And furthermore said in substance that all acts and declarations of either of the conspirators before accomplishing the object of the conspiracy and after it was formed were in law, the acts of all of them.

If the purpose of the details of what occurred at the home of Hensley was to establish motive alone, there might be room for the contention that the court should have admonished the jury as to its purposes, but such was by no means the entire purpose of that testimony. It strongly tended toward the establishment of the alleged conspiracy to kill Hugh Baker because of evident enmity existing between him and members of the Poe crowd, which killing would perhaps have occurred that night had it not been for the interference of Mrs. Hensley. No one can read this record and conclude that the mission of Poe and his crowd that night was wholly an innocent one.

An objection to similar testimony was urged in the case of *Shotwell v. Commonwealth*, supra. But this court, in overruling it, said:

"The declarations and acts of either of the conspirators, in pursuance of the conspiracy, after it was formed and before the end, was in legal contemplation the act of all of them. Each was responsible for what the others did in the prosecution of the design for which they combined. It was competent to show the cause of the ill feeling, the threats, the hostile declarations, the purchase of the cartridges, the

whispered conversation at the schoolhouse, the fact that they left it in a body when John Gambrell was seen approaching, and every circumstance and incident that tended to throw light upon their acts in furtherance of the common design. *Powers v. Commonwealth*, 61 S. W. 735, 22 Ky. Law Rep. 1807, 53 L. R. A. 245; *Commonwealth v. Hargis*, 99 S. W. 348, 30 Ky. Law Rep. 510."

Under the facts disclosed by this record, we are quite sure that the court did not err in admitting the complained of testimony, were all of the defendants in condition to insist upon it.

[4] From the authorities referred to it will also appear that the testimony was not prejudicial to the rights of the objecting defendant John Forman, although he was not present, since it went to establish a conspiracy through the utterances of coconspirators before the accomplishment of their common purpose. For similar reasons the testimony given as to threats against Hugh Baker made by William Poe a few days before the killing was also relevant.

[5] The foundation for ground (2) urged for a reversal is a qualification given to instruction No. 5 on behalf of each defendant, it being the self-defense instruction, and which qualification says:

"Unless you shall further believe from the evidence, beyond a reasonable doubt, that the combat and fight was voluntarily engaged in by both defendant William Poe and those acting with him, if any, and by the deceased, James Baker, and those acting with him, if any, with intention on the part of each to kill the other or to do him great bodily harm, or that the defendant William Poe and those acting with him, if any there was, when they were in no danger, real or to him or them apparent, of death or great bodily harm at the hands of the deceased or those with him, or either of them, began the difficulty by shooting at the deceased or those with him, and thereby so made the danger to himself or those acting with him, if any, excusable on the part of the deceased and those with him, in their necessary or apparently necessary self-defense, then and in either of these events the defendant Poe should not be acquitted on the ground of self-defense or apparent necessity or the defense of another or apparent necessity therefor."

In support of this ground it is insisted (a) that there was no evidence that the fight at the schoolhouse was voluntarily engaged in by the two opposing forces, and (b) that the testimony conclusively showed that defendants did not begin that difficulty, but that, on the contrary, they were upon the merciful mission of clearing up the battlefield on Ayler Lick branch. If the premises assumed by defendants' counsel were true, the correctness of their criticism would necessarily follow. We have before said that they insist that the Bakers had no warrant for their arrest. Evidently there was bad blood existing be-

tween the two factions, growing out of their charges and countercharges with reference to illicit distilling, and the testimony is amply sufficient, leaving out entirely the consideration of any warrant for the arrest of the defendants, to authorize the conclusion that each party was on the lookout for the other and that they intended to engage in mutual combat upon meeting. Furthermore, the "merciful mission" theory is not only dispelled by the testimony of the commonwealth's witnesses, but by a number of convincing circumstances appearing in the record. At any rate, the qualification of the self-defense instruction complained of presented the theory of the commonwealth, and which theory its testimony tended to establish, and it was proper that the court should submit it to the jury.

In passing, we might say that it is seldom we find more appropriate instructions in a criminal case than those found in this record. We therefore dismiss this ground as being without merit.

[6] Ground (3) urged by counsel for a reversal is based upon an affidavit of one of them that a juror who sat in the case had stated to him after the jury were discharged that another juror, while considering the case, stated that one could not see the schoolhouse where the fight occurred from the residence of William Poe, thereby contradicting some of defendants' witnesses, who testified to having seen the fight from William Poe's house.

Long before the enactment of section 272 of the Criminal Code, this court, in the case of *Johnson v. Davenport*, 3 J. J. Marsh. 393, with reference to receiving testimony of jurors for the purpose of impeaching their verdict, said:

"The dangerous tendency of receiving testimony of the jurors, for such a purpose, is too obvious to require comment. It would open a door so wide, and present temptations so strong, for fraud, corruption and perjury, as greatly to impair the value of, if not eventually to destroy, this inestimable form of trial by jury."

Those statements were quoted with approval in the case of *Commonwealth v. Skeggs*, 3 Bush, 19. See, also, the case of *Caldwell v. Spears*, 186 Ky. 64, 216 S. W. 83.

The section of the Criminal Code referred to forbids the examination of a juror to establish ground for a new trial, except to show that the verdict was made by lot. Under these authorities, the affidavit of the juror containing the facts alleged to have been stated to counsel would not be sufficient to authorize a new trial, and a fortiori is it insufficient when appearing secondhand and in the form of hearsay testimony through the affidavit of counsel.

From a careful reading of the entire rec-

ord, we are driven to the conclusion that the defendants had a fair and impartial trial, and that none of their substantial rights were prejudiced.

Wherefore the judgment is affirmed.

JACKSON v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 18, 1920.)

Criminal law §369(11)—On trial for arson evidence relative to prior fire held inadmissible.

On prosecution for arson in burning the house of another, evidence of defendant's contradictory statements when questioned as to his whereabouts, when four days before such fire the adjoining house, owned by him and insured, was burned, held inadmissible, as within no exception to the rule against evidence of other crimes.

Appeal from Circuit Court, Fayette County.

Garrett Jackson was convicted of arson, denied a new trial, and appeals. Reversed, with directions for new trial.

George Vaughn, of Lexington, for appellant.

Chas. I. Dawson, Atty. Gen., and Thos. B. McGregor, Asst. Atty. Gen., for the Commonwealth.

THOMAS, J. The appellant, Garrett Jackson, was indicted, tried and convicted in the Fayette circuit court of the crime of arson and, his motion for a new trial having been overruled, he prosecutes this appeal. The principal error relied on for a reversal is the introduction by the commonwealth, over defendant's objections, of incompetent testimony. Other objections to the verdict consist in improper argument of the commonwealth's attorney, which, however, was chiefly based upon the criticized evidence, and there was also objection by defendant to questions asked some of the witnesses by the commonwealth's attorney concerning the burning of some of defendant's property in years prior to the burning for which he was indicted. But the objection to this testimony was sustained and the witnesses were not permitted to answer.

The house for the burning of which the defendant was indicted was No. 216 Owens street, Lexington, Ky., and was owned by Anna Belle Jackson, the divorced wife of the defendant; she having procured title to it some years before in a litigation for divorce and settlement of property rights between them. Defendant was left the owner of the house adjoining it, being No. 214 Owens street, and some time before the fire,

for some reason not explained in the record, he conveyed that house to a woman by the name of Hattie Bean, but she never took possession nor exercised any control over it and defendant continued to reside in it, assessed it for taxation, and paid the taxes thereon. He also carried in his own name fire insurance on that house to the amount of \$1,200, as we gather from the evidence. There was another policy on it for \$1,000, but it appears that this policy was taken out by some attorneys to whom defendant had executed a mortgage to secure an attorney fee, and he claims that he had no knowledge of this latter policy. It seems that Anna Belle Jackson had something like \$2,000 insurance on her house, although the property was listed at a valuation of less than \$500. However, there is no testimony to show that her house was overinsured; on the contrary, it is shown, and not disputed, that the restoration of her house (which was not entirely destroyed by the fire) would cost about \$2,300. The fire which destroyed the house at 216 Owens street, belonging to Anna Belle Jackson, and for the burning of which the defendant was indicted in this case, occurred about 10:30 a. m., October 29, 1919. In the early part of the night of October 25, 1919, a fire almost completely destroyed the house which defendant claimed, but which he had deeded to Hattie Bean, as we have seen, and the testimony complained of was that given by the deputy fire marshal concerning the first fire of October 25. The substance of that testimony was a conversation between the fire marshal and defendant, which occurred the next day, concerning the whereabouts of the latter at the time of the burning of his house on the evening of October 25. According to the witness, the defendant told an incoherent and contradictory story about taking some unknown colored man to a stock farm located some distance from Lexington. The witness stated that the defendant first said on that occasion that he went only two miles into the country, and later said it was five miles, and still later said that it was nine miles; that he did not know the owner of the stock farm nor the name of the man he carried there, and was confused about the pike upon which the stock farm was situated. Upon objection to this testimony the court said (presumably in the presence of the jury, there appearing in the record nothing to the contrary), "I will instruct the jury that they will consider it for no other purpose except the method or practice of the defendant," to which statement of the court the defendant excepted. We think this testimony was irrelevant for any purpose on the trial under the indictment for burning the house at 216 Owens street, and it was highly prejudicial to the defendant's rights.

The general rule which obtains everywhere

is that evidence of crimes other than the one on trial is not admissible except for certain purposes, such as to establish identity, guilty knowledge, criminal intent, or motive for the commission of the crime for which the defendant is being tried, or where the facts in regard to the commission of the other offense and the one on trial are so interwoven, the one with the other, that they cannot be separated, or where the independent offense was perpetrated to conceal the crime for which defendant is being tried, or when a conspiracy is charged in the indictment under which defendant is being tried, and the facts concerning the commission of the independent crime are relevant to show the conspiracy. *Wigmore on Evidence*, § 300; *Jones on Evidence*, § 145; *Martin v. Commonwealth*, 93 Ky. 189, 19 S. W. 580, 14 Ky. Law Rep. 95; *Raymond v. Commonwealth*, 123 Ky. 368, 96 S. W. 515, 29 Ky. Law Rep. 785; *Morse v. Commonwealth*, 129 Ky. 294, 111 S. W. 714, 33 Ky. Law Rep. 831, 894; *Romes v. Commonwealth*, 164 Ky. 334, 175 S. W. 669; *Graham v. Commonwealth*, 174 Ky. 645, 192 S. W. 683; *Clary v. Commonwealth*, 163 Ky. 48, 173 S. W. 171; *Music v. Commonwealth*, 186 Ky. 51, 216 S. W. 116; *Tull v. Commonwealth*, 187 Ky. 413, 219 S. W. 409; and *Morgan et al. v. Commonwealth*, 188 Ky. 458, 222 S. W. 940.

The complained of testimony in the instant case was not admissible under any of the exceptions enumerated, or any others which we can recall. It did not tend to establish the identity of the person who burned the house at 216 Owens street or his guilty knowledge, intent, or motive, nor were the facts with reference to the burning of the first house so interwoven with those relating to the second fire as to be admissible under this exception to the general rule, nor could the commission of the crime of burning the first house, if it was incendiary, in any wise conceal the crime of burning the second house. Neither was it admissible to show any general reputation of defendant as an incendiary, if, indeed, such testimony would be admissible under any circumstances, nor would the crime of burning his own house establish a general course of conduct on the part of the defendant, if it were admissible to establish such course of conduct by proof of independent crimes. There was no conspiracy charge in the indictment against defendant; hence the testimony concerning the first fire was not admissible to establish a conspiracy.

The facts in the *Raymond Case*, supra, are very similar to those of the instant case. The defendant *Raymond* was indicted and tried for burning a barn belonging to *S. L. Vanmeter*, which burning occurred on August 6, 1905. A tenant house belonging to *Vanmeter* was burned on July 10, 1905, 26 days before the burning of the barn. The defend-

ant had been ousted from the premises of *Vanmeter* by writ of forcible detainer, and he was so angered thereat that he threatened to "get even" with *Vanmeter*. On his trial under the indictment for burning the barn the court permitted testimony of the fact that the tenant house had been burned 26 days before the barn was burned but after defendant had made his threats. This court, in reversing the judgment of conviction because of the introduction of the fact of the burning of the tenant house, said:

"The issue being tried by the jury was whether or not appellant burned *Vanmeter's* barn. The fact that a month before, *Ruark's* house had also been burned had no legal connection with the guilt or innocence of the accused of the offense with which he stood charged. The first was entirely collateral to the latter, and the fact that there was evidence that the accused had threatened to 'get even' with both *Ruark* and *Vanmeter* did not so connect the two offenses as to make the production of the evidence of one a necessity in establishing the other. At best, the fact that *Ruark's* house was burned was only an incident which would tend to establish a suspicion in the minds of the jury that he was also guilty of the offense for which he was being tried. The necessity of confining the evidence adduced to that which tends to establish the issue being tried is too apparent to need elaborate elucidation. The defendant is called upon to defend himself against the charge set forth in the indictment. He cannot intuitively know how to produce evidence to defend himself against a charge which he cannot in advance ascertain will be made against him."

The fact that the two fires in this case were closer together in point of time than were the two in the *Raymond Case* would make but little, if any, difference as to the admissibility of testimony concerning the first fire. To our minds there were more logical grounds for the admission of the complained of testimony in the *Raymond Case* which the court rejected than for the admission of the same character of testimony in this case. In that case the defendant had threatened the owner of the destroyed property, while no such facts exist in this case. If defendant burned his house at 214 Owens street and his motive therefor was to collect the insurance, his purpose was accomplished when that fire occurred, and the admitted testimony could serve no purpose but to blacken the reputation of the defendant in the estimation of the jury without elucidating any fact in connection with the burning of the house for which he was being tried.

It was not competent for the commonwealth's attorney to interrogate defendant or other commonwealth's witnesses concerning other fires occurring long prior to the one involved, but, since the court sustained an objection to the questions, we are not prepared to say that the error of the attorney in pro-

pounding them would be sufficient to authorize a reversal. Since the remarks of the commonwealth's attorney to which objection was made were based upon the testimony of the fire marshal, which we have discussed and held to be incompetent, it will not be necessary to consider or make other reference to them.

For the error indicated the judgment is reversed, with directions to grant a new trial and for proceedings consistent with this opinion.

EMPIRE COAL CO. et al. v. EMPIRE COAL MINING CO. et al.

(Court of Appeals of Kentucky. June 15, 1920.)

1. Appeal and error \S 1097(1)—Decision of Court of Appeals on former appeal conclusive.

Where present appellant was party to former appeal by present appellees, and a party to judgment of Court of Appeals affirming judgment of trial court, it is concluded by such judgment as to matters in issue between it and present appellees, former appellants, which were decided; existing final judgment on merits when matter is within jurisdiction being conclusive of rights of parties and privies in any other action, including matters which might have been litigated.

2. Appeal and error \S 1097(1)—Decision on former appeal conclusive, despite present appellant's prayer for appeal.

Where the present appellant specifically prayed an appeal against present appellee from so much of the judgment as fixed the amount of its recovery, while appellee prayed appeal against right of appellant to recover anything, as well as amount which trial court adjudged, an appeal first decided, decision of Court of Appeals on such first appeal by present appellees is conclusive against the present appellant, and entails dismissal of appellant's appeal.

3. Appeal and error \S 14(4), 595—Plaintiff and defendant may take and perfect appeals on same record.

Where both plaintiff and defendant pray and are granted appeal from the judgment of the circuit court to the Court of Appeals, they may each take and perfect their appeals at the same time and on the same record.

4. Appeal and error \S 338(3)—Cross-appeal must be taken before submission of original appeal.

Under Civ. Code Prac. \S 755, a cross-appeal may be taken by an appellee as a matter of right to have any errors of the trial court prejudicial to him reviewed and corrected, on hearing of the appeal against him, by judgment of the Court of Appeals, but such cross-appeal must be taken by appellee before submission of the original appeal in the Court of Appeals.

5. Appeal and error \S 338(3)—One of two independent appeals must be perfected before submission of other.

While, under Civ. Code Prac. \S 755, cross-appeal which appellee may take must be taken before trial of original appeal in Court of Appeals, a party who has been granted appeal from the circuit court's judgment, when his adversary also has been granted the same right and perfects appeal by filing the record in the Court of Appeals, also must perfect appeal before submission of the case for trial in the Court of Appeals.

6. Appeal and error \S 338(3)—Party aggrieved by judgment must take appeal or cross-appeal.

Plaintiff, complaining of the judgment, could have taken the appeal granted it by the circuit court, or could have prayed a cross-appeal with the same effect, as provided by Civ. Code Prac. \S 755, but could not, without taking appeal or cross-appeal, appear in the Court of Appeals and insist on affirmance of judgment for it, but, after affirmance, undertake an original appeal complaining of the amount of recovery.

Appeal from Circuit Court, Christian County.

Action by the Empire Coal Company against the Empire Coal Mining Company and others, wherein, after judgment and appeal by defendants, plaintiff company and Douglas Henry, its trustee in bankruptcy, appeal. Appeal dismissed.

See, also, 183 Ky. 699, 210 S. W. 474.

Trimble & Bell, of Hopkinsville, for appellants.

John T. Edmunds, of Hopkinsville, Stites & Stites, of Louisville, Thomas N. Greer, of Shelbyville, Tenn., Laffoon & Waddill, of Madisonville, and Guy H. Briggs, of Frankfort, for appellees.

HURT, J. The Empire Coal & Coke Company on the 15th day of March, 1911, executed a lease upon its mines, etc., in Christian county to the appellant Empire Coal Company. The duration of the lease was 10 years from its date. During the year 1916, the Empire Coal & Coke Company sold its mines and mining property to C. N. Bryan, who in turn sold same to J. D. Hutton and G. Bibbs Jacobs, who thereupon organized two corporations called the Empire Coal & Land Company and the Empire Coal Mining Company. Hutton and Jacobs were the owners of all the stock in both of these corporations, except a few shares issued in the names of members of their families. The latter corporation being in possession of the property, under some kind of an arrangement with the Empire Coal & Land Company, and engaged in working the mines and selling coals therefrom, when on February 13, 1917, the Empire Coal Company instituted an action at law

against the Empire Coal Mining Company, the Empire Coal & Land Company, J. D. Hutton, G. Bibbs Jacobs, and C. N. Bryan, alleging that the defendants were wrongfully in possession of the property and praying to recover same from them, and damages for its detention. Each of the defendants to this action filed a separate answer, in which were presented certain equitable defenses, which resulted in causing a transfer of the action from the law side of the docket to the equity side of it, and a final judgment in the case by the chancellor. Before the submission of the cause, the Empire Coal Company filed an amended petition, in which it averred as a fact its claim to the possession and use of the property under the lease to it from the Empire Coal & Coke Company, and that the defendants had acquired their rights to the property with full knowledge of the existence of the lease which it held, and prayed in the alternative that either it be granted the relief sought in its petition, or "that, if said relief cannot be granted in full, it be adjudged a lien on said property for whatever amount the court may adjudge to be due it, and all other relief which plaintiff may be shown to be entitled according to the rules of equity," etc. When the cause was submitted for trial and judgment, the court adjudged that the Empire Coal Company recover of C. N. Bryan the sum of \$8,000 for the value of its rights under the lease, but of this sum it should recover from the Empire Coal Mining Company and the Empire Coal & Land Company the sum of \$4,000, with a lien upon the property to secure the payment of the judgment and an order of sale of the property to satisfy the judgment, but with a judgment over in favor of the two latter companies against Bryan for the amount of the judgment, when it should have been paid by them. The Empire Coal Company was awarded a judgment for its costs against the Empire Coal Mining Company, the Empire Coal & Lumber Company, J. D. Hutton, G. Bibbs Jacobs, and C. N. Bryan. From so much of the judgment as adjudged a recovery of costs, and a lien upon the property for the satisfaction of the judgment of \$4,000 and its interest, against the Empire Coal Mining Company and Empire Coal & Land Company, the latter two companies, Hutton, Jacobs, and Bryan prayed and were granted an appeal to this court, and from so much of the judgment as adjudged a recovery of \$4,000 with its interest against the Empire Coal Mining Company and Empire Coal & Land Company, they prayed and were granted an appeal to this court. From so much of the judgment as adjudged a recovery in favor of the Empire Coal Company against the Empire Coal Mining Company and the Empire Coal & Land Company of only \$4,000 and its interest, and failed to ad-

\$12,500, the Empire Coal Company and was granted an appeal to this

court. From so much of the judgment as adjudged a recovery of only \$8,000, instead of \$12,500, and failed to adjudge a recovery in its favor of the further sum of \$2,200 against Bryan for the value of certain personal property, the Empire Coal Company prayed and was granted an appeal to this court.

The judgment was rendered on the 7th day of July, 1917, and on the 17th day of December thereafter the Empire Coal Mining Company, the Empire Coal & Land Company, Hutton, and Jacobs perfected their appeal to this court against the Empire Coal Company, and thereafter, on the 28th day of March, 1919, the action was tried upon that appeal in this court, and the judgment of the circuit court was affirmed. *Empire Coal Mining Co. et al. v. Empire Coal Co.*, 183 Ky. 699, 210 S. W. 474. After the judgment had been affirmed the Empire Coal Company collected the judgment which it had recovered against the Empire Coal Mining Company and the Empire Coal & Land Company. After the affirmation of the judgment the Empire Coal Company became a bankrupt, and before two years had expired, in fact lacking a day, after the rendition of the original judgment, the Empire Coal Company by its trustee in bankruptcy took this appeal upon the same record as the appeal of the Empire Coal Mining Company and others against it had been taken. The appellees here are the same as the appellants upon the former appeal, and the appellant here was the appellee upon the former appeal. The appellees, by answer in this court, set up several grounds upon which they insist that the present appeal ought to be denied. One of the grounds is that the question to be decided is *res judicata*, and that the appellant is estopped by the former judgment of this court, rendered upon the appeal of the present appellees, to again litigate the question which the appellants seek to have again considered upon the present appeal. It will be observed that the judgment of the circuit court determined that the appellant had a right of recovery against the appellees because of appellant's rights under the lease, and the amount which appellant was entitled to recover of appellees was adjudged by the circuit court to be the sum of \$4,000, and for the satisfaction of such sum awarded appellant a lien upon the property, which lien was directed by the judgment to be enforced. The appellees, upon their appeal from that judgment, among other things, insisted that the judgment against them was erroneous, because the lease was, as they asserted, valueless. The appellant was the sole appellee, and appeared in this court and by briefs of its counsel insisted upon an affirmation of the judgment which was adjudged by this court to be done, and that judgment has long since become final.

[1] The appellant being a party to the former appeal, and a party to the judgment of

this court which affirmed the judgment of the circuit court, it is difficult to suggest any reason why it should not be concluded by that judgment, as to matters and things in issue upon the former appeal between it and the appellees and which were decided by this court. It is needless to say that it is a doctrine of universal application to the judgments of all courts that an existing final judgment given upon the merits of the controversy where the matter is one within the jurisdiction of the court is conclusive of the rights of all the parties to that judgment and their privies in any other action upon the same matters in issue. Where a claim or demand has been thus adjudicated, it is a finality, and concludes the parties and their privies, not only as to all matters which were offered to sustain or defeat the claim in controversy, but as to all matters which are admissible for that purpose, and which includes everything which might have been properly litigated in the action, and when one sues another for a sum of money, the sum, which the court adjudges as the amount due, is a final determination upon that issue as long as the judgment remains unreversed. The reasons for the above principles rest upon the necessity and expediency of ending controversies and litigations, so that when a right has been once tried and determined, or opportunity has been once fairly given for the purpose, parties will not be permitted to vex others, as well as courts, with a second trial and adjudication of the same matter of controversy. There does not seem to be any greater reason for the application of these doctrines to trial courts than to those of review, and in the latter a party will not be permitted to split up his cause of action, and to have a trial by piecemeal, or to maintain a second action against the same party for the establishment of the same right in this court than in any other, where opportunity has been given him upon the first appeal to present his entire cause of complaint, and to have an adjudication upon it and an end of it. In *Montgomery v. Garr, Scott & Co.*, 37 S. W. 580, 18 Ky. Law Rep. 607, a party who was an appellee to a former appeal, which was determined by a judgment of this court, and who thereafter took an appeal from the same judgment against the parties, who were appellants upon the former appeal, and about the same matter of controversy, this court held that the party being a party to the former appeal and judgment was concluded by it. This view seems to be the logic of the law and in accordance with the policy of the law of this state, as well as that in every other, and why it should not be so there does not seem to be any sound reason. A party who is before this court with every opportunity afforded him to make complaint of the judgment of the court from which an appeal has been taken, and by taking advantage of the opportunity and rights that he has

to have any contention that he may desire to present to this court passed upon and determined, surely thereafter should not be permitted to come and require this court to again try the cause of controversy between him and his adversaries, as in that event there would be no end of litigation, and, when a judgment was rendered by this court, in place of its being a finality, it would be open to be set aside and disturbed at the caprice of any litigant.

[2] The appellant, however, now insists that it has a right to appeal from the judgment of the trial court, because it was granted an appeal by that court, and now desires to appeal from so much of the judgment as fixes the amount which it should recover of the appellees. As heretofore stated, the appellant did specifically pray an appeal against the appellees from so much of the judgment as fixes the amount of the recovery, while the appellees prayed an appeal against the right of appellant to recover anything, as well as the amount which the circuit court adjudged it to be entitled to recover of appellees. It thus now appears that appellant does not desire a readjudication by this court of the liability of the appellees to it, but desires to split the cause of controversy, and to leave the former judgment of this court undisturbed as to its right of recovery against the appellees, but to have the former judgment which was final, set aside to the extent that the amount of the recovery was fixed, and to have a readjudication of that question. It does not require any argument to demonstrate that such a proceeding as that, upon such terms and conditions, would not be permitted in a trial court, and why should it have standing in this court?

[3] It is true that where both the plaintiff and the defendant prays and is granted an appeal from a judgment of the circuit court to this court they may each take and perfect their appeals at the same time and upon the same record. *Allen County v. U. S. Fidelity & Guaranty Co.*, 122 Ky. 832, 93 S. W. 44, 29 Ky. Law Rep. 356, Section 755, Civil Code, provides as follows:

"The appellee may obtain a cross-appeal, at any time before trial, by an entry on the records of the Court of Appeals."

[4] Thus a cross-appeal may be taken by an appellee as a matter of right to have any errors of the trial court, prejudicial to him, reviewed and corrected, upon the hearing of the appeal against him, by a judgment of this court. A cross-appeal, however, must be taken by the appellee before the submission of the original appeal for trial in this court, in order that it may be heard by the court at the same time the original appeal is considered and disposed of, and to prevent the necessity of having a trial of the same issue, between the same parties, a second time. *Patrick v.*

Fletcher, 149 Ky. 730, 149 S. W. 1008; Covington Transfer Co. v. Piel, 9 Ky. Law Rep. 665, 6 S. W. 122; Louisville Tobacco W. H. Co. v. Calvert, 180 Ky. 718, 203 S. W. 567.

[5] While by the provisions of section 755, supra, the cross-appeal which an appellee may take requires it to be taken before the trial of the original appeal, the same reasons for the enactment of such provision, and the same reasons for the judgments of the courts, cited, would require a party, who has prayed and been granted an appeal from a judgment, and his adversary also has been granted the same right, and perfects his appeal by filing the record in this court, to also perfect his appeal before the submission of the action for trial in this court. There could be no question but what present appellees are bound by the former judgment of this court upon the appeal which they took against the appellant as to the matter in issue upon that appeal. As heretofore stated, the matter in issue upon that appeal was the right of the appellant to recover a sum against them and to subject their property for its payment, as well as the amount to which the appellant was entitled to recover. If the present appeal should be entertained, it would be to hold that appellant is not bound by that judgment, although the appellees are, which would be contrary to the general rule that the estoppel by a judgment is mutually binding upon all the parties to it. The appellant was not deprived of an opportunity, by the provisions of the Civil Code or otherwise, of bringing before this court any cause of complaint that it had of the judgment of the trial court with regard to the matter in controversy between it and the appellees, upon the former appeal, before the submission and trial of the cause upon that appeal and adjudication by this court upon the merits of the appeal.

[6] The appellant had two ways open by which it could have had, before the question was adjudicated upon by this court, any complaint which it had of the judgment presented to this court for trial, along with the appeal of the appellees. It could have taken the appeal which was granted it by the lower court, or it could have prayed a cross-appeal with the same effect as provided by section 755, supra, Civil Code. Hence it appears that appellant, alleging a cause of action against the appellees, secures, by the judgment of the chancellor, a recovery against them, but not the amount to which he claims to be entitled. The appellees appealed from that judgment, and the appellant also prayed and was granted an appeal. It, however, did not take its appeal, nor did it take a cross-appeal, but, instead, appeared in this court, and insisted upon the affirmance of the judgment. After the judgment is affirmed, it now undertakes an original appeal from the judgment involving the same matter which was the subject of the

decision of this court upon the former appeal. When the judgment of the chancellor was affirmed, it became the judgment of this court, from which no appeal can be taken to itself. If it had been reversed, then there would have been nothing to appeal from. It was the duty of appellant, when appellees took their appeal from the judgment to have before the submission and trial, either, to have effected its appeal from the judgment or to have taken a cross-appeal, and thus had all the questions in controversy, between the parties about the particular matter, disposed of by the one judgment of the court. This course should have been pursued, not because of any statutory provisions, but that this court should not be subject to the trial of the same matter of controversy between the same parties twice, and because when the decree of the chancellor was affirmed it became the judgment of this court, which is final, and not subject to appeal, and because of the common-law principle that when parties have an action pending before a tribunal having jurisdiction of the matter in controversy it is their duty to present to the court all their respective grounds to sustain its action, and to defeat it where the law authorizes them so to do, and when the court has determined the matter, it concludes both parties in another action or proceeding between them concerning the same issues. *Caston v. Caston*, 54 Miss. 513; *Still & Still v. Anderson*, 63 Miss. 545; *Howell v. Jackson*, 86 Ark. 530, 111 S. W. 999; *Corning v. Troy Nail Factory*, 15 How. 451, 14 L. Ed. 768; *Martin v. Hunter*, 1 Wheat. 355, 4 L. Ed. 97.

The appeal is therefore dismissed.

HOLLAND v. GOODE.

(Court of Appeals of Kentucky. June 15, 1920.)

Parent and child \S 13(1)—Father not liable for negligence of son driving son-in-law's automobile.

A father was not liable for the negligence of his son driving his son-in-law's automobile on the business of a third person, though with the consent of the father, who was present in the car as the guest of his son and the third person.

Appeal from Circuit Court, Trigg County.

Action by J. B. Goode against S. M. Holland. From judgment for plaintiff, defendant appeals. Appeal granted, and judgment reversed for new trial.

Smith & King, of Cadiz, for appellant.
Max Hanberry, of Cadiz, for appellee.

SAMPSON, J. Appellee Goode and wife were riding in a buggy drawn by a single horse on the pike leading from Cadiz to Hopkinsville, when they observed an automobile approaching at a rapid speed from the opposite direction. Goode reined his horse to the right of the road and stopped so as to give the car plenty of room to pass. Just as the car passed it struck Goode's vehicle, overturning it and precipitating both Goode and his wife to the ground. The car never stopped. Goode sustained severe injuries to his person for which he instituted this action against Holland to recover damages. A trial resulted in a verdict of \$200 for Goode, and Holland has entered a motion in this court for appeal.

His chief complaint is that the trial court erred grievously against him in overruling his motion made both at the conclusion of the evidence of plaintiff in chief, and at the close of all the evidence for a directed verdict in his favor, on the grounds: (1) That no negligence was shown to have been chargeable to Holland; (2) the car which struck Goode's buggy was not the property of Holland nor in his possession or under his direction or control, even though his 19 year old son was driving it and Holland himself was riding in the car.

From the evidence we learn that the car belonged to one Grasty, who is the son-in-law of Holland. Grasty was in the army and had left the car in the custody of the son of appellant, and the son was using it frequently, but not with the consent or dictation of Holland. On the occasion in question, a neighbor named Wall engaged young Holland to drive him to Hopkinsville to do some shopping, and appellant Holland was the guest of his son and Wall on the trip. There is no evidence whatever that Holland owned or controlled the car at the time of the injury. The facts do not bring this case within the recently announced automobile "family doctrine," which makes the parent liable for injury done by a car on a highway when driven by the infant child of the owner on theory that the car is being used by the child with the direction of the parent or with his consent, and for the purpose for which the car was intended when purchased, and therefore the child is the agent of the parent in the operation of the car. 2 R. C. L. 1199; 20 R. C. L. 529; *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N. S.) 59; *Stowe v. Morris*, 147 Ky. 386, 144 S. W. 52, 39 L. R. A. (N. S.) 224.

If Grasty had left the car in charge of Holland instead of the son, and Holland had directed his son to use the car on the occasion of the injury to Grasty, if he were injured, the father would have been liable even though the car was driven by the son. The son, according to the evidence, had the cus-

tody and control of the car independent of Holland, and, if he were guilty of negligence resulting in injury to Goode, the father was not liable even though the son could be made to respond in damages.

The uncontradicted evidence on the subject of ownership and control of the car made it the duty of the trial court to have sustained the motion of appellant Holland for a directed verdict in his favor. In overruling this motion the court committed reversible error.

Appeal granted, and judgment reversed for new trial not inconsistent with this opinion.

THOMAS v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 15, 1920.)

1. Criminal law §593—Refusal of continuance for absence of an attorney not abuse of discretion.

In prosecution for taking and detaining a woman against her will with intent to have carnal knowledge of her, denounced by Ky. St. § 1158, denial of continuance or postponement of trial on account of absence of an attorney of defendant's *held* not an abuse of discretion; defendant's rights not having been prejudiced.

2. Criminal law §659—Remark of mother of prosecutrix not erroneous as suggesting that she change statement.

In prosecution for taking and detaining a woman against her will with intent to have carnal knowledge of her, denounced by Ky. St. § 1158, where the mother of prosecutrix, while prosecutrix was under cross-examination, remarked that prosecutrix did not understand what was meant by a question, there was no error on any theory that the remark influenced prosecutrix to change her statement.

3. Witnesses §287(1)—Question of prosecutor to prosecutrix not erroneous as causing change in testimony.

In a prosecution for taking and detaining a woman against her will with intent to have carnal knowledge of her, in violation of Ky. St. § 1158, question to prosecutrix by an attorney assisting in the prosecution as to whether she understood a question propounded by defendant's counsel, *held* not erroneous as having caused her to change her testimony as it was permissible for the witness to make herself understood.

4. Abduction §1—Act must be against will of woman.

The act of taking and detaining a woman against her will with intent to have carnal knowledge of her, denounced by Ky. St. § 1158, must be done against the will of the woman, and such crime may be committed against a lewd woman.

5. Abduction — Proof of previous intimacy between defendant and others and prosecutrix admissible, on claim of consent.

In prosecution for taking and detaining a woman against her will with intent to have carnal knowledge of her in violation of Ky. St. § 1158, it is competent to show previous intimacy between defendant and the woman, or acts on her part of a lewd character with other men, occurring shortly before commission of crime alleged, where issue is whether or not acts constituting crime were against her will.

6. Damages — 206(1) — Court may require plaintiff complaining of injury to undergo physical examination.

Under certain conditions of fact which may exist in actions for personal injuries, the courts on proper showing will require a plaintiff to undergo an examination by competent persons to determine the extent and nature of the injuries complained of.

7. Witnesses — 298½ — Prosecutrix properly not required to submit to examination.

In a prosecution for having taken and detained a woman against her will with intent to have carnal knowledge of her, in violation of Ky. St. § 1158, the trial court did not err in failing to require prosecutrix on defendant's motion to submit to physical examination, though defendant claimed she had been intimate with other men.

Appeal from Circuit Court, Ballard County.

Earl Thomas was convicted of unlawfully taking and detaining a woman against her will with intent to have carnal knowledge of her, and appeals. Affirmed.

John M. Moore, of La Center, and Crossland & Crossland, of Paducah, for appellant.

Chas. I. Dawson, Atty. Gen., Thos. B. McGregor, Asst. Atty. Gen., and W. P. Hughes, of Frankfort, for the Commonwealth.

HURT, J. The appellant, Earl Thomas, was tried and found guilty of the crime of unlawfully taking and detaining a woman against her will with the intent to have carnal knowledge of her himself, which is denounced in section 1158, Ky. Stats. The sentence imposed upon him was two years' confinement in the penitentiary. There is no contention that the evidence was insufficient to support the verdict of the jury, or that the pleadings are not sufficient to support the judgment. A reversal of the judgment is sought because of alleged errors of the court in denying a continuance or postponement of the trial, errors made during the trial, and in overruling the motion for a new trial.

[1] (a) It is claimed that the court abused its discretion to the prejudice of the accused in denying him a continuance or the postponement of the trial until another and later day in the term. The ground upon which the continuance or postponement was sought was

the absence of one of the attorneys for the accused upon the day the action was set for and called for trial, and, if a postponement had been granted until a later day in the term, it would have enabled the attorney to have been present and participate in the trial and assisted in the conduct of the defense of the accused. The facts upon which the continuance or postponement was asked were as follows: The accused employed an attorney for his defense, who was made acquainted with all the facts of the case, and several days before the beginning of the term at which the trial took place, accompanied by his attorney, the accused sought to employ a partnership, consisting of two attorneys, and who resided in an adjoining county, to render him further assistance. The attorney because of whose absence the continuance or postponement was asked, when he was informed of the day upon which the action was set for trial, informed the accused and his attorney accompanying him that he could not be present in the Ballard circuit court upon that day, because of a previous employment in an action which would be upon trial in a court in another county upon that day, and that he could not undertake the employment unless a postponement of the trial could be had until a later day. It was the opinion of the attorney accompanying the accused that the postponement could be secured, and upon that condition the other attorneys accepted the employment. No arrangements were sought or made for a postponement of the trial until the action was called for trial, and the attorney for the commonwealth had answered that he was ready to proceed with the trial, when the absence of the attorney was set out in the affidavit, and the cause of his absence was stated to be that he was then engaged in a trial in the McCracken circuit court, but, if the trial of this cause was postponed for another day, that he could be present and would be. The attorney whom the accused first employed was present, and also one of the attorneys of the partnership whom he had employed as above stated. No reason of any kind is suggested in the affidavit as to why the two attorneys who were present could not fully and adequately conduct the defense of the accused, nor any peculiar fact, circumstance, or reason why the presence of the absent attorney was necessary in order to secure for the accused a fair and impartial trial and the full protection of the laws and the benefit of any fact that would tend to support the defense. It thus appears that there was no element of surprise in the failure of the attorney to be present when the case was called for trial. The accused was not expecting the presence of the attorney at that time, nor was the attorney intending to be present at that time,

nor was the accused or his counsel surprised by the calling of the action for trial.

It has been held that the absence of one or more of the attorneys for a defendant is not a ground for a continuance of the cause, and for the same reason not a valid cause for a postponement, unless it is made to appear that the defendant cannot have a fair trial without the presence of such attorney. *Tolliver v. Commonwealth*, 165 Ky. 312, 176 S. W. 1190; *Brown v. Commonwealth*, 7 Ky. Law Rep. 451; *Stephens v. Commonwealth*, 6 S. W. 456, 9 Ky. Law Rep. 742; *Cook v. Commonwealth*, 114 Ky. 586, 71 S. W. 522, 24 Ky. Law Rep. 1409; *Mullins v. Commonwealth*, 172 Ky. 92, 188 S. W. 1079; *Rose v. Com.*, 181 Ky. 337, 205 S. W. 326; *Howerton v. Com.*, 129 Ky. 482, 112 S. W. 606, 33 Ky. Law Rep. 1008. The cases of *Bates v. Com.*, 16 S. W. 528, 13 Ky. Law Rep. 135, *Leslie v. Com.*, 42 S. W. 1095, 19 Ky. Law Rep. 1203, *Cornellous v. Com.*, 64 S. W. 412, 23 Ky. Law Rep. 771, *Wilson v. Com.*, 134 Ky. 670, 121 S. W. 614, and *McDaniel v. Com.*, 181 Ky. 766, 205 S. W. 918, do not support a contrary doctrine. In those cases, wherein it was held that the failure to continue or postpone the trial of the accused on account of the absence of the counsel was prejudicial to the accused, the absence of the counsel resulted in a surprise upon the accused, or in a state of case wherein he was unable for want of time or other reason to secure other counsel, or on account of the nature of the facts, the unavoidable absence of a particular person as counsel, the accused was prevented from having a fair and full presentation of his defense. The facts in the instant case were few and easily understood. The two attorneys who represented the defendant upon the trial seem to have been perfectly conversant with all of them, and from an examination of the record it does not appear that anything could have properly been done in the defense of the accused which was not done. The court must have known from experience that, if the absent attorney on the day the action was called for trial was then engaged in the trial of one accused of murder in the court of another county, it was wholly problematical when the vicissitudes of that case which he was engaged in trying would permit him to be absent from that court so as to give attention to the defendant's defense in this action. The reason suggested as to why the denial of a postponement of the trial was prejudicial, to the effect that the absent attorney, if present, would probably have advised the accused to have refrained from offering in evidence in his defense the proof of certain things which the accused stated were facts, and the admission of which, it is argued, had the effect of creating a prejudice against him in the minds of the jurymen, does not seem to be meritorious,

as that would be to strangely conclude that the rights of the accused were prejudiced by permitting him to put into the evidence the proof of things which he contends were the true facts of the case. The granting of continuances and postponements of trials are matters within the sound discretion of the trial court, and must necessarily be, as the postponement of a trial affects the arrangement and conduct of a court, and, if the court does not abuse its discretion, a ruling of it upon such subjects will not be disturbed. The record does not demonstrate that the rights of the accused were in any wise prejudiced by the refusal to grant a continuance or postponement of the trial.

[2] (b) The appellant insists that the court erred to his prejudice in permitting the mother of the young woman whom the defendant is alleged to have unlawfully detained to remark to the attorney for defendant, while the young woman was undergoing cross-examination as a witness, that the witness did not understand what he meant by a question which he propounded to her, and that the remark suggested to the witness to change her statement, and that she did so, upon a question material to the defense. The court, of course, could not prevent the remark by the mother of the witness, and the record does not show that it was even heard by the judge. No objection was made to the remark, nor was the court's attention called to it, nor was there any request to the court to take any action in reference to it. A reading of all the testimony of the witness leads to the conclusion that the remark of the mother to the attorney had no influence upon the testimony of the witness, and was as harmless to the accused as his attorneys seemed to treat it at the time.

[3] It is also complained that an attorney who was assisting in the prosecution by a question which he propounded to the prosecutrix caused her to make a change in her testimony. This was a question addressed to her to know if she understood a question asked her by the attorney for the accused, and stating the question. No change, however, was made in her testimony because of the latter question, because the attorney for defendant had not permitted her to answer the question asked by him, except in part, having propounded another when she had only partially answered the question, and stopped her from making a complete answer. No impropriety could arise from permitting the witness to make herself understood, in reference to the question asked her by the attorney for defendant, and to prevent the leaving of the examination in such a condition that the jury might misunderstand the testimony. The question asked by the attorney for the commonwealth which is complained of did not indicate the answer desired.

[4, 5] (c) In defense of the charge against him the defendant deposed that on three different occasions previous to the one upon which it is claimed that he committed the crime for which he was convicted the prosecutrix had voluntarily submitted to having sexual intercourse with him, and that she had informed him that as the results of the intercourse she had become enceinte, and at her solicitation he had secured and administered to her a drug for the purpose of producing an abortion. The acts constituting the crime denounced by section 1158, supra, must, of course, be done against the will of the woman, and such a crime may be committed against a lewd woman, as well as a chaste one, but it is competent upon the trial of one accused of the crime to show previous sexual intimacy between himself and the woman, or acts on the part of the prosecutrix of a lewd and lascivious character with other men, occurring shortly before the commission of the crime alleged, where the issue is whether or not the acts constituting the crime were done against the will of the woman, and were or were not done by the accused with her consent, in corroboration of the claim that the acts were done with her consent. *Brown v. Com.*, 102 Ky. 227, 43 S. W. 214, 19 Ky. Law Rep. 1174; *Stewart v. Com.*, 141 Ky. 522, 133 S. W. 202; *Gravitt v. Com.*, 184 Ky. 436, 212 S. W. 430.

Before the trial was entered upon, the appellant moved the court to cause a physical examination of the young woman to be made by a competent physician to determine whether she had ever been guilty of a fornication, and during her cross-examination as a witness, in reply to questions propounded by the attorneys for the appellant, she testified that she had never had sexual intercourse with the accused nor any other person, and in answer to a further inquiry by the same attorneys she declared her willingness to submit to a physical examination to determine the truth of her statements. At this point the appellant renewed his motion. Both motions were, however, overruled, and of this the appellant complains. At the time the motions were made there had been no charge by affidavit, evidence, or otherwise to indicate to the court that any accusation of unchastity could be brought against her, or that the demonstration of whether or not she had been theretofore chaste or unchaste would shed any light upon the issues of the trial. Under such a state of case, it is apparent that a court would be without authority to assume and exercise a power to unnecessarily invade the privacy and offend the instincts of modesty of a young woman who is a mere witness in an action, and to humiliate her by directing a physical examination of her person, against her consent, upon the mere request of one whom she accuses of having made an unjustifiable assault upon

her. It is apparent that, if she is willing to submit to such an examination, the authority of the court is not necessary to effect it. Afterward, when the accused testified, he gave evidence of the improper intimacy of the prosecutrix with him, as before stated, and this was the first time anything was brought to the attention of the court upon which it could in any event have acted in directing a physical examination of the prosecutrix. The motion was not thereafter renewed. The foregoing is sufficient to show that the contention of appellant that it was the duty of the court to order such an examination made with the consent of the young woman or to require her to submit to such an examination, if against her consent, for his benefit, is not meritorious. A number of authorities are, however, cited by appellant in support of his contention that it was the duty of the court to order and require such an examination in cases of this character, but none of the authorities cited have any relation to such a state of case.

[6, 7] It is true that it is a well-established principle which applies to civil actions for damages for personal injuries that under certain states of case which may exist in such action the courts will, upon a proper showing, require a plaintiff to undergo an examination by competent persons to determine the extent and nature of the injuries complained of, as held in *Browder v. Commonwealth*, 136 Ky. 45, 123 S. W. 328, *Belt Electric Line Co. v. Allen*, 102 Ky. 551, 44 S. W. 89, 19 Ky. Law Rep. 1656, 80 Am. St. Rep. 374, and *L. & N. R. R. Co. v. Simpson*, 111 Ky. 754, 64 S. W. 733, 23 Ky. Law Rep. 1044. The authority of these cases is conceded, and it is said that in actions for divorce upon the ground of permanent impotency and such malformation as prevents sexual intercourse, on account of the necessity of the case, the courts have exercised the right of acquiring a party to the suit to submit to a physical examination. All such cases, however, are civil actions, wherein parties are invoking the aid of the courts to sustain them in their civil rights. In an action similar to the instant one the alleged wronged female is a mere witness. She is seeking no relief, and the commonwealth is conducting a prosecution for the good of social order and society. Our attention has not been called to any case wherein the court has exercised the authority to require or even have conducted, through its agencies, a physical examination and inspection of the persons of the women in cases of criminal prosecution for unlawful detention of them against their wills with the intention to have carnal knowledge of them, and kindred crimes. It has never been resorted to in practice in this jurisdiction, which is a convincing authority that the right does not exist. In the states of Texas and Arkansas

to falsely charge a female with having been guilty of fornication is by statute a penal offense and for which one may be punished by fine and imprisonment, but the courts of those states have refused, upon motion of a defendant, to require a prosecutrix to submit to an inspection and examination of her person to determine whether she had been guilty of fornication, unless she consents to the inspection. *Bowers v. State*, 45 Tex. Cr. R. 185, 75 S. W. 299; *Whitehead v. State*, 39 Tex. Cr. R. 89, 45 S. W. 10; *McArthur v. State*, 59 Ark. 436, 27 S. W. 628. In *McGuff v. State*, 88 Ala. 147, 7 South. 35, 16 Am. St. Rep. 25, the court expressed doubt that such a right existed, and refused to order a reversal of a conviction where the trial court had denied the request of one tried upon a charge of attempted rape to require a physical examination of the prosecutrix, holding that in any event it was a matter within the discretion of the trial court, and not reviewable. The exercise of such a right would lead to the greatest abuses, and would probably amount to a safe guaranty of an escape from punishment in many instances, in that modest women would oftentimes doubtless prefer to bear with the wrong visited upon them than to expose themselves to the humiliation of a physical examination. The evidence obtainable by a physical examination and inspection of the person of the prosecutrix would not prove an undue intimacy with the defendant, though it might prove such with another, and, in any event such evidence could only be corroborative of that of the defendant when his defense is that the acts constituting the detention were done with the consent of the prosecutrix, but, where a denial of the acts constituting the detention is made, and no question arises as to the consent of the prosecutrix to such acts, it is impossible to see how evidence obtained by a physical examination of the prosecutrix could shed any light upon the truth of the issues. Hence the court did not err in declining to order or require the physical examination of the witness.

The judgment is therefore affirmed.

WYNN v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 18, 1920.)

1. Criminal law §854(9)—Jurors may be taken to places of amusement, and one may temporarily withdraw.

A jury in a criminal case, in charge of the sheriff, may properly be taken to places of amusement, to restaurants, and the like, and the temporary withdrawal of a juror from the immediate presence of his fellow jurors or the

sheriff will not constitute such separation as will affect the verdict, where he remains in plain view of the sheriff and the remaining jurors.

2. Criminal law §698(1)—Objection waived by not calling to attention of court.

Where on cross-examination of a witness for the prosecution an objection was interposed to a question and the court made no ruling thereon, the notation being "Passed for the present," the defendant waived any objection he might have had where the matter was not brought again to the attention of the court.

3. Witnesses §274(1)—Question as to general reputation too broad.

A question on cross-examination, "Do you know the general reputation of Mr. F., the man who was killed?" was too broad, and the court did not err in sustaining objection thereto.

4. Witnesses §337(2)—Reputation of accused for morality, truth, and veracity may be inquired into where he testifies.

Generally speaking, where an accused testifies in his own behalf, his reputation for morality, truth, and veracity may be brought in question.

5. Criminal law §1170½(5)—Sustaining objection to questions on cross-examination of character witness harmless.

Accused in a homicide case cannot complain of a ruling sustaining an objection to a question on cross-examination as to the reputation of decedent, where from succeeding questions and answers it is manifest accused received the full benefit of any knowledge or information the witness had as to the decedent's reputation.

6. Criminal law §1170½(3) — No error where court sustains objections to incompetent questions.

Accused was not entitled to a reversal by reason of the prosecuting attorney having asked incompetent questions, where the court promptly sustained objections thereto and the questions were not answered; accused not requesting the court to do more.

7. Witnesses §242—Question as to statements of third persons to refresh recollection of character witness improper.

In a homicide case, the court erred in overruling an objection to the question asked a witness for the prosecution: "Take Mr. W. (the defendant). You testify that his character was bad. To refresh your recollection, I will ask you if you have ever heard it said that Mr. W. was charged with robbery and sent to the penitentiary?"

8. Criminal law §1186(4)—No reversal except for prejudicial error.

Under Cr. Code Prac. § 340, a conviction will not be reversed for error, where upon consideration of the whole case the court is satisfied that the substantial rights of the defendant were not prejudiced thereby.

Appeal from Circuit Court, Henderson County.

Jim Wynn was convicted of voluntary manslaughter, and he appeals. Affirmed.

Cass L. Walker, of Providence, and W. P. McClain and F. J. Pentecost, both of Henderson, for appellant.

N. Powell Taylor, and Marvin D. Eblen, both of Henderson, and Chas. I. Dawson, Atty. Gen., and T. B. McGregor, Asst. Atty. Gen., for the Commonwealth.

QUIN, J. Appellant was indicted for the crime of murder of W. H. Fox, committed June 13, 1918, upon trial was found guilty of voluntary manslaughter, was sentenced to a term of 21 years in the penitentiary, and to reverse that judgment has prosecuted this appeal. The evidence in the case being sufficient to sustain the verdict, it will be unnecessary to enter into a discussion of the events leading up to the crime for which appellant was indicted. We will address ourselves to the points raised by counsel in the brief, but in the inverse order of their presentment.

1. Alleged misconduct of the jury on the night of the first day of the trial. With the usual admonition the sheriff was placed in charge of the jury. He took the 12 men to witness a special attraction at the skating rink in Henderson. A space 60x180 feet had been set aside for the skaters; around the four sides, behind a railing, several rows of benches had been placed for spectators. The musicians were stationed near the center of the rink. The sheriff and members of the jury sat on benches. Harry High, one of the jurors, was a pianist and cornetist; upon request made to him and to the sheriff he was permitted to assist the musicians; he was seated within thirty feet of the place where the sheriff was sitting.

[1] In support of the motion for a new trial, and as grounds for reversal, it is said that at times during the performance people congregated around High and the piano, and in such numbers as to obstruct the view of the sheriff, thus affording designing persons opportunity to communicate with High, but the affidavits filed in support of the motion do not show that any communications affecting or pertaining to the trial were made. On the contrary, the affidavits of the sheriff, High, the remaining 11 jurors, and other persons state that during the whole evening High was in plain view of the sheriff, and that the opportunity to communicate with either High or the other jurors was at no time given, and High himself says that he did not speak to any one about the case, nor was it discussed in his presence at any time that evening. It is well recognized that a jury in a criminal case, in charge of the sheriff, may properly be taken to places of amusement, to restaurants, and the like, and that the temporary withdrawal of a juror from the immediate presence of his fellow jurors or the sheriff will not constitute such separation

as will affect the verdict where, as in the present instance, the juror of whom complaint is made was during the whole evening within plain view of the sheriff and the remaining jurors, and at a distance of not exceeding 80 or 40 feet.

We have had occasion to write upon this subject in numerous cases. The opinion nearest in point to the facts of this appeal is probably that of *Johnson v. Commonwealth*, 179 Ky. 40, 200 S. W. 35. In this case it was charged that the sheriff permitted one of the jurors to converse with a person other than a member of the jury, and two or more of the jury were permitted to enter a drug store and thereby separate themselves from the remaining members. It was not charged that anything improper was said or done by any of the jurors or persons, but there, as here, it was contended that the acts were in violation of the Criminal Code and the decisions of this court holding that although the case was not discussed between the jurors and other persons, and no juror did anything culpable, yet their conduct was improper because an opportunity was presented for the jury to discuss the case with strangers or others if they had been so minded. Affidavits of the sheriff and others were filed showing that the jurors whose conduct was complained of were in the presence of and within view of the sheriff and the other jurors; that the conversation referred to related to a matter having no connection with the case referred to; and the sheriff said the two jurors who went to the drug store were in plain view all the time. The court held it satisfactorily appeared the jurors were kept together, nothing happened that could have prejudiced the appellant, and no opportunity was given for any wrong.

In *French v. Commonwealth*, 100 Ky. 63, 37 S. W. 269, 18 Ky. Law Rep. 574, relied upon by appellant, the facts were similar to *Campbell v. Commonwealth*, 162 Ky. 106, 172 S. W. 110, distinguished in the *Johnson Case*, supra. In the *French Case* a juror was permitted to go to his place of business some blocks away, and therefore was separated from the remaining jurors and the sheriff—facts entirely dissimilar to those found in the present record.

In the recent case of *Shackelford, etc., v. Commonwealth*, 185 Ky. 51, 214 S. W. 788, we had occasion to deal with this same question, and in the opinion will be found many cases from this court on the subject. We there held that the facts were not sufficient to justify or warrant a reversal. The mere opportunity to converse with a juror, nothing else appearing, is not sufficient to secure a new trial. It is better, however, to avoid the appearance of wrongdoing. This can best be done in those cases where the jury must be kept together by not allowing any separation of the jurors for

any purpose during the trial when possible to do so.

2. The admission and rejection of evidence.

[2] (a) In the cross-examination by appellant's counsel of the witness Reynolds the following question was asked:

"I will ask you this: If after Devers was arrested Mr. W. J. Nisbet came up there and made an affidavit, Mr. Forsythe I believe it was made an affidavit, and claimed that whisky, and you delivered that whisky to him?"

An objection was interposed to this question, but there was no ruling of the court thereon; the notation being "Passed for the present." No further reference is made to the question or to the objection. There is nothing to show how the court ruled thereon. While the question was not answered, it does not appear it was ever brought again to the attention of the court. Thus appellant waived any objection he might otherwise have had in this regard.

(b) Objection is next made to certain other questions propounded the witness Reynolds. As to the first of these an objection by the commonwealth was sustained, but appellant made no avowal. As to the second there was an avowal following the ruling of the court sustaining an objection to the question. The question, however, pertained to a collateral matter and one not directly involved upon the trial, nor did the court's ruling constitute prejudicial or reversible error. The question had reference to the purchase of whisky from appellant.

(c) Two other questions addressed to the witness Reynolds were objected to. Those pertained to the trial of appellant on a charge of bootlegging. There had been previous testimony introduced on this question, which was one of the events that took place prior to the commission of the crime. It is urged the questions were unfair and tended to prejudice the minds of the jury. While their pertinency is not apparent, we do not think the questions or answers thereto were prejudicial.

[3-5] (d) After appellant had concluded his case the commonwealth introduced testimony to prove that appellant's reputation for truth and veracity, as well as his moral character, was bad. One of these witnesses, T. J. Montgomery, on cross-examination was asked this question: "Do you know the general reputation of Mr. Fox, the man who was killed?" An objection to this question was sustained. This is urged as error. The question was not in proper form, as will readily be seen. A man may acquire a reputation for many things. Generally speaking, where the accused testifies in his own behalf his reputation for morality, truth, and veracity may be brought in question; but here the inquiry was too broad. It should have been

more limited or restricted. In *McLain v. Commonwealth*, 171 Ky. 373, 188 S. W. 377, it was held competent to prove by those intimate with decedent that he was a man of overbearing disposition, quarrelsome, inclined to bring on difficulties and trouble; the plea was self-defense, and it was doubtful, under the evidence, as to who was the aggressor. If this was the idea sought to be covered by the question, it was embraced in the next succeeding question propounded the same witness, which was answered without objection. Similar objection was made to a question of like nature addressed to Dr. Williams. The witness was asked if he thought he knew the general reputation, etc., of deceased. From the succeeding questions and answers given without objection, it is manifest accused received the full benefit of any knowledge or information witness had as to Fox's reputation. However, no avowal was made as to any of the questions to which an objection was sustained.

[8] (e) The conduct of the county attorney in asking three certain incompetent questions is complained of. In each instance the court promptly sustained the objection. The questions were not answered. They were improper and should have no place in the record; but in acting upon the objections the court did everything requested by appellant's counsel.

[7] (f) It is said the court erred in overruling the objection to the following question asked a witness for the prosecution:

"Take Mr. Wynn. You testify that his character was bad. To refresh your recollection, I will ask you if you have ever heard it said that Mr. Wynn was charged with robbery and sent to the penitentiary?"

This question was improper, and due regard to the rules of evidence and practice should have so told the representative of the commonwealth. The answer was: "I have heard it; yes, sir." There had been some previous evidence in this connection, but not of such a nature as to make the question competent or proper.

[8] By provisions of section 340 of the Criminal Code a judgment of conviction shall be reversed for any error of law appearing in the record, when upon consideration of the whole case the court is satisfied that the substantial rights of the defendant have been prejudiced thereby. The record before us discloses certain errors, such, for instance, as the question next above referred to; but upon an examination of the entire record we are satisfied the court committed no error prejudicial to the substantial rights of accused.

Having reached this conclusion, it follows that the judgment appealed from must be and is affirmed.

CITY OF LOUISVILLE et al. v. J. ZINMEISTER & SONS.

(Court of Appeals of Kentucky. June 18, 1920.)

Taxation ¶237—Firm preparing green coffee a "manufacturer" within tax exemption statute.

A firm importing green coffee and putting it through the numerous processes necessary to make it fit for consumption is a "manufacturer" within Ky. St. Supp. 1918, § 4019a10, exempting from taxation, except by the state, machinery and products in course of manufacture of firms actually engaged in manufacturing, and their raw material actually on hand.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Manufacturer.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Suit by J. Zinmeister & Sons against the City of Louisville and others. From judgment for plaintiffs, defendants appeal. Affirmed.

Wm. T. Baskett and Joe S. Lawton, both of Louisville, for appellants.

E. C. Underwood, of Louisville, for appellees.

SAMPSON, J. One of the lines of business of J. Zinmeister & Sons, of Louisville, consists in the importation of green coffee which it prepares by putting it through several different processes, for use by the consumer. This company insists that it is a manufacturer of coffee products, and consequently is entitled to exemption from taxation for city purposes under section 4019a10, Kentucky Statutes, on all machinery and products in course of manufacture and "raw material actually on hand" at its plant for the purpose of manufacture.

The city of Louisville and its assessor, Baldauf, and tax receiver, Watts, assert the coffee machinery as well as the raw material or green coffee imported by appellee, to be prepared for consumption, are subject to the city tax, and were threatening to coerce Zinmeister & Sons to pay the taxes when that firm, in January last, instituted this action against the city of Louisville, its assessor and tax receiver, to obtain an injunction restraining the city, and its said officials from listing its said coffee machinery and raw material for taxation purposes in the city and from collecting or attempting to collect or levy any tax bill on said coffee machinery or raw material.

The petition avers that Zinmeister & Sons were on the 1st of September 1918, engaged in the actual manufacture of coffee products at its plant in Louisville, Ky.; that the plain-

tiff imports large quantities of green coffee which in its natural state is absolutely unfit for use for any purpose whatsoever; that said coffee so imported is manufactured by it into an article of commerce and an article of food or drink by and through certain processes employed by appellee which it recites as follows:

"The plaintiff first runs the green coffee through a separating machine which classifies or separates the coffee beans according to size, the larger beans being marketed at a higher level than the smaller beans.

"That, after the separation process above referred to is completed, it is necessary to thoroughly cleanse all coffee, thereby removing trash, pebbles, bag strings, and other foreign substances which through the carelessness of the planters are scooped up along with the coffee from the ground when being sacked; that to accomplish this cleansing process the plaintiff runs the coffee through a machine known as a milling machine.

"That after said coffee has been separated or classified as aforesaid, and after same has been cleansed by running through the milling machine, the plaintiff then carries said coffee, by means of automatic conveyers, to the roasting machines; that these machines are large, expensive, and scientifically constructed machines for roasting coffee, which consist in part of revolving perforated cylinders containing contrivances which automatically turn and shift about the coffee therein contained, thereby enabling said coffee to be completely and uniformly roasted; that said cylinder must be operated by highly experienced employees in order to secure the even roasting of said coffee and in order that said coffee may be roasted to the proper extent, neither more nor less.

"That, after said coffee is roasted, same leaves the cylinders at a tremendously high temperature, and it is necessary that the temperature of said coffee be immediately reduced in order to prevent said coffee from burning or from continuing to roast after the proper degree of roasting has been attained; that to accomplish this purpose the plaintiff places said coffee in specially constructed contrivances for reducing the temperature of said coffee by means of passing currents of cold air through said coffee.

"That after said coffee has passed through the cleansing process it is necessary to and the plaintiff does put said coffee through a further cleansing process, for which purpose the plaintiff uses specially constructed machinery which eliminates from the coffee all foreign substances whatever.

"That after the said process last mentioned is completed the plaintiff runs said coffee through a finished machine which polishes the coffee beans and thereby greatly improves its appearance and marketability.

"That after the polishing of the coffee bean as aforesaid the plaintiff places said coffee in certain scientifically constructed machines known as 'steel-cutting mills'; that by means of said mills the coffee bean is not ground or crushed, as was formerly the case in the handling of coffee, but, on the contrary, the said

coffee beans are actually cut into small particles of uniform size; that in the old-fashioned grinding of coffee there was a considerable waste, in that it was difficult to obtain a uniform size of the ground coffee; that to be properly handled in the boiler the coffee should be neither too fine nor too coarse.

"That in the said process of steel-cutting said coffee, by a specially constructed apparatus used in connection with said steel-cutting machine, the inside chaff or 'feather' of the coffee bean, together with any particles of dust or other deleterious substance that may be concealed in the crevice of said coffee beans, are entirely removed from said coffee beans; that the said chaff or feather is a deleterious substance, and its removal improves both the quality and appearance of the finished product.

"That, after leaving said steel-cutting mills, said coffee is packed by the plaintiff in specially prepared containers, the purpose of which is to prevent said coffee losing its strength and aroma; that a large part of the packing of said coffee is done by machinery."

Section 4019a10, Kentucky Statutes, provides in part as follows:

"All property subject to taxation for state purposes * * * shall be subject also to taxation in the county, city, school or other taxing district in which same has a taxable situs, except the following classes of property which shall be subject to taxation for state purposes only: * * *

"(2) Machinery and products in course of manufacture of persons, firms or corporations actually engaged in manufacturing and their raw material actually on hand at their plants for the purpose of manufacture."

If Zinmeister & Sons are engaged in the manufacture of coffee products within the meaning of the statute just quoted, then it is exempt from the tax which is sought to be enjoined, but, if the process through which it puts the green coffee which it imports from South America does not amount to or come within the term "manufacture," then it is liable to the tax, and the injunction must be dissolved.

The petition was amended, and to it as amended defendant, city of Louisville and others, filed demurrer, which the court, after careful consideration, overruled, and delivered an opinion sustaining the petition. The defendants then declined to plead further, and elected to stand upon their demurrer, whereupon the court entered a judgment granting the injunction against the city of Louisville and its said officials, restraining them and each of them from making out or certifying the tax bill and from collecting any taxes for city purposes for the year 1919 on any green coffee then in stock and all coffee machinery used by the plaintiff in the manufacture of its coffee products. From this judgment the city and its said officials appeal.

It is the contention of the city that Zin-

meister & Sons are not engaged in the manufacture of coffee, and it asserts that coffee grows and is not manufactured, that you cannot make or manufacture coffee, but can only grow it, and therefore the appellee company is not engaged in the manufacture of coffee or coffee products, but only in putting the original product through certain processes for its refinement and improvement.

On the other hand, Zinmeister & Sons contend that it is manufacturing coffee in the sense that the term "manufacture" is employed in the tax exemption statutes, in that it takes a raw material, which is then absolutely unfit for use, and converts it into a finished article of commerce. It does this work at its factory in Louisville, employing a large force of helpers and using extensive and scientific machinery. The processes which appellee uses cannot be performed at all by a small grocery or householder. These processes can be accomplished only by "specially constructed scientific machinery and by skilled manipulation."

In the recent case of Lorillard Co. v. Ross, Sheriff, 183 Ky. 217, 209 S. W. 39, we held that the word "manufacture," in the sense in which it is employed in the statute quoted above, does not import the means or methods employed, or the nature or number of processes resorted to, or the size of the factory or the number of hands it employs, or the volume of machinery in use, but the result accomplished, whether the article is manufactured or not. That was a tobacco case, and the Lorillard Company purchased large quantities of raw tobacco and gathered it in its warehouse or place of business in the city of Louisville for the purpose of regrading, stemming, and redrying it. This plant is equipped with engines and other machinery and appliances used to stem and redry the tobacco. It was the contention of the Lorillard Company that it was manufacturing tobacco, but the facts of that case clearly showed that the Lorillard Company only gathered raw tobacco at its warehouse in Louisville for the purpose of regrading, stemming, and redrying it before forwarding it to other factories where the tobacco was worked into a finished product ready for market and consumption by the public. We held that the tobacco and machinery in the warehouse were not at the plant for the purpose of manufacture in the sense in which the term "manufacture" is used in the statutes under discussion, and that the Lorillard Company was liable for the tax. That was on the idea that only a part of the work necessary to turn out a finished product ready for market and consumption was taken by the Lorillard Company at its place in Louisville, its main manufacturing establishment being located somewhere in the East, to which this tobacco

was carried after the few preliminary steps were taken at the Louisville house. The Eastern manufacturing establishment of the Lorillard Company made the tobacco into plugs, twists, cigars, etc., but no such product was turned out by the Louisville house. We therefore held that, as the Louisville plant did not produce a finished product ready for consumption or for sale to the public in general, it was not a manufacturing plant within the terms of the statute exempting such plant from city taxation. The Lorillard Company Case followed the principles announced in the American Tobacco Co. v. City of Bowling Green, 181 Ky. 416, 205 S. W. 570.

The case at bar is very similar to the tobacco cases, except that Zinmeister & Sons imported the raw material and perfected it for sale in the open market and consumption by the public. It takes the raw coffee in its natural state, wholly unfit for consumption by the human family, and so cleanses, purifies, dries, roasts, and reduces it as to make it an article of food and drink, suited to the marts of trade.

If a concern which buys tobacco, cleanses, regrades, and otherwise prepares it so as to make it an article of commerce, is a manufacturer, we can see no reason why a concern which imports green coffee and puts it through the several processes necessary to make it fit for human consumption is not also a manufacturer and the output the result of "manufacture" within the meaning of the statutes exempting manufacturers from taxation for city purposes.

We have held that a sawmill which converts logs into lumber is a manufacturing es-

tablishment (Bogart v. Tyler, Adm'r, 119 Ky. 637, 55 S. W. 709, 21 Ky. Law Rep. 1452), and that a flouring mill is a manufacturing establishment (Hall & Son v. Guthrie, 103 S. W. 721, 31 Ky. Law Rep. 801).

Whether a refining process applied to a given article is "manufacture" within the meaning of the Statutes (section 4019a10) depends upon the particular facts of the case. Courts have experienced much difficulty in determining what is a manufacturing establishment and what is included in the term "manufacture." There is no hard and fast rule by which to determine whether a given establishment is a "manufacture," but all the facts and circumstances must be taken into consideration in determining whether the establishment is or is not to be so reckoned. Whether it is such an establishment does not depend upon the size of the plant, the number of men employed, the nature of the business, or the article to be manufactured, but upon all these together and upon the result accomplished.

If raw material is converted at a factory or plant into a finished product, complete and ready for the final use for which it is intended, or so completed as that in the ordinary course of business of the concern it is ready to be put upon the open market for sale to any person wishing to buy it, the plant which turns it out is a manufacturing establishment within the meaning of the Statutes, and we think the trial court correctly held the petition of appellee good and awarded the injunction prayed. Wherefore, the judgment is affirmed.

Judgment affirmed.

**GENERAL BONDING & CASUALTY INS.
CO. et al. v. MOSELEY et al.
(No. 2834.)**

(Supreme Court of Texas. May 5, 1920.)

1. Corporations §99(2) — Contract right transferred in payment for stock is "property actually received."

Contract rights transferred to a corporation in payment for stock to the extent of their value are "property actually received" by the corporation within Const. art. 12, § 6.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Actually Receive.]

2. Corporations §99(2)—Insurance §33—Stock subscriber's note secured by first mortgage is "property actually received."

Note of a subscriber to corporate stock in an insurance company, secured by valid first mortgage on real estate to which the subscriber has title, accepted by the corporation in payment for the stock, is "property actually received," within the meaning of Const. art. 12, § 6, so that Acts 1909, c. 108, authorizing the incorporation of insurance companies whose capital consists of first mortgages on unincumbered realty in Texas, is valid.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Action by A. Moseley and another against the General Bonding & Casualty Insurance Company and others. To review the judgment for plaintiffs, defendants brought error in the Court of Civil Appeals, which affirmed (174 S. W. 1031), and defendants bring error. Judgment of the district court and Court of Civil Appeals reversed, and cause remanded to the district court.

Locke & Locke, of Dallas, for plaintiffs in error.

M. M. Harkins, of Quanah (Jno. W. Veale, of Amarillo, of counsel), for defendants in error.

PHILLIPS, C. J. The suit was one for the cancellation of a note and deed of trust upon land to secure its payment, given by the plaintiffs for shares of stock in the defendant corporation, upon the ground of fraud in the procurement of the plaintiffs' subscription agreement, and because, as is claimed, the note and mortgage were not "property" within the meaning of Section 6 of Article 12 of the Constitution, and hence could not be accepted in payment for the stock.

It is undisputed that the mortgage was a first mortgage upon the land; that the title of the plaintiffs to the land was valid; and that the value of the land was double the amount of the note, a policy of fire insurance for \$3,000.00 covering the buildings on the

property having been delivered to the corporation with loss payable to it.

The corporation was organized under Section 62 of the Act of 1909. By the provisions of that act its capital could consist of first mortgages upon unincumbered real estate in this state, the title to which was valid and whose market value was double the amount loaned thereon exclusive of buildings, unless the buildings were insured in some responsible company and the policy or policies were transferred to the corporation. Article 4711, Revised Statutes.

The question in the case is whether the subscribers' note and first mortgage upon the land constituted "property actually received" by the corporation, within the meaning of Section 6 of Article 12 of the Constitution.

[1,2] We held in *Washer v. Smyer*, 109 Tex. —, 211 S. W. 985, 4 A. L. R. 1320, that the naked note of a subscriber to the capital stock of a corporation given in payment of his subscription was not property within the intendment of the Constitution, since it was simply his promise to pay the amount of his subscription in another form. But under the established rule of decision in this court, that contract rights transferred to a corporation in payment for stock are, to the extent of their value, "property actually received" by the corporation, (*Cole v. Adams*, 92 Tex. 171, 46 S. W. 790)—a decision whose soundness cannot be controverted—a subscriber's note secured by a valid first mortgage upon real estate, accepted by the corporation in payment for stock, cannot be held as other than property in the full sense of the Constitution. The corporation thereby obtains something more than the mere promise of the subscriber to pay. It obtains the right to have the land appropriated to the payment of the note. This is a valuable right, a property right, as fully so as any contract right, and, in general, as valuable as any such right. The corporation receives it and owns it. It constitutes a distinct asset in its hands; recognized, generally, as one of the most stable, desirable and easily convertible forms of property, as instanced by the Legislature's Act authorizing the capital of such corporations as this one to consist of such mortgages.

The right acquired under such mortgages is clearly property, and the law was therefore one within the power of the Legislature to enact.

The judgments of the District Court and Court of Civil Appeals are reversed and the cause remanded to the District Court for trial upon the issues of fraud.

HAWKINS, J. In this case I will file later, a statement of my views.

MASSIE v. HUTCHISON et al. (No. 2595),
(Supreme Court of Texas. May 19, 1920.)

Trial \Rightarrow 255(4)—**Instruction to limit witness' testimony unnecessary in absence of request.**

A party who objected to the admission of testimony, admissible for certain purposes, but did not ask the trial court to place any limitation thereon by special charge or otherwise, is not entitled to have the judgment of the trial court reversed for failure to limit the testimony.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Suit by Rachael L. Hutchison and others against W. M. Massie. There was a judgment in favor of defendant which was reversed by the Court of Civil Appeals (159 S. W. 315), and defendant brings error. Reversed and remanded.

Stephens & Miller, of Ft. Worth, for plaintiff in error.

Randolph & Randolph, of Plainview, and T. P. Adams, of Wichita Falls, for defendants in error.

GREENWOOD, J. The defendants in error sued the plaintiff in error in the district court of Floyd county to recover the title to, and possession of, a section of land in that county. The district court rendered judgment for plaintiff in error.

It was shown by uncontradicted evidence that at one time the land belonged to Dr. Jones and his wife, and that defendants in error were their heirs and were entitled as such heirs to recover, unless Dr. Jones and wife conveyed the land in 1878 to one C. W. Haxton, under whom plaintiff in error Massie claimed.

The evidence offered by plaintiff in error Massie to prove the existence, contents, and destruction of a deed to the land from Dr. Jones and wife to C. W. Haxton, was entirely circumstantial.

Certain collateral facts having a tendency to support the conclusion that the deed was executed were testified to by the witnesses Marion T. Chase and Angie Idol. Defendants in error objected to the admission of this testimony, but did not ask the trial court to place any limitation thereon, by special charge or otherwise. The Court of Civil Appeals of the Seventh District held that the testimony should not have been excluded, on defendants

in error's objection, but reversed the judgment of the district court because of the failure of the presiding judge to give a limiting charge, without request therefor. 159 S. W. 319.

The writ of error was granted to settle the conflict between the decision ordering a reversal of the trial court's judgment for the judge's omission to give an unrequested, limiting charge, and numerous decisions of this court and of other Courts of Civil Appeals.

Shumard v. Johnson, 66 Tex. 72, 17 S. W. 398, is decisive against the action of the Court of Civil Appeals in ordering the reversal of the trial court's judgment. There it is said:

"The contract between Johnson and Durie was objected to in the court below on several grounds, but, in this court, the only complaint is that in admitting the document the court below did not inform the jury of the restricted purposes for which it was allowed. There was no request for such statement of particular uses at the time the paper was put in evidence, or in the final submission of the case to the jury. There was no error in the mere omission of the court to qualify the admission of the contract, of its own motion, without suggestion or request of defendant. * * * The appellant cannot complain here that the court below was not more vigilant for him than he was for himself."

Some of the cases, wherein this court and the Courts of Civil Appeals have announced the same rule as did Shumard v. Johnson, are Walker v. Brown, 66 Tex. 556, 1 S. W. 797; Ry. Co. v. Johnson, 72 Tex. 100, 10 S. W. 325; Ry. Co. v. George, 85 Tex. 158, 19 S. W. 1036; Roos v. Lewyn, 5 Tex. Civ. App. 593, 23 S. W. 450, 24 S. W. 540; Ins. Co. v. Baker, 10 Tex. Civ. App. 515, 31 S. W. 1073; Hartt v. Cattle Co. (Civ. App.) 210 S. W. 615.

Because of the error of the Court of Civil Appeals in holding that defendants in error were entitled to have the judgment of the trial court reversed for failure to limit the witnesses' testimony, in the absence of a request that any such limitation be put on the testimony by defendants in error, it is ordered that the judgment of the Court of Civil Appeals be reversed; but, inasmuch as that court has not disposed of defendants in error's assignment of error challenging the sufficiency of the evidence to sustain the judgment for plaintiff in error, it is ordered that this cause be remanded to the Court of Civil Appeals for the determination of that assignment.

ST. LOUIS & S. F. R. CO. v. WHITE.
(No. 2659.)

(Supreme Court of Texas. June 2, 1920.)

Carriers ⇨229(2)—Measure of damages for delay in delivery of stock stated.

Where a negligent delay in delivering stock resulted in the loss of the market on the day of arrival, as there was no time left to shape them for market on that day, the proper measure of damages is the difference between market value, had they arrived without delay or injury, and market value on the first market after their arrival for which they could be prepared by exercise of reasonable diligence.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by J. B. White against the St. Louis & San Francisco Railroad Company. Verdict and judgment for defendant in the district court. From an affirmance by the Court of Civil Appeals (160 S. W. 1128), defendant brings error. Judgments affirmed.

A. H. Dashiell, of Terrell, and Andrews, Streetman, Burns & Logue, of Houston, for plaintiff in error.

Wynne & Wynne, of Kaufman, for defendant in error.

GREENWOOD, J. In this case, defendant in error recovered of plaintiff in error damages sustained by cattle belonging to defendant in error from rough handling and delays occasioned by the negligence of plaintiff in error in transporting the cattle to market at Chicago. Had ordinary care been exercised, plaintiff in error would have delivered the cattle in time for them to have been sold on Monday's market. The cattle were delivered at 2:30 p. m. on Monday. The market closed 30 minutes later. There was testimony that this was too late to place the cattle on the market before Tuesday, because it required an hour or an hour and a half to shape up the cattle for the market. The decline in the market price of the cattle from Monday to Tuesday was 15 cents per 100 pounds. Defendant in error was allowed compensation for this decline in the verdict on which judgment was rendered by the trial court. The charge stated the measure of damages to be the difference between the market value, at Chicago, of the cattle, had they arrived without delay or injury, and their market value, at Chicago, upon the first market after their arrival for which they could be prepared by the shipper by the use of reasonable diligence.

Plaintiff in error urged in the Court of Civil Appeals, and urges here, that the delivery of the cattle, before the close of the mar-

ket on Monday, precluded any recovery by defendant in error on account of the decline in the market after Monday, regardless of the time required to put the cattle in shape for sale on the market. In support of this position the decision of the Texarkana Court of Civil Appeals is cited in *O., R. I. & G. Ry. Co. v. Young & Ball*, 107 S. W. 127. In that case, it was held that the proper measure of damages for delay in a cattle shipment was the difference in market value of the cattle, at destination, at the time of their delivery to the consignee, and their market value, at destination, at the time and in the condition in which they should have arrived, and it was further held that the shipper could not recover for any loss occurring after the delivery of the cattle to the consignee because the cattle could not be rested and fed and watered, after delivery, before the close of the day's market.

The Dallas Court of Civil Appeals, in refusing to follow the decision in *O., R. I. & G. Ry. Co. v. Young & Ball*, supra, cited with approval the opposite conclusion of the Austin Court of Civil Appeals, in an opinion of Chief Justice Key in *Ft. W. & R. G. Ry. Co. v. Albin*, 142 S. W. 933.

The writ of error was granted because of the conflict between the decision in this case, reported in 160 S. W. 1128, which follows the *Albin Case*, and the decision in *O., R. I. & G. Ry. Co. v. Young*.

There is no difference in actual loss to a shipper from a negligent failure to deliver cattle until the close of a day's market and from such failure to deliver until too near the market's close to effect sales. The shipper cannot reasonably be required to do more in getting cattle on the market than to exercise ordinary care. Complete compensation for the actual consequence of the carrier's wrong would be denied, were the shipper not allowed to recover for a decline in market prices which occurred before he could sell on the first market open to him, before he was at all in default, and it cannot be said to be a negligent act in law to prepare cattle for market in the customary way. In *G., C. & S. F. Ry. Co. v. McCarty*, 82 Tex. 612, 18 S. W. 716, it seems to have been assumed that the time, after arrival, at which cattle could have been made ready for the market, would be the time to ascertain their value, for the purpose of measuring damages for delay in their shipment. See, also, *St. L., I. M. & S. Ry. Co. v. Henry*, 81 S. W. 334; *Ayres v. O. & N. W. Ry. Co.*, 75 Wis. 215, 43 N. W. 1122.

In our opinion, the question was rightly determined by the Court of Civil Appeals, and the judgments of the district court and of the Court of Civil Appeals are affirmed.

COX v. ST. LOUIS & S. F. R. CO.
(No. 2624.)

(Supreme Court of Texas. June 2, 1920.)

1. Commerce ⇨27(5) — Trucker unloading freight shipped to another state employed in "interstate commerce."

A trucker injured in unloading freight shipped from another state is employed by a carrier in "interstate commerce," and liability therefor is governed by the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665.)

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. Master and servant ⇨180(1)—Fellow-servant rule under federal act defined.

The federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) fixes liability on the carrier for injuries from negligence of any employé of the carrier whether negligent employé is a vice principal or a fellow servant of the injured employé.

3. Master and servant ⇨288(13) — Assumption of risk after assurance of safety of manner of unloading truck held for jury.

Assumption of risk by a trucker injured in unloading a truck in a required manner, after he had been assured of its safety by his foreman assisting in the work, held for the jury.

4. Master and servant ⇨220(8)—Assumption of risk after assurance of safety defined.

Where, after calling attention to possible danger, a servant, relying on his foreman's assurance of safety, proceeds to do work in a required manner, he cannot be charged with assumption of risk unless the danger is so obvious that an ordinarily prudent person would appreciate it, despite the assurance.

5. Master and servant ⇨217(29) — Railroad trucker held not to have assumed risk of foreman's negligence.

Where a railroad trucker assisted by his foreman in unloading bundles from a truck in a manner required by the foreman was injured by the foreman swinging his end of a bundle before the trucker was ready, and before it reasonably appeared so, there was no assumption of risk as to the foreman's negligence in swinging his end, as the nature of the act precluded knowledge or discovery thereof in time to have averted injury.

6. Appeal and error ⇨1083(1)—Judgment of trial court affirmed notwithstanding findings of Court of Civil Appeals.

Where the Court of Civil Appeals does not find against any fact essential to plaintiff's recovery and the Supreme Court does not approve its conclusions of law on which it based its judgment reversing a judgment for plaintiff, its judgment will be reversed and the judgment of the trial court affirmed.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by S. E. Cox against the St. Louis & San Francisco Railroad Company. Judg-

ment for plaintiff was reversed by the Court of Civil Appeals (159 S. W. 1042), and plaintiff brings error. Reversed, and judgment of the district court affirmed.

Randell & Randell and B. L. Jones, all of Sherman, for plaintiff in error.

Head, Smith, Maxey & Head, of Sherman, and Andrews, Ball & Streetman, of Houston, for defendant in error.

GREENWOOD, J. This was a suit by plaintiff in error, Cox, to recover damages of defendant in error, St. Louis & San Francisco Railroad Company, for personal injuries.

Cox was employed by the railroad company as a trucker at Hugo, Okl. He was directed by his foreman, named Reams, to unload four bundles of paper, each weighing 110 pounds, by throwing them, with Reams' help, from the truck to the top of a pile some four feet in height, while resting the handles of the truck on the warehouse floor and while holding down the handles with one foot. Reams was authorized by the railroad company to determine the manner in which the paper should be unloaded and to direct Cox in unloading same. The paper was part of a shipment from Paris, Tex., to Hugo, Okl. Cox had started to raise the truck handles so as to dump the paper from the truck to the floor, with a view of raising it from the floor to the top of the pile, when he was stopped by the above directions from Reams. Cox said when he received his directions: "Mr. Reams, the truck will dump." Reams replied:

"They won't do anything of the kind. Back up and let them down and put your foot on the truck handle, and we will unload from the truck."

While Reams and Cox were unloading the bundles in accordance with Reams' instructions and while throwing off the second bundle, the truck handles suddenly struck Cox in the chest, causing his injuries. The handles flew up when Cox's foot released same, which was occasioned by the act of Reams in swinging his end of the bundle of paper before Cox was ready to swing his end and before it reasonably appeared to Cox that he was ready to make the swing. The acts of Reams, in the manner in which he directed the bundles to be unloaded and in too hastily swinging his end of the second bundle, were negligent; and his negligence was the proximate cause of the injuries to Cox. All of the above facts were pleaded and have support in the evidence. The charge of the trial court authorized a verdict for Cox on findings of negligence of Reams, with respect to either the manner in which he directed Cox to do the work or the manner in which

he (Reams) did his part of the unloading. The trial court entered a judgment for Cox on a general verdict.

The Dallas Court of Civil Appeals reversed the trial court's judgment and rendered judgment for the railroad company on two conclusions of law, viz.: First, that Reams was a fellow servant of Cox; and, second, that Cox assumed the risk of injury from Reams' acts of negligence. 150 S. W. 1042.

[1] Cox suffered his injuries while he was engaged in unloading freight shipped from Texas to Oklahoma. He was therefore injured while employed by the carrier in interstate commerce, and liability for his injuries is governed by the federal Employers' Liability Act. *Southern Pacific Co. v. Industrial Accident Commission*, 251 U. S. 259, 40 Sup. Ct. 130, 64 L. Ed. —.

[2] The plain words of the federal act, no less than the decisions construing it, fix liability on the carrier for injuries resulting from the negligence of any employé of the carrier, regardless of whether the negligent employé is a vice principal of the carrier or a fellow servant of the injured employé. So, the conclusion of the Court of Civil Appeals cannot be upheld denying a recovery to Cox on the ground that Reams was his fellow servant. *Boldt v. Pennsylvania R. R. Co.*, 245 U. S. 445, 38 Sup. Ct. 139, 62 L. Ed. 885; *Second Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

[3-5] The case not coming within the class as to which the defense of assumption of risk was eliminated by the act of Congress, we must apply the common-law rules in reaching a conclusion as to how far that defense was available to the railroad company.

In behalf of the railroad company, it is urged that the negligence causing the injuries consisted in the manner in which the work was required to be done; that such manner was known to Cox; and that the dangers incident thereto were both obvious and appreciated by Cox, who was an experienced trucker. Though we eliminate from consideration the act of Reams in swinging too hurriedly his end of the bundle of paper, we cannot hold that it was conclusively shown that Cox assumed the risk of injury from the manner in which the paper was unloaded. It is true that Cox was an experienced trucker. It is true that Cox knew the manner in which he was ordered to do the work. And it is true that Cox was apprehensive of danger at the time he received Reams' order. But, after Cox had voiced his apprehension of danger, he was assured by one having the authority from the railroad company to determine and direct how the work should be done that his fears were unfounded; and he testified that, after receiving this assurance, he believed that the

work could be done as directed, with safety, by the exercise of ordinary care.

An apprehension of danger, which has been removed through unfounded assurances of safety, can have no more effect in determining whether a risk has been assumed, than if it had never existed. It must, of necessity, be a subsisting apprehension if it is to furnish an essential element to sustain the defense of assumed risk. Hence the soundness cannot be questioned of the rule that where the servant proceeds to do the master's work in a required manner, involving negligence for which the master is responsible, after calling attention to possible danger therein, in reliance on an assurance of safety by the master through one selected by him to direct the work, and the servant is injured by reason of the manner in which the work is done, the master cannot charge the servant with the assumption of the risk of his injury, unless the danger of doing the work in the manner required is so obvious that an ordinarily prudent person must appreciate it, despite the assurance of safety. *Industrial Lbr. Co. v. Bivens*, 47 Tex. Civ. App. 896, 105 S. W. 837; *Orange Lbr. Co. v. Ellis*, 105 Tex. 371, 150 S. W. 582; *Gila Valley Ry. Co. v. Hall*, 232 U. S. 102, 34 Sup. Ct. 229, 58 L. Ed. 521; *Coal & Coke Ry. v. Deal*, 281 Fed. 610, 145 C. O. A. 490; *Lord v. Wakefield*, 185 Mass. 218, 70 N. E. 123; *Lack Singletree Co. v. Cherry*, 166 Ky. 799, 179 S. W. 1072; *Richey's Federal Employers' Liability Act*, § 73, p. 185; *Street's Ed. Shearman & Redfield on Negligence*, § 215, p. 614.

Here it was the duty of Cox to obey Reams' directions. There is no evidence that Cox ever attempted the work of unloading with the aid of a coemployé from a truck, with his foot on the handles, as Reams required the work to be done. His conduct was consistent with his reliance on Reams' assurances against danger. Clearly it was for the jury to determine whether, in the face of Reams' assurances, Cox appreciated the risk of his injury or believed, as he testified, that the work could be safely performed; and, even more clearly was the question one on which conflicting inferences might be drawn, and hence essentially one for the jury, as to whether the risk of injury was under all the attendant circumstances so obvious that a person of ordinary prudence would have appreciated it, notwithstanding Reams' assurances.

As said by Justice Holmes in *McKee v. Tourtellotte*, 167 Mass. 69, 44 N. E. 1071 (48 L. R. A. 543):

"When we say that a man appreciates a danger, we mean that he forms a judgment as to the future, and that his judgment is right. But if against this judgment is set the judgment of a superior, one too who, from the nature of the callings of the two men and of the

superior's duty, seems likely to make the more accurate forecast, and if to this is added a command to go on with his work and to run the risk, it becomes a complex question of the particular circumstances whether the inferior is not justified as a prudent man in surrendering his own opinion and obeying the command."

Under the charge of the trial court, a verdict was authorized for Cox on the finding that his injury was the proximate result of negligence on the part of Reams in the way in which he did his part of the work of unloading the paper; and the Court of Civil Appeals finds that Reams did swing his end of the bundle of paper before Cox was ready to swing and before it reasonably appeared to Reams that Cox was ready, and that such conduct was negligence on Reams' part, causing the injury.

As stated above, Cox did not, as matter of law, assume the danger arising from the endeavor to unload from the truck. There is an utter lack of evidence to support the conclusion that Cox assumed the risk attributable not to that endeavor but to Reams' want of care in pursuing it. The law authorized Cox to assume that Reams would exercise ordinary care in doing his part of the work. The result of Reams' departure from the use of such care was instantaneous injury to Cox. The nature of Reams' act precluded knowledge of it by Cox or its discovery by him in time to have averted the injury. Under these conditions, there could be no assumption of the risk which arose from Reams' negligence in handling his end of the bundle of paper. *C. & O. Ry. Co. v. Proffitt*, 241 U. S. 468, 36 Sup. Ct. 620, 60 L. Ed. 1102; *C. & O. Ry. Co. v. De Atley*, 241 U. S. 314, 36 Sup. Ct. 310, 60 L. Ed. 1016; *T. & P. Ry. Co. v. Behymer*, 189 U. S. 468, 23 Sup. Ct. 622, 47 L. Ed. 905; *C., R. I. & P. R. Co. v. Ward*, 252 U. S. 18, 40 Sup. Ct. 275, 64 L. Ed. —; *Pope v. K. C., M. & O. Ry. Co. of Tex.*, 207 S. W. 514.

In *T. & N. O. Ry. Co. v. Kelly*, 98 Tex. 137, 80 S. W. 79, the court approved a declaration of Justice Gaines in *Railway v. Somers*, 78 Tex. 442, 14 S. W. 780, which is as applicable to acts of negligence by employes, for which the employer is answerable, as to defects, and which is:

"Because a servant knows of one defect he does not take the risk of another of which he has no knowledge, and if both contribute to injure him, he is entitled to recover, provided but for the unknown defect the accident would not have happened."

[6] In this case, since the Court of Civil Appeals made no finding against the exist-

ence of any fact essential to plaintiff's recovery, and since we do not approve the conclusions of law, on which alone that court based its judgment, it becomes our duty, under the settled practice in this court, to reverse the judgment of the Court of Civil Appeals and to affirm the judgment of the district court. *Beck v. Texas Co.*, 105 Tex. 303, 148 S. W. 295; *Tweed v. Tel. Co.*, 107 Tex. 247, 166 S. W. 696, 177 S. W. 957.

It is so ordered.

HEFNER v. FIDELITY & CASUALTY CO. OF NEW YORK. (No. 2630.)

(Supreme Court of Texas. June 9, 1920.)

1. Insurance \Leftrightarrow 665(5)—Evidence showing disability resulting from accident was total, but not immediate.

In an action by an attorney on an accident insurance policy for the indemnity provided therein for immediate, continuous, and total disability, evidence held to show that the disability of the insured resulting from the accident, while total within the meaning of the policy, was not immediate.

2. Insurance \Leftrightarrow 539(6)—Attributing insured's condition to disease, and not to accident, no excuse for delay in giving notice of loss.

The fact that physicians, who attended a person accidentally injured, attributed his condition to disease, and not to the accident, does not excuse a failure to give the company notice of the accident as soon as reasonably possible, as required by the policy.

Certified Question from Court of Civil Appeals of Eighth Supreme Judicial District.

Action by T. J. Hefner against the Fidelity & Casualty Company of New York. Judgment for defendant was affirmed on appeal by the Court of Civil Appeals (160 S. W. 330). On certified question. Question answered.

Clay Cooke and J. W. Parker, both of Pecos, for plaintiff.

Neill & Armstrong, of El Paso, for defendant.

GREENWOOD, J. The Court of Civil Appeals has certified the question as to whether the trial court erred in giving a peremptory instruction for appellee.

We answer that there was no error in the action of the trial court, for the reasons given in the opinion on rehearing by Associate Justice Higgins.

**PRUDENTIAL LIFE INS. CO. OF TEXAS
v. PEARSON. (No. 159-3145.)**(Commission of Appeals of Texas, Section B.
May 26, 1920.)

1. Corporations \S 99(2)—Insurance \S 33—
Note secured by deed of trust accepted by
insurance company in payment for stock
"property actually received."

Note of subscriber to corporate stock in an insurance company, secured by valid deed of trust on real estate to which the subscriber has title, accepted by the corporation in payment for the stock, is "property actually received" within the meaning of Const. art. 12, § 6.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Actually Receive.]

2. Trial \S 143—Conflicting evidence will not support directed verdict.

Conflicting evidence upon an issue will not support directed verdict.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Suit by H. S. Pearson against the Prudential Life Insurance Company of Texas. To review decree for plaintiff, defendant brought error in the Court of Civil Appeals, which affirmed (188 S. W. 513), and defendant brings error. Judgment of the district court and Court of Civil Appeals reversed, and cause remanded to the district court on recommendation of the Commission of Appeals.

Jas. A. King, of Austin, Mathes & Williams, of Plainview, and Milton H. West, of Brownsville, for plaintiff in error.

L. R. Pearson, of Ranger, and C. D. Russell, of Plainview, for defendant in error.

McCLENDON, J. This action was brought to rescind a subscription contract for 16 shares of the capital stock of the defendant, Prudential Life Insurance Company of Texas, and to cancel a \$3,200 note and trust deed upon 640 acres of land; which note and trust deed were executed by plaintiff, H. S. Pearson, in payment for the stock. The trial court rendered judgment for plaintiff, granting the relief prayed for, upon a directed verdict; which judgment the Court of Civil Appeals affirmed. 188 S. W. 513. The errors assigned challenge the correctness of the trial court's action in directing a verdict for plaintiff.

Two grounds for relief were asserted by plaintiff: First, that he was induced by fraudulent representations to purchase the stock; and, second, that the note and trust deed did not constitute "property actually received," within the meaning of section 6 of article 12 of the Constitution of Texas.

[1] Defendant is within the class of corporations whose capital stock can consist of first mortgages upon real estate worth double

the amount of the loan. It is not questioned that the trust deed complied in every respect with our statutes in this regard. With respect to plaintiff's second ground for relief the case is therefore ruled by the decision in General Bonding & Casualty Insurance Co. v. Moseley, 222 S. W. 961, decided by the Supreme Court on May 5, 1920.

[2] The evidence upon the issue of fraud was conflicting, and will not support the directed verdict.

We conclude that the judgments of the district court and Court of Civil Appeals should be reversed, and the cause remanded to the district court for further trial.

PHILLIPS, C. J. We approve the judgment recommended in this case, and the holding of the Commission on the question discussed.

**ILLINOIS BANKERS' LIFE ASS'N v.
FLOYD. (No. 133-3627.)**(Commission of Appeals of Texas, Section B.
June 9, 1920.)

1. Insurance \S 640(4) — Notice of death presumed, where failure to give notice not pleaded.

In an action on a life insurance policy, where insurer has not pleaded failure to give notice of death of insured, it will be presumed that such notice was given, in view of Rev. St. 1911, art. 5714.

2. Insurance \S 559(2)—Proof of death not required, where insurer denies liability.

Where insurer denied all liability beyond the amount paid it, proof of death was not required, and would have been a useless formality.

3. Tender \S 22—Plea of tender by insurer held not necessary in action on life policy.

In an action on a life policy, where it appeared that plaintiff had been tendered, through her attorney, more than three months before the suit was brought, the full amount the company had received, and liability for which it admitted, no plea of tender was necessary; the only purpose of pleadings being to notify the opposing party of what is expected to be proved.

4. Insurance \S 640(3)—That insured died by his own hand held sufficient allegation of suicide.

In an action on a life insurance policy, an allegation by defendant that insured "died by his own hand" held equivalent to alleging that he intentionally took his own life.

5. Insurance \S 446—Suicide forfeits policy, notwithstanding insured morally irresponsible.

An insurance policy containing a suicide clause is forfeited by the suicide of insured, notwithstanding that his mind was impaired to the extent that he was not morally responsible for his act.

6. Pleading \S 21—Inconsistent matters may be pleaded, if at the same time and in due order of pleading.

There is no qualification or abridgment of the rights to plead matters that are inconsistent, if they be pleaded at the same time and in due order of pleading.

7. Insurance \S 840(3)—Answer denying liability, except for stated amount, held good on demurrer.

In an action of a life insurance policy containing a suicide clause, where it appeared that insured had committed suicide 33 days after the issuance of the policy, an answer denying liability for the face of the policy and admitting liability for repayment of all insurer had received from insured, with tender of such amount, held good on general demurrer.

8. Insurance \S 515 — Amount payable under policy held validly reduced by provision "promising a benefit."

Under Rev. St. 1911, art. 4742, forbidding provision for any mode of settlement at maturity of an insurance policy of less value than the face of the policy, except that a company may issue a policy "promising a benefit less than the full benefit" in case of insured's suicide, a policy provision was sufficient, as "promising a benefit," to validly reduce the amount payable under the policy, where the policy provided for payment "of the contribution to the mortuary fund," in case of suicide.

9. Appeal and error \S 931(3) — To support judgment, facts presumed found.

It must be presumed that the trial court found all the facts necessary to support its judgment.

10. Insurance \S 672—Plaintiff held entitled to amount tendered by company.

Where, although plaintiff in action on insurance policy did not pray in the alternative or otherwise for recovery of the lesser amount for which the insurance company admitted liability, yet a ground of her motion for new trial was alleged error of the trial court in not rendering judgment for her for that amount, judgment should have been rendered for her for such amount.

11. Costs \S 42(8) — Costs to be adjudged against plaintiff refusing tender of amount admitted and found due.

Where plaintiff, suing on an insurance policy, made no prayer for recovery of the lesser amount for which defendant admitted liability, and when it was tendered by the company it was refused by her, costs should be adjudged against her.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Action by Lula Viola Floyd against the Illinois Bankers' Life Association. A judgment for defendant was reversed by the Court of Civil Appeals (192 S. W. 607), and defendant brings error. Reversed and rendered.

Pat M. Neff and J. N. Gallagher, both of Waco, for plaintiff in error.

Paul Steed, of Stephenville, and Bean & Kleet, of Lubbock, for defendant in error.

KITTRELL, J. Plaintiff in error issued a policy of insurance on the life of the husband of defendant in error October 8, 1914, and the premium, \$42, was paid. The policy was for \$3,000. The insured died by his own hand November 10, 1914. The jury so found, and further found that he took his own life intentionally—a fact concerning which there was practically no dispute.

The plaintiff alleged the contract, and the death of the insured, and demand for payment, and refusal, and prayed judgment for \$3,000, but did not plead in the alternative for recovery of the mortuary contribution. The defendant pleaded as a defense to the action a provision of the policy reading as follows:

"If within two years from the issuing of any certificate or policy the member or insured, whether sane or insane, shall die by his own hand, the liability of the association shall be limited to the amount of the mortuary contribution of such member or policy holder."

There was no exception addressed to the pleading by plaintiff. In reply she pleaded in substance that when the insured took his own life he was—because of a number of reasons assigned—not responsible for the act. The defendant addressed no exception to that plea, and in pursuance of it the court submitted of his own motion a special issue (No. 3) conforming to that plea, and the jury to such issue responded in the affirmative, viz. that the insured was mentally irresponsible.

The defendant did not plead that the insured took his own life intentionally, and to the failure or omission to so plead plaintiff excepted, which exception was overruled, and plaintiff excepted. Defendant did not plead failure to give notice of the death of the insured as required by the policy, nor did it plead what the amount of the mortuary fund was, nor plead that there was a mortuary fund, nor did it plead tender of any amount.

It was, however, proved by plaintiff by the evidence of one of her attorneys that on or about July 10, 1915, the sum of \$42, the full amount of the premium, was tendered him for plaintiff, and was by him refused. It was proved, also, in the same way, that accompanying the tender was a letter denying liability for the \$3,000 on account of the suicide.

Those facts are set forth at this point, both because due order of statement requires that it be done, and because, in the concluding part of the original opinion of the Court

of Civil Appeals (192 S. W. 607), is the following language:

"There is some evidence tending to show that a tender was at one time made to appellant's attorneys, but the sum tendered does not appear from the statement of facts."

The judge who wrote the opinion must have overlooked a page in the statement of facts. It is shown therein by the evidence of one of plaintiff's attorneys that on or about July 10, 1915, three months before suit was filed the cashier of a bank, whose name is given, tendered to the attorney \$42, the whole amount received by the company from the insured, and that the tender was by the attorney refused.

The trial court rendered judgment for plaintiff on the verdict of the jury, but on hearing motion for new trial set aside the verdict and judgment, and rendered judgment for defendant. The Court of Civil Appeals of the Seventh District reversed that judgment, and rendered judgment for plaintiff in the full amount of the policy.

Opinion.

The parties will, for the sake of convenience and brevity, be referred to as they were in the court below.

[1] Not having pleaded failure to give notice of the death of the insured, it was presumed such notice was given. Article 5714, R. S.

[2] Furthermore, the defendant having denied all liability beyond the amount paid the company, such proof was not required, and would have been a useless formality. *East Texas Fire Ins. Co. v. Coffee*, 61 Tex. 293; *Knickerbocker v. Pendleton*, 112 U. S. 696, 5 Sup. Ct. 314, 28 L. Ed. 866; *National, etc., v. Thomas*, 10 App. D. C. 277.

[3] The only purpose of pleading being to notify the opposing party of what is expected to be proved, and plaintiff having been tendered, through her attorney, more than three months before suit was brought, the full amount the company had received, and liability for which it admitted, no plea of tender was necessary. The pleading of defendant, to which, as has been stated, no exception was taken, was equivalent to saying that defendant was not, because the insured died by his own hand, liable for the \$3,000 insurance, but was liable for the \$42.

No objection appears to have been made to the form or manner or amount of the tender, and the inference is deducible from the record that the refusal was based on the belief of plaintiff's attorneys that their conception of the law as reflected in the supplemental petition, and by their insistence on judgment for plaintiff on the finding of the jury on issue No. 3, would necessitate recovery in plaintiff's favor for the face of the policy. Since the Court of Civil Appeals ex-

pressly states that "we do not base the disposition of the appeal on the question of insanity," it is not necessary to enter upon any extended discussion of the law or the pleading as relates to that question.

[4] It is sufficient to say that the pleading of the defendant was as broad as the terms of the policy, and that to allege that the defendant "died by his own hand" was equivalent to alleging that he intentionally took his own life. *Bigelow v. Berkshire, etc.*, 93 U. S. 284, 23 L. Ed. 918.

[5] There are many cases in the reports of Texas, and in those of other states, similar to this, and it may serve a useful purpose to say that the contention of plaintiff that, if the mind of the insured was impaired to the extent that he was not morally responsible for the act of taking his own life, the policy was not forfeited, is not sound in law. The law was so declared in *Mutual Life Ins. Co. v. Terry*, 15 Wall. 580, 21 L. Ed. 236, and that holding has been followed in this state (*Life Ins. Co. v. Walden* [Civ. App.] 26 S. W. 1012; *Life Ins. Co. v. Hayward*, 88 Tex. 322, 30 S. W. 1049, 31 S. W. 507); but it is now settled law in this state that, if the exception in the policy be that the company shall be exempt from liability "if the insured dies by his own hand, sane or insane," there can be no recovery. *Mutual Reserve, etc., v. Payne* (Civ. App.) 82 S. W. 1063; *Parish v. Mutual Benefit, etc.*, 19 Tex. Civ. App. 457, 49 S. W. 153; *Grand Fraternity v. Melton*, 102 Tex. 399, 117 S. W. 788.

The opinion of the Court of Civil Appeals has been most carefully examined and analyzed, and that court appears to us to have based its conclusion in a large measure upon its construction of the meaning and effect of article 4742 of the Revised Statutes, and, following upon and collateral to that construction, upon the matter of pleading. That article of the statute, so far as it is quoted, construed, and applied, reads as follows:

"No policy of life insurance shall be issued or delivered in this state, or be issued by a life insurance company incorporated under the laws of this state, if it contains any of the following provisions: * * *

"3. A provision for any mode of settlement at maturity of less value than the amounts insured on the face of the policy, plus dividend additions, * * * less any indebtedness to the company on the policy, and less any premium that may, by the terms of the policy, be deducted: Provided, that any company may issue a policy promising a benefit less than the full benefit in case of the death of the insured by his own hand while sane or insane, or by the following stated hazardous occupations."

At the risk of extending this opinion to a greater length than is desirable, we will as a matter of justice to the Court of Civil Appeals, liberally, but carefully and accurately, paraphrase and summarize the grounds on which that court bases its holding. Before

proceeding so to do, it will be helpful to state in simple, ordinary language what the contract was, so that that material fact may be kept in view. Stated in condensed form, it was that in consideration of \$42 paid, and the payment of a like amount annually thereafter, the company would, in event of the death of the insured otherwise than by his own hand within two years from the date of the policy, pay plaintiff \$3,000, but if the insured did die by his own hand, sane or insane, within two years from the date of the policy, the company would be responsible for, and would pay only, the amount of "the contribution of the insured to the mortuary fund."

The Court of Civil Appeals adjudged that the defendant was liable for the full sum of \$3,000, and based such judgment upon, as we conclude from a most careful and painstaking analysis of the opinion, the following grounds:

(1) That under article 4742 suicide cannot be set off as a complete bar to the action.

(2) That article 4742 has been enacted since the Payne and Parish Cases supra, were decided, and that article clearly implies that a violation of the suicide clause in the policy shall not be an absolute defense.

(3) That article 4742 gives the company the privilege of fixing the amount at less than the full benefit named in the contract, and the amount named in this contract is "the amount of the mortuary contribution paid to the association by the insured."

(4) That while the defendant pleaded a release from liability under the suicide clause, there is as a matter of fact no such clause in the policy, and under the statute none can be inserted under which the company could be entirely relieved of responsibility.

Before setting forth further the holdings of the Court of Civil Appeals, it is proper to say here that, conceding for the sake of argument that those above set forth are sound, it does not follow that the conclusion reached by that court is correct, because it is based, as we conceive, on a misconstruction of defendant's pleading; therefore on a false premise.

Defendant did not plead the provision of the policy relating to suicide as a ground of entire release from liability. On the contrary, it was in legal effect an admission of liability to the extent of what the company had been paid. It is true the defendant followed that pleading with the further pleading that it was by the suicide of the insured released from any and all liability, on which latter pleading the Court of Civil Appeals lays much stress; but, if it be conceded that these pleas are apparently, or even indeed really, inconsistent, that fact could not give to the latter the effect to destroy or even impair the validity or force of the former.

[8] It is the long-settled law of pleading in this state that:

"There is no qualification or abridgment of the right to plead matters that are inconsistent, if they be pleaded at the same time and in due order of pleading." *Fowler v. Davenport* 21 Tex. 633; *Duncan v. Magette*, 25 Tex. 255; *Smith v. Sublett*, 28 Tex. 163.

The plaintiff insisted most strenuously in the Court of Civil Appeals, as she does in this court, that the stipulation in the policy limiting the liability of the company to the amount of the mortuary contribution does not constitute a "promise," within the meaning of the statute, when it says the company may issue a policy promising less than the full benefit named in the policy. The Court of Civil Appeals evidently disagreed with that contention, since it says:

"The stipulation would be a promise and more; it would be a binding obligation, if it appeared that the insured ever paid to the company any sum whatever as a mortuary contribution, or was bound by the terms of the contract to make such payment."

It then proceeds to say in substance, in this connection, that there is nothing in the pleadings or evidence to show that there had ever been a mortuary contribution, or that any provision had ever been made for one; therefore the promise is to pay something which did not exist, and therefore promised no benefit whatever.

The Court of Civil Appeals further held:

(5) That defendant having failed to plead under the suicide clause the amount of the mortuary contribution, and that it had taken advantage of the statutory privilege, and inserted a clause whereby it could pay a benefit less than the face of the policy, and there being no evidence whatever that there had been a mortuary contribution by the insured, or any other policy holder, the plaintiff should recover the whole amount of the policy.

The Court of Civil Appeals further held:

(6) That "while it is correct as a proposition of law that, if an insurance company proves the amount of its liability to be less than the face of the policy and tenders that amount to the plaintiff, the judgment should be limited to the sum so tendered, yet that proposition has no application here, because appellee did not tender any sum in its pleadings, but, on the contrary, pleaded that by reason of the suicide of the insured "the contract became absolutely null and void, and this defendant was thereby released from any and all liability thereunder."

What we have already said concerning the question of tender, and the rule of pleading recognized and applied in this state, makes unnecessary any discussion of this holding.

From the foregoing summary and analysis of the opinion of the Court of Civil Appeals

it will be seen that the conclusion it reached is based upon what it conceives to be the failure of defendant to properly plead its case.

[7] While it may be conceded that the pleading might have been clearer, more specific and definite, yet in view of the peculiar facts and the language of the contract, and of the further fact that no exception was directed against the manner or form of pleading the provision of the policy relating to the obligation to pay the amount of "the mortuary contribution," we are of the opinion that the pleading was good on general demurrer. It was in effect a denial of liability for the \$3,000, and an admission of liability for repayment of all that it had received from the insured, which interpretation of the contract defendant had translated into action, by tendering back \$42, all it had received.

[8] With the holding of the Court of Civil Appeals that defendant had promised no benefit we cannot agree. When it tendered the insured the policy containing the provision for payment "of the contribution to the mortuary fund" in case the insured died by his own hand, and the insured accepted the policy and paid the premium, a complete and binding contract was made.

We are not at liberty to ignore any fact which is clearly apparent in the record, and it is obvious that in the space of 33 days which elapsed between the issuance of the policy and the death no mortuary fund could have accrued—certainly none in excess of the whole amount paid by the insured. That the plaintiff was of the opinion that the pleading and evidence identified and fixed the amount recoverable as "the contribution to the mortuary fund" is made evident by the fact that, although she did not plead in the alternative for such recovery, yet the tenth and last ground of her motion for a new trial was that "the court erred in not rendering judgment for her for the amount of the mortuary contribution."

[8] It must be presumed that the trial court found all the facts necessary to support its judgment, and, this being true, it must have found the obvious fact that the whole amount received from the insured by the company had been tendered back, and the tender refused. Manifestly there could have been no recovery of the \$3,000 insurance, because that by the terms of the contract had been forfeited; hence there was no ground on which judgment could, under the pleadings or evidence, have been properly rendered for plaintiff for that amount.

Any judgment for the plaintiff would have the effect to take from defendant and give to plaintiff that which by the terms of the contract the act of her husband had deprived her of the right to receive. The judgment of the district court, in so far as it denied

plaintiff recovery on the policy, was correct, and the Court of Civil Appeals erred in adjudging to the contrary.

[10] Plaintiff did not pray, in the alternative or otherwise, for recovery of the \$42, and when it was tendered her attorney on July 10, 1915, it was refused; but the last ground of her motion for a new trial was alleged error of the trial court in not rendering judgment for that amount in her favor, and in view of the terms of the contract, and the admission by defendant of liability to that extent, judgment should have been rendered in favor of plaintiff for \$42 and interest.

[11] However, as plaintiff made no prayer for it, and when it was tendered it was refused, we are of the opinion that the costs should be adjudged against her.

We recommend that the judgment of the Court of Civil Appeals, reversing the judgment of the district court, denying plaintiff recovery for the face of the policy, be reversed, and that the judgment of the district court in that regard be affirmed.

We further recommend that judgment be here rendered for plaintiff—defendant in error here—for \$42, with interest at 6 per cent from July 10, 1915, in all \$54.50, and that the costs be adjudged against her.

PHILLIPS, C. J. Judgments of district court and Court of Civil Appeals are reversed. Judgment will be entered here for defendant in error for \$42, with legal interest from July 10, 1915, and for costs in the district court and Court of Civil Appeals. The costs of this court will be adjudged against her.

CLEGG et al. v. TEMPLE LUMBER CO. et al. (No. 148-3095.)

(Commission of Appeals of Texas, Section B.
June 26, 1920.)

Parties ~~et al.~~—Plaintiffs having separate demands cannot be joined.

Where all plaintiffs in suit to recover land asked for cancellation of a former judgment against them, and for repossession of their separate tracts, and one plaintiff also asked damages; there was a misjoinder of parties plaintiff.

Error to Court of Civil Appeals of Ninth Supreme Judicial District.

Suit by W. E. Clegg and others against the Temple Lumber Company and others. From judgment for the named defendant, plaintiffs appealed to the Court of Civil Appeals, which affirmed (195 S. W. 646), and plaintiffs bring error. Judgment of the Court of Civil Appeals affirmed on recommendation of the Commission of Appeals.

E. P. Padgett, of Hemphill, for plaintiffs in error.

W. F. Goodrich, of Hemphill, and Minor & Minor, of Beaumont, for defendant in error.

KITTRELL, J. From the decision of the Court of Civil Appeals (195 S. W. 646) to which we refer, writ of error was granted by the Committee of Judges. In the view of the Supreme Court the suit, however styled, was essentially one for the recovery of land, and the trial court's sustaining of exceptions upon the question of misjoinder of parties plaintiff was correct. *Hunt v. Johnson*, 106 Tex. 510, 171 S. W. 1125. Plaintiff's refusal to amend following that ruling of the trial court necessarily ended the case.

In this view we conclude that the judgment of the Court of Civil Appeals should be affirmed on the ground stated.

PHILLIPS, C. J. We approve the judgment recommended in this case.

TEXAS & N. O. RY. CO. v. WEEMS et al. (No. 110-2956.)

(Commission of Appeals of Texas, Section B.
June 23, 1920.)

1. Carriers ~~45~~—Evidence held to authorize finding of contract to furnish cars.

In an action for breach of a carrier's contract to deliver cars to orchard for shipment of peaches, evidence held sufficient to authorize finding of making of contract substantially as alleged by plaintiffs.

2. Carriers ~~45~~—Evidence held insufficient to show damages from failure to furnish cars would have been diminished by delivery of fruit at station.

In action for breach of carrier's contract to deliver cars to orchard for shipment of peaches, evidence held insufficient to show that plaintiffs' damages certainly would have been diminished had they delivered fruit at station of defendant carrier or at that of another carrier.

Error to Court of Civil Appeals of Sixth Supreme Judicial District.

Action by J. B. Weems and others against the Texas & New Orleans Railway Company. A judgment for plaintiffs was affirmed by the Court of Civil Appeals (184 S. W. 1103), and defendant brings error. Judgment of trial court and Court of Civil Appeals affirmed on recommendation of the Commission of Appeals.

See, also, 165 S. W. 1194.

Guinn, Imboden & Guinn, of Rusk, and Jno. T. Garrison, of Houston, for plaintiff in error.

Norman, Shook & Gibson, of Rusk, for defendants in error.

MONTGOMERY, P. J. This suit was instituted by J. B. Weems and Commodore Yarborough against the Texas & New Orleans Railway Company to recover damages for the breach of an express contract to furnish cars for shipment of certain peaches owned by the plaintiff and growing near the line of the defendant's railway company. For convenience the parties will be designated as they appear in the court below, as plaintiffs and defendant.

It was alleged by the plaintiffs that in the month of May, 1910, they entered into an agreement with the defendant railway company by which the defendant agreed to furnish the plaintiffs refrigerator cars for the shipment of their peach crop then growing, but not yet ready for market, and further agreed to deliver the cars as needed, upon a certain track in or near plaintiffs' orchards, and further contracted "that, upon the plaintiffs notifying the defendant on the night or afternoon before the number of cars required the next day, such number would be so furnished on such notification"; that plaintiffs obligated themselves to ship their peach crop on and over defendant's line of railway.

It was further alleged that defendant failed to furnish the cars for three consecutive days when properly notified and requested, as provided in the contract, and that plaintiffs were thereby damaged by the loss of large quantity of fruit then ready for shipment. The defendant denied making the contract sued on, and pleaded other matters which it is not necessary to state.

The case was tried before a jury on special issues, and upon the verdict judgment was rendered for plaintiffs. The defendant appealed. The Court of Civil Appeals affirmed the judgment of the trial court. 184 S. W. 1103.

In granting the writ of error in this case the Supreme Court indicated that it was of the opinion that the evidence failed to show the contract as pleaded by the plaintiffs. In the application for writ of error the claim is made that the evidence was insufficient to show the contract alleged in that it failed to show that there was an agreement on the part of the railway company to furnish cars when notified on the afternoon or night before of the cars needed for the next succeeding day.

[1] We have carefully read the statement of facts in connection with the petition for writ of error, and have concluded that there was evidence which, if believed, showed the making of the contract, and that the contract was substantially as alleged by the plaintiffs.

The evidence showed that the contract was made by letters written by plaintiff Weems, acting for himself and the plaintiff Yarborough, and one Mrs. Clark, the agent

of the defendant railway company. Prior to the trial the original letters had been lost or destroyed. Purported copies of only three letters were offered in evidence. These letters failed to show the contract as alleged by the plaintiffs. There was, however, testimony tending to show that the copies offered in evidence were not true copies of the originals, and also that there were other letters relating to the same matter which were not produced on the trial. The plaintiff Weems testified that he had received a letter from the agent of the railway company agreeing to furnish the cars, as alleged in his petition, and that he accepted the offer and agreed to ship his entire crop over the line of the defendant railway company. He testified that the letter of the railway company to him and his letter to the railway company to the effect above set out were not in his possession and could not be produced; that the entire correspondence in his possession had been delivered to his attorney, and he was informed that the same had been destroyed by a fire which consumed the office of the attorney. The testimony of the attorney tended to corroborate Weems. We think it unnecessary to set out the testimony in detail. Suffice it to say that in our judgment there was ample testimony to authorize a finding that the contract was made substantially as alleged by the plaintiffs.

[2] With reference to the claim that plaintiffs are not entitled to recover the amount of the judgment as rendered because they failed after the breach of the contract by the railway company to deliver the fruit at the depot of the defendant railway company, or of the Cotton Belt Railway Company, which also had a depot near plaintiffs' orchards, and there tender the fruit for shipment, we think that the evidence failed to show that the plaintiffs' damages would thereby have certainly been diminished. There was evidence tending to show that there was a great congestion of traffic at that particular time, and that the railway companies were unable to furnish cars for all who requested them. It being a question of fact as to whether or not the plaintiffs, under the circumstances, could by delivering the fruit at the railway station have procured transportation therefor, and thus mitigated the damages, we feel bound by the conclusion of the trial court and Court of Civil Appeals. We have examined all the assignments of error, and the entire record, and find nothing that in our judgment requires a reversal of the case.

We recommend that the judgment of the trial court and the Court of Civil Appeals be affirmed.

PHILLIPS, C. J. We approve the judgment recommended in this case.

COYLE et al. v. PALATINE INS. CO., Limited. (No. 161-3151.)

(Commission of Appeals of Texas, Section B. June 23, 1920.)

1. Insurance \S 846(6)—Burden on insured to show loss not excepted from policy.

Under a policy insuring against damage by tornado, windstorm, or cyclone, expressly excepting from the risk any loss or damage through tidal wave, high water, or overflow, and damage caused by water or rain, whether or not driven by the wind, burden was on insured to show that loss was not among those excepted.

2. Insurance \S 423—Loss by wind and water excluded by stipulation from policy covering only damage by wind.

A policy insuring against damage by tornado, windstorm, or cyclone, expressly excepting damage through any tidal wave, high water, or overflow, and damage caused by water or rain, whether driven by wind or not, covered only losses resulting from wind and no other cause, and parties having stipulated it was impossible to determine to what extent wind and water were factors in causing a loss, it was excluded from indemnity provided.

Error to Court of Civil Appeals of First Supreme Judicial District.

Action by B. A. Coyle and others against the Palatine Insurance Company, Limited. To review judgment for plaintiffs, defendant brought error to the Court of Civil Appeals, which affirmed in part, and reversed and rendered in part (196 S. W. 560), and plaintiffs bring error. Judgment of the Court of Civil Appeals affirmed on separate opinion approving that of the Commission of Appeals.

Stewarts and Albert J. De Lange, all of Galveston, for plaintiffs in error.

Williams & Neethe, of Galveston, and Locke & Locke, of Dallas, for defendant in error.

SADLER, P. J. The opinion of the Court of Civil Appeals will be found in 196 S. W. 560, wherein is given a full statement of the issues and evidence requisite to an understanding and decision of the two fundamental propositions presented in the petition for writ of error. We do not think it necessary to restate the record, except in so far as it may be germane to a clearer understanding of the questions decided. The contract provides that the insurance company "does insure * * * against all direct loss or damage by tornado, windstorm, or cyclone, except as hereinafter provided, * * *" and provides:

"This policy is made and accepted subject to the foregoing stipulations and conditions and to the following stipulations and conditions printed on the back hereof, which are hereby specially referred to and made a part of this policy."

Among the stipulations germane printed on the back of the policy are these:

"This company shall not be liable for any loss or damage * * * occasioned directly or indirectly by or through any * * * tidal wave, * * * high water, overflow, or cloudburst;" and, second, "for any loss or damage caused by water or rain, whether driven by wind or not, unless the building insured * * * shall first sustain an actual damage to the roof or walls of same by the direct force of the wind, and shall then be liable only for such damage to the interior of the building * * * as may be caused by water or rain entering the building through openings in the roof or walls made by the direct action of the wind."

It was agreed that the loss and damage to the building, caused solely by the direct action of the wind, independently of water in any form whatever, was \$500; further, that the loss or damage to the interior of the building, caused by water or rain entering the same through openings in the roof or walls, made by the direct action of the wind alone, independent of water in any form whatever, was \$600. These items are not in controversy. It is conceded that the policy covers this damage. The item in dispute is the stipulation in the agreed statement:

"That the loss and damage to the said building, exterior and interior, resulting from the combined action of wind and water in whatever form, omitting damage to the interior included in the next preceding item of this award, was \$3,352.43."

As to this last item of damage, it was agreed:

That the "committeemen appointed by the parties to this suit in pursuance of a written agreement referred to in the preceding paragraph have found that certain loss or damage resulted from the 'combined action of wind and water.' It is agreed that as to such loss or damage so found by the committeemen it is impossible to determine to what extent each was an element or factor with the other in causing such loss or damage."

The cause was tried upon stipulated agreement of facts about which no question is raised.

The trial court rendered judgment in favor of the insured for the full amount of the three items of damage above mentioned. The insurer brought the judgment for review to the Court of Civil Appeals by writ of error upon the proposition that the policy of insurance did not cover the item of damage caused by the "combined action of wind and water." The Court of Civil Appeals sustained the contention of the insurance company in this particular, and to that judgment writ of error has been granted upon two propositions made by plaintiffs in error: (a) That the Court of Civil Appeals erred in placing the burden of proof upon the insured to show that the dam-

age in question was chargeable directly to the force of the wind; and (b) in holding that under the facts the wind was not the direct proximate and predominant cause of the damage.

By the notation before us the Supreme Court on January 11, 1918, granted the writ in the view that—

"The effect of the decision is to put upon the insured the burden of proving that the loss did not fall within the exception of the policy. The contrary in our opinion is the law."

However, it appears that thereafter the application was referred to the committee of judges, who on May 27, 1918, granted the writ with the notation that—

"The burden was on the insurance company to show that the damage fell within the exception of the policy. This it did not do. In our opinion the Court of Civil Appeals erred in not so holding."

Opinion.

We have given the question presented the most careful consideration. It appears that in *Travelers' Accident Insurance Co. v. Sallie Lou Harris*, on October 11, 1916, the Supreme Court granted an application for writ of error, with the notation that—

"We think the court erred in imposing upon the defendant the burden of proving that the accident was within the exceptions of the policy. 77 Tex. 225."

Thereafter this section of the Commission held that the burden of proof rested upon the insured in that case to show that her cause of action did not fall within the excepting clause, which holding was approved by the Supreme Court. 212 S. W. 933.

Paraphrasing the policy of insurance in the instant case:

It "does insure * * * against all direct loss or damage by tornado, windstorm or cyclone, except for any loss or damage caused by water or rain, whether driven by wind or not, unless the building insured * * * shall first sustain an actual damage to the roof or walls of same by the direct force of the wind, and shall then be liable only for such damage to the interior of the building * * * as may be caused by water or rain entering the building through openings in the roof or walls made by direct action of the wind, and except for any loss or damage * * * occasioned directly or indirectly by or through any * * * tidal wave, high water, overflow, or cloudburst."

In order to determine where the burden of proof rests under such policy, it is material to inquire whether under proper construction the policy insures generally against wind damage, and the excepting provisions take something out of the general contract of insurance by way of defeasance or excuse, or whether the contract covers only what is left

after satisfying the conditions; that is, do the conditions and exceptions excuse or defeat the general promise, or do they limit the extent of the promise?

Without further discussion, in our opinion the contract under consideration falls clearly within the rule reannounced in *Travelers' Accident Insurance Co. v. Harris*, supra, and is controlled by the authority sustained by the cases cited in that opinion. In further support of this view, in addition to the authorities cited in the opinion of the Court of Civil Appeals in this case, we call attention to *Newark Trust Co. v. Agricultural Insurance Co.*, 237 Fed. 788, 150 C. C. A. 542, by the Circuit Court of Appeals of the United States for the Third Circuit. In that case a contract of insurance practically identical with that under consideration, and containing the identical clauses evidencing the limitation of the promise as are those in the policy under consideration, is construed. The holding there is in accord with the settled authority of this state.

The defendant in error in a very interesting and instructive argument insists, that regardless of where the burden of proof is placed, the facts show that the damage in question must be charged to the direct action of the wind; that under the facts it is shown that the wind was the direct, proximate, and efficient cause of the damage; indeed, but for the wind, the water would not have produced the injury. It would probably be necessary to consider this question if we were not precluded by the stipulation of the parties contained in the agreed statement of facts. The fourteenth paragraph of the agreement precludes the decision of this question. It is there agreed that it is impossible to determine to what extent, in the damage caused by the combined action of wind and water, each was an element or factor with the other in causing such loss or damage. This stipulation applies directly to the item of damage in controversy. The parties at interest, having before them all of the facts which are made to appear in this record, agreed among themselves that it was impossible to determine which element, wind or water, was the direct, proximate, and efficient cause of the damage. We do not think, therefore, that it is necessary or proper to enter into a discussion of this question, since it has been removed from the consideration of the court by the stipulation in the agreement.

We therefore recommend that the judgment of the Court of Civil Appeals be affirmed.

PHILLIPS, C. J. We approve the judgment recommended by the Commission of Appeals, but will state our views of the case.

[1] The risk insured against under the policy being "all direct loss or damage by tornado, windstorm or cyclone," and the policy expressly excepting from such risk "any loss or damage occasioned directly or indirectly

by or through any * * * tidal wave * * * high water * * * overflow," and "any loss or damage caused by water or rain, whether driven by wind or not," etc., the burden of proof—had the question been material—would have been upon the plaintiffs to show that their loss was not one thus expressly excepted from the contract. Without such proof, had it been required, evidence of a loss within the terms of the contract would have been incomplete, and hence liability under the contract would not have been established. Such exceptions have not the character of conditions subsequent. They are written into the contract to prevent their subject-matter becoming confused with its general portion. Their effect is to declare that there shall be no liability under the contract which is not clear and independent of them. The burden of establishing such a liability is upon him who asserts it. The matter presented by such exceptions in a contract is therefore not defensive. In its essential nature it is affirmative. It is made so by the terms of the contract. Such is the settled rule in this court. *Insurance Co. v. Co-operative Association*, 77 Tex. 225, 13 S. W. 980; *Insurance Co. v. Boren*, 83 Tex. 97, 18 S. W. 484.

But in the present case this is an immaterial question. It is rendered so by the stipulation of the parties as to the facts.

[2] With respect to the damage here in dispute the parties have agreed that it resulted from "the combined action of wind and water," and that "it is impossible to determine to what extent each was an element or factor" in causing it. The effect of this is clearly to exclude the loss in controversy from the indemnity provided by the policy. That indemnity was only against direct loss or damage by the wind. This means, and can only mean, a loss resulting from the wind and no other cause, and fairly capable of establishment as having been so caused. It would make a different contract for the parties to say that it contemplates a loss, not directly due to the wind alone, but to the wind and an expressly excepted cause, combined, with the part for which the wind might be responsible impossible of determination and hence purely speculative. No liability could be adjudged under the policy which was not proven. The effect of the stipulation was to admit that the amount of the disputed loss attributable to the wind—the risk covered by the policy—could not be proven. If so, a loss within the contract was not established.

It may be admitted, as the plaintiffs in error urge, that the wind was the cause of the action of the water. But, as related to the loss in dispute, the contract expressly provided that the insurer was not to be responsible for any damage, whatever, due to the action of water caused by the wind. All part of the loss caused by water, though the water's action was due to the wind, is thus elim-

inated. Therefore, the rule invoked, that where there is no order of succession in time and there are two concurrent causes of a loss in which the damage done by each cannot be distinguished, the predominating cause will be deemed the proximate cause, can have no application. The water as a concurrent cause, or as any element in the cause, which produced the loss, is by the contract put out of the case. There is left, under the stipulation, only the wind as a part of the combined and responsible cause. The extent of its agency or the damage due to its agency, it is admitted, could not be shown. As to the part of the loss caused by the wind, there was, accordingly, no proof; and there being no proof there could be no judgment.

The judgment of the Court of Civil Appeals is affirmed.

DE SHAZO et al. v. EUBANK. (No. 141-3070.)

(Commission of Appeals of Texas, Section A.
June 23, 1920.)

1. Public lands §174—Certificate of occupancy issued by land commissioner cannot be collaterally attacked.

Where one owning lots in a county applied to purchase school lands as additional land, and after proof of occupancy the land commissioner issued a certificate, such certificate is not open to collateral attack on the ground that the lots were not private land, within the statute allowing the acquisition of additional land, for the commissioner is required to determine the sufficiency of the proof of occupancy, and as the statute relating to the acquisition of school land provides for payment over a long term of years, it is essential that on issuance of a certificate after proof of occupancy the title cannot be collaterally attacked.

2. Public lands §173(5) — School lands held within statute forbidding surveyor to acquire "public land."

Within Pen. Code 1911, art. 164 making it a misdemeanor for a county surveyor to acquire "public land," school lands are "public land," though not part of the unappropriated domain; for, while the term "public land" varies in statutes, it should be given such construction as will effectuate the intent of the Legislature.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Land.]

3. Public lands §173(3)—Purchaser of school lands complying with requirements has inchoate right.

A purchaser of school lands who has complied with the conditions as to occupancy and filed an affidavit thereof within proper time acquires an inchoate right to the land, which can be perfected by compliance with the further re-

quirements of the statute, and this right is subject to sale or transfer.

4. Public lands §173(11)—Compliance with requirements held not to divest state of title to school lands.

While a purchaser, on complying with the requirements of the statute as to occupancy of school lands and the filing of an affidavit thereof, acquires an inchoate right subject to sale or transfer, the state is not completely divested of title until all conditions of the purchase are fully complied with, and the right of the purchaser is subject to forfeiture for failure to make payment as required, etc.

5. Public lands §173(5) — School lands are "public land" as to county surveyor, though certificate of occupancy has been granted.

Under Pen. Code 1911, art. 164, making it a misdemeanor for any county surveyor to be directly or indirectly concerned in the purchase of any "public land," the term is not limited to the unappropriated public domain, but includes school lands, and, as the issuance of a certificate of occupancy does not completely divest the state of its title, the county surveyor is incompetent to acquire the right or interest of an occupant who has not received a certificate but a patent.

Error to Court of Civil Appeals of Eighth Supreme Judicial District.

Suit by J. W. Eubank against Maria De Shazo and others, in which defendants filed a cross-action. Judgment for plaintiff was affirmed on defendant's appeal by the Court of Civil Appeals (191 S. W. 369), and defendants bring error. Judgment of Court of Civil Appeals reversed, and judgment rendered that plaintiff take nothing.

W. F. Hendrix and M. W. Stanton, both of El Paso, for plaintiffs in error.

Nealon & Dorman, of El Paso, for defendant in error.

SONFIELD, P. J. The following is the statement of the case by the Court of Civil Appeals:

"Eubank filed this suit January 22, 1915, against Maria, Donald, and Kenneth De Shazo, to remove cloud from title to survey No. 218, S. F. No. 7088, H. M. Mundy, grantee, containing 160 acres, situate in El Paso county. Defendants pleaded not guilty, and filed a cross-action asserting title in themselves. Upon trial before a jury a peremptory instruction was given in plaintiff's favor, in accordance wherewith verdict was returned and judgment rendered.

"On May 5, 1908, the land in controversy was public free school land, and by application of that date, filed in the general land office May 18, 1908, E. L. De Shazo applied to purchase the same as additional to private land. Upon this application the land was awarded September 12, 1908. By quitclaim deed dated January 17, 1912, filed for record April 7, 1913, E. L. De Shazo, for a recited consideration of \$250, conveyed all of his right, title, and interest in the

land to Eubank. On June 20, 1912, De Shazo made his proof of occupancy and improvements, and filed same in the general land office on June 22, 1912, and on June 24, 1912, certificate of occupancy was issued and sent to De Shazo by the land commissioner. On December 18, 1913, De Shazo died intestate, leaving as his heirs the defendants herein, namely, his wife, Maria, and two children, Donald and Kenneth. On May 8, 1918, the land was patented by the state to E. L. De Shazo, his heirs and assigns. At the time he applied to purchase the land De Shazo owned and resided upon lots 1, 2, and 3 in block 21 in Grandview, an addition to and part of the city of El Paso. Grandview is a part of the Salazar grant, and is laid off into streets, lots and blocks. The addition is not within the corporate limits of the city of El Paso. The three lots had a 75-foot front. De Shazo continued to reside there until the date of his death. This was his home tract and the private land referred to in his application to the state to purchase the land in controversy. Upon the dates above mentioned and long prior thereto, Eubank was county surveyor of El Paso county."

On appeal, the Court of Civil Appeals affirmed the judgment of the district court. 191 S. W. 369.

It is contended by defendants: (1) That the lots in Grandview addition upon which De Shazo's home was situate, and where he resided during the required three years' occupancy, were not "private land," within the meaning of the law relating to the sale of school land, and that his ownership thereof and residence thereon did not authorize the purchase of school land as additional thereto; (2) at the date of the deed from De Shazo to plaintiff, though De Shazo had complied with the conditions of occupancy and improvement, he had not yet filed the proof thereof, and no certificate of occupancy or patent had issued; that the land was therefore "public land," title to which could not be acquired by plaintiff, then county surveyor, in view of article 164, Penal Code, making it a misdemeanor for any county surveyor to be directly or indirectly concerned in the purchase of any right or interest in any public lands in his own name, or in the name of any other person. The Committee of Judges to whom the application was referred, being inclined to the view that De Shazo was not authorized to purchase the school land in controversy, granted the writ.

[1] The Court of Civil Appeals declined to pass upon the status of the Grandview lots as a proper home tract authorizing the purchase of school land as additional thereto. That court held, in effect, that the commissioner, being vested with the power to make a sale and award of the land to a qualified purchaser, having determined that De Shazo was such a purchaser, as the owner of and settler upon the Grandview lots, and having actually made the sale and

award, and De Shazo having complied with all the terms and conditions of his purchase, and the certificate of occupancy having issued, the sale and award cannot be regarded as a nullity and subject to collateral attack. In this conclusion we concur.

In the disposition of public school lands, it is the policy of the state to sell to actual settlers and to require actual occupancy of the land so sold. One owning other or private land is authorized to purchase school land within a certain radius as "additional land," and the occupancy of the home tract for the requisite period is regarded as an occupancy of such additional land—a constructive occupancy. To entitle one to purchase additional land, his "other" or "private land" must be of the kind and character contemplated by the statute. The actual settler upon the school land proper must make proof of occupancy thereof; where the occupancy is constructive, he must make proof of occupancy of the basic tract.

Upon the filing of proof of occupancy, a certificate thereof is issued by the land commissioner. The issuance of the certificate is not merely ministerial, the commissioner being vested with discretion in determining the facts. If satisfied that the proof of occupancy is false, or the occupancy insufficient, not in compliance with the statute, he can refuse the certificate.

"If the certificate be refused, then the title of the purchaser would be open to attack by any one who should settle upon and make application to purchase the land; but if issued it would be conclusive, except, possibly, against the state." *Logan v. Curry*, 95 Tex. 664, 69 S. W. 129; *Mitchell v. Robison*, 108 Tex. 641, 132 S. W. 465.

The matter of the sale of the land in controversy was within the jurisdiction of the land commissioner. The duty devolved upon him, before issuing the certificate of occupancy, to determine whether De Shazo owned, settled upon, and occupied for the required time other or private land of the character entitling him to purchase. This was involved in determining De Shazo's compliance with the conditions of settlement and occupancy. If the certificate of the land commissioner does not evidence an adjudication of these facts, but merely an occupancy of the basic tract, it is meaningless. The basic tract being private land owned by De Shazo, the state is concerned in its occupancy only as such occupancy affected his right to the additional land.

A purchaser of school land must, within two years after the completion of the three-year period of occupancy, make proof thereof. Patent cannot issue until the filing of such proof and the payment in full of the purchase money. When proof of occupancy has been filed, the purchaser can pay the balance of the purchase money and demand

a patent, or he can pay the same in annual installments running for a period of at least 35 and up to 37 years. It is to the interest of the state, as well as of the purchasers of the school land, that the titles of such purchasers be established, at least to the extent of being invulnerable to collateral attack, at some time prior to the issuance of the patent. To permit such attacks through all the years, where the purchaser exercises his option of payment of the purchase money in annual installments, would be promotive of continuous litigation and strife. The evident intention of the Legislature in requiring proof of occupancy and the issuance of the certificate was, in the language of the court in *Logan v. Curry*, supra:

"To set at rest the question of actual settlement, and to establish the purchaser's right to the land, subject only to the condition that he pay the unpaid installments of purchase money and interest thereon, as required by the statute."

The purpose of the proof and certificate, when the school land itself is occupied, is to establish and evidence title to the land so occupied. Where the occupancy is of the basic tract, the purpose is to establish and evidence the purchaser's title to the additional land. In each case the certificate has the same conclusive effect.

[2-5] Was the land at the date of the purchase by plaintiff from De Shazo "public land" within the purview of article 164 of the Penal Code? The term "public land," as used in various statutes, is generally held to comprise all of the unappropriated public domain—such of the lands belonging to the state as are subject to sale or other disposal. *Day Land & Cattle Co. v. State*, 68 Tex. 526, 4 S. W. 865. The sense in which the term is used may vary somewhat in the different statutes, and it should be given such meaning as will effectuate the intention of the Legislature in its use. Thus, in *Cotulla v. Laxson*, 60 Tex. 443, it is held that the term "public land," as used in article 164 of the Penal Code, is not limited in its signification to unappropriated public domain, but also includes public school lands. With reference to this, the court says:

"These public school lands were set apart for a public purpose, devoted to the promotion of public education. The act of appropriation, or, rather, the dedication of these lands to that purpose, did not work a change in their ownership; true they were not thereafter unappropriated public domain, but as ever belonged to the public."

The purchaser of school land who has complied with the condition of settlement, and within the proper time filed his affidavit

thereof, acquires an inchoate right to the land, which can be perfected by compliance with the further requirements of the statute. *Canales v. Perez*, 65 Tex. 291. The right so acquired is, by the express terms of the statute, subject to sale or transfer by the purchaser. Upon the completion of the required term of occupancy, the land becomes the private land of the purchaser to the extent that liens created thereon by him can be foreclosed and the land subjected to sale on execution. But the right or title of the purchaser is not then complete; it is subject to forfeiture for failure to make proof of occupancy within the specified time, or to pay the annual interest or installments of principal of the purchase money. The state is not completely divested of title until all the conditions of purchase are fully complied with. As said by the court in *Williams v. Finley*, 99 Tex. 468, 474, 90 S. W. 1087, 1090:

"The title remains in the state and the purchaser has only the right to acquire it by continued compliance with the conditions prescribed by the statute."

De Shazo, at the date of his conveyance to plaintiff, had not acquired the title of the state. He conveyed to plaintiff the right to acquire it by continued compliance with the statutory requirements. Whatever may have been the status of his title as to others, it is clear that, in so far as plaintiff was concerned, the land conveyed was public land, within the meaning of the article under consideration.

We are convinced that, in order to effectuate the intention of the Legislature in the use of the term "public land" in the connection in which it is used, the term should be construed to embrace public school lands in which the state has any character of title; such lands not losing the character of "public land" until there is a full and complete divestiture of the state's title.

The legislative intent in the enactment of article 164 of the Penal Code is not difficult of ascertainment. Such intention was declared in the early cases by our Supreme Court. A sound public policy requires that officers charged with duties pertaining to the public lands should not be permitted to avail themselves of information acquired through their official positions to speculate in such lands, to the detriment and disadvantage of other citizens and of the public at large. Such officers are in the nature of trustees, and, to insure against an abuse of the trust reposed in them, it is essential that they be forbidden to acquire, directly or indirectly, in their own name or in the name of another, any interest in such lands. *Wills v. Abbey*, 27 Tex. 202; *Cotulla v. Laxson*, supra; *State v. Thompson*, 64 Tex. 690.

As before stated, the purchase by De Shazo was subject to forfeiture. In the event of forfeiture, the land would revert and become again a part of the public domain, subject to sale and award to applicants. In such case the county surveyor would have certain duties to perform in reference thereto. It is evident that a purchase by such officer of the title of a purchaser subject to forfeiture might involve a conflict between his rights under the purchase and his duty to the state.

Inasmuch as plaintiff was incompetent, under the terms of the statute, to purchase from De Shazo, the patent issued by the state to De Shazo cannot inure to plaintiff. It follows that he has failed to show title to the land in controversy.

We are of opinion that the judgment of the Court of Civil Appeals should be reversed, and judgment here rendered that plaintiff take nothing by his suit against defendants.

PHILLIPS, C. J. We approve the judgment recommended in this case.

WALTON v. CORSICANA TRANSIT CO. et al. (No. 124-2999.)

(Commission of Appeals of Texas, Section B.
June 23, 1920.)

Error to Court of Civil Appeals of Sixth Supreme Judicial District.

Action by W. W. Walton against the Corsicana Transit Company, the Corsicana Gas & Electric Company, and the Southern Traction Company. On appeal by defendants from judgment for plaintiff, judgment against the Corsicana Gas & Electric Company was reversed and rendered, the appeal of the Transit Company was dismissed, and the judgment as to the Traction Company was affirmed by the Court of Civil Appeals (189 S. W. 807), and plaintiff brings error. Affirmed.

Luther A. Johnson and Richard Mays, both of Corsicana, for plaintiff in error.

McClellan & Prince and Woods & Kerr, all of Corsicana, for defendants in error.

McCLENDON, J. In the opinion of the Supreme Court the decision of the Court of Civil Appeals in this case was correct.

The opinion of the Court of Civil Appeals, reported in 189 S. W. 307, states the nature of the case and the conclusions reached by that court. We refer to that opinion.

We therefore conclude that the judgment of the Court of Civil Appeals should be affirmed.

PHILLIPS, C. J. We approve the judgment recommended in this case.

Ex parte WADE et al. (No. 5883.)

(Court of Criminal Appeals of Texas. June 16,
1920.)

Habeas corpus ~~85~~(1)—Evidence held insufficient to show relators guilty of capital crime.

Evidence in habeas corpus proceedings held insufficient to warrant the trial court's conclusion that the proof that relators, accused of homicide and seeking admission to bail, were guilty of a capital crime, justifying denial of bail, was evident.

Appeal from District Court, Waller County; J. D. Harvey, Judge.

Habeas corpus for admission to bail on behalf of Jim and Stewart Wade. From order refusing bail, relators appeal. Order reversed, and bail granted.

J. M. Mathis, of Houston, for appellants.

R. E. Hanney, of Hempstead, and Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. This is an appeal from an order of the district judge refusing bail. Relators are charged by complaint with the murder of Gerald Sellars. A voluminous statement of facts is before us, but the evidence will not be discussed in detail. In substance, it appears that some weeks prior to the homicide a quarrel took place between Nathan Sellars, the father of the deceased, and the relator Jim Wade. Subsequently Nathan Sellars fired at Jim Wade several shots, one of them taking effect in his back, and at the time of the homicide the record suggests the existence of ill feeling between Nathan Sellars and the relator Jim Wade. On the night preceding the difficulty in which the deceased lost his life, Jim Wade and Stewart Wade spent the night in a house belonging to Jim Wade, situated in a village in which Nathan Sellars with his family, including deceased, resided, the parties being neighbors. Early in the morning Nathan Sellars while, according to his testimony, looking for his calf, passed near the home of relators, and Jim Wade, observing him, and, as he claims, desiring to talk with Nathan Sellars with a view of reaching an understanding with him, went out of his house, informing his brother Stewart Wade of his purpose. When he reached a point about 100 yards distant from Nathan Sellars, shots were exchanged between them, each of them firing a number of times, the evidence being conflicting as to who was the aggressor, the state's testimony going to show that Jim Wade fired twice before Sellars began, the relators' testimony indicating that Sellars began to draw his gun on observing Jim Wade, and that they fired the first shot about the same time. Neither of them was injured, but during the duel the wife of Nathan Sellars

called to her son, the deceased, and told him they were shooting his father. The deceased, arming himself, left the house, and was met by the relator Stewart Wade. As they met, according to the testimony of both the state and the relators, Stewart Wade said to deceased: "Let's not have anything to do with this. We are too good friends." There is a conflict as to the remainder of the conversation, but the evidence is undisputed that both began firing, deceased stepping behind a barn, from which he fired a number of shots, both of the relators, according to some of the testimony, engaging in the conflict with him, and he finally received two wounds, from one of which he later died.

The state, relying upon various circumstances, advances the theory that the record discloses against the relators conspiracy and premeditation. Stewart Wade contends that the evidence points to no wrongful participation in the conflict on his part, insisting that he but responded to the aggressive acts of the deceased. On the undisputed facts there are inferences that might be drawn by a jury favorable to the relators, and on the facts not undisputed there is a conflict of evidence such as on the whole record did not warrant the conclusion by the trial judge that the proof that relators were guilty of a capital crime was evident.

The order denying bail is therefore reversed, and bail granted to each of the relators in the sum of \$10,000, upon the making of which under the terms of law with sufficient surety their discharge is ordered.

HELLMAN v. STATE. (No. 5853.)

(Court of Criminal Appeals of Texas. June 9, 1920.)

1. Criminal law §1086(1)—Record not reviewable when matters preliminary to judgment of conviction are not shown in record.

Where record showed, "We, the jury, find the defendant guilty and assess his punishment. * * * G., Foreman"—followed by an order adjudging him guilty as found by the jury, etc., there was no such judgment shown to have been entered as is required by Code Cr. Proc. 1911, art. 853, where it failed to show that appellant entered any plea, or that a jury was impeached, or any of such preliminary matters required by such statute.

2. Criminal law §1086(13)—Appellate court acquires no jurisdiction in absence of showing of entry of proper judgment.

The appellate court acquires no jurisdiction of an appeal where the record does not show entry of a judgment in compliance with 1911, art. 853.

Appeal from Matagorda County Court; John F. Perry, Judge.

J. Hellman was convicted of a violation of the pistol law, and appeals. Appeal dismissed.

Matt Cramer, of Bay City, for appellant. Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This appeal is prosecuted from a conviction for violation of the pistol law.

[1,2] A motion to dismiss the appeal is made on the ground that the record does not show a judgment. The only attempt at a judgment in the record is found in the following language:

"We, the jury, find the defendant J. Hellman guilty, and assess his punishment at \$100.00 fine and costs. G. S. Gideon, Foreman."

Then follows the order of the court adjudging him guilty of carrying a pistol as found by the jury, etc. It will be noticed that it fails to show that appellant entered any plea, or that a jury was impeached, or any of those preliminary matters required by the statute which precedes the rendition of a verdict. C. C. P. art. 853. This judgment as presented is not in accord with the statute. Without a judgment the jurisdiction of this court does not attach. We are therefore of opinion that the motion of the Assistant Attorney General is well taken and is sustained.

The appeal is dismissed.

HENDRIX v. STATE. (No. 5850.)

(Court of Criminal Appeals of Texas. June 9, 1920. Rehearing Denied June 25, 1920.)

1. Burglary §46(8)—Defendant's testimony held not to require instruction on reasonable explanation of possession of stolen property on first opportunity.

Where defendant, when arrested on charge of burglary, was silent as to his possession of the goods, his testimony that later, while in jail he was asked for money taken, and returned it, and offered to return the clothes, saying they were given to him by his companion, who was there in jail, it was not error to refuse an instruction on reasonable explanation of his possession at first opportunity.

2. Burglary §46(7)—Instructions held to sufficiently present defendant's theory of non-participation.

Instructions that, if defendant's companion burglarized a residence, and if there was a reasonable doubt whether defendant was not present and did not participate, he should be

acquitted, though he afterwards came into possession of some of the stolen property, held to sufficiently present defendant's theory that he did not participate.

Appeal from District Court, Ellis County; F. L. Hawkins, Judge.

W. H. Hendrix was convicted of burglary of a residence, and appeals. Affirmed.

Adair Dyer, of Ennis, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of burglary of a private residence and allotted five years in the penitentiary.

This is a case of circumstantial evidence. Davis and appellant were traveling in an auto through Ellis county from the city of Dallas to the city of Temple. En route they camped near the residence of W. B. Banks for two or three days. The reason assigned for this by appellant's testimony is that when they reached that point the gasoline tank of their auto "sprung a leak and they were out of gasoline"; their purpose being to repair the car and secure gasoline. While there Banks' residence was burglarized. Appellant and Davis were arrested; appellant being found in possession of some of the stolen property. His testimony is to the effect that he did not steal the goods or enter the house, and knew nothing of it until after he had received the goods from Davis; that Davis left the car, the casing of which appellant was repairing, for the purpose of securing gasoline, and on his return had the stolen goods, and gave him some of them; that he knew nothing of the burglary, had no connection with it, and was not aware the goods were stolen. The state's evidence is sufficient to sustain the conviction. It is not deemed necessary to detail it.

[1] Appellant asked and was refused a charge to the effect that if appellant, when his possession was first challenged, gave an account which was reasonable and probably true, or there was a reasonable doubt of it, the jury should acquit. He also excepted to the court's charge, because it did not submit this issue. The facts upon which appellant's requested charge is based are recited by him in his bill of exceptions No. 2, as follows:

"When I was arrested out there, no one asked me anything about the stuff, and I didn't say anything about it. I remember Mr. Banks coming to see me at the jail. He called me over to the door, and I went over to the door, and he asked for the money, and I gave him the money that was in the pockets. There was

about 30 cents. That was about all Mr. Banks said to me. Well, Mr. Banks said that he didn't want the clothes; he didn't need them. I offered him the clothes. I asked him if they were his clothes; if they were, I would give them to him. I told him that I got the clothes from Davis. Davis was there in the jail at the time."

As we understand the doctrine of reasonable explanation, this testimony does not bring the question within that rule. His statement excludes the idea that he gave an account of it on the first opportunity. He says that, when he was arrested, no one asked him anything about the stuff, and he himself did not say anything about it. When he was arrested, charged with this offense, it was called to his attention. His right to possession of the property was then called in question. This was not within the doctrine of reasonable account of possession of stolen property.

[2] Appellant testified on the trial substantially as his statement above quoted. The court charged the jury with reference to this, if they should find from the evidence that Davis burglarized the private residence of Banks, but that the defendant was not present and participating with him at the time, or if the jury should have a reasonable doubt upon this issue, it would be their duty to acquit defendant of the charge of burglary, although they may believe from the evidence that he afterwards came into possession of some of the property taken from the alleged burglarized house, and was in possession of the same at the time of his arrest. This we understand was his testimony upon the trial and his theory of the case. The court also gave appellant's requested instruction to the effect that if Davis burglarized the house of Banks, and appellant at the time remained in an automobile or on the road, and waited for Davis, and did not take any part in the burglary, and did not in any way assist in the perpetration of the same, and was not present encouraging such perpetration, or if the jury should have a reasonable doubt as to whether such facts are true or not, then in such event they should find appellant not guilty. These charges aptly and pertinently applied the law to the facts of this case, and give defendant the full benefit of all that he claimed with reference to his connection or want of connection with the burglary of the house and possession of the goods that came from it. This is practically the only question presented by appellant's appeal.

Finding no reversible error in the record, the judgment will be affirmed.

ALARCAN v. STATE. (No. 5851.)

(Court of Criminal Appeals of Texas. June 9, 1920.)

1. Criminal law \S 1086(14)—Denial of continuance not reviewed, where record does not show reservation of exception.

A ruling refusing an application for a continuance will not be reviewed, where the record fails to show an exception reserved.

2. Criminal law \S 1159(5)—Finding that value of property exceeded \$50 not disturbed.

The appellate court will not disturb a conviction for theft of property over the value of \$50, because the jury believed the state's evidence as to the value of the property to the exclusion of defendant's testimony, where the state's evidence would justify the conclusion of the jury.

3. Larceny \S 64(7)—Conviction sustained by evidence.

In a prosecution for theft of property over the value of \$50, evidence held to warrant the jury in concluding that defendant was the person who took the property, notwithstanding defendant's explanation of his possession of the stolen goods.

Appeal from District Court, Ellis County; F. L. Hawkins, Judge.

Micario Alarcán was convicted of theft, and appeals. Affirmed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for theft of property over the value of \$50.

[1] The application for continuance will not be considered because the record fails to show an exception reserved to the ruling of the court refusing it. Branch's Ann. P. C. p. 183, for collation of many cases.

It is contended that the evidence is not sufficient to support the conviction:

[2] 1. That the facts do not show the value of the property to be in excess of \$50. This was a controverted issue upon the trial, defendant introducing such evidence, if the jury believed it, to have authorized the conviction of appellant for a misdemeanor theft. The state's evidence justified the jury in concluding that the property was worth over \$50. We do not feel justified in reversing a judgment because the jury believed the state's evidence to the exclusion of defendant's testimony, where the state's evidence would justify the conclusion of the jury.

[3] 2. It is contended the evidence is not sufficient to connect the defendant with the burglary of the house from which the property found in his possession was taken. This is a case of circumstantial evidence. It is

uncontroverted that the house was entered and the property taken; that the property taken was in a trunk, which was closed and fastened by its owner; that the residents were away from the house for some days, and during their absence the house was entered, the trunk broken, and the property taken. About the 25th of December, 1919, appellant carried quite a lot of the stolen property in a suit case to the restaurant of Alberta Perez and left it. This was very early in the morning. Mrs. Perez had just gotten up, but her husband was still in bed. This is an uncontroverted fact, testified by all the witnesses who testified in regard to the matter, including appellant. Appellant accounted for his possession of the property by testifying and making statements to the same effect, that about 11 or 12 o'clock at night, prior to the morning he left the suit case at Perez's restaurant, an unknown Mexican came to him, having the grip in possession, and asked him to keep it until he went to and returned from Dallas, which would be about a week; that he took the grip, which contained the stolen property, and early the next morning carried it to the Perez restaurant and left it, and had not gone back to the restaurant from that time until his arrest, which occurred a few days later. He made a statement to the same effect when his possession of it was challenged. He further testified he had never seen the Mexican before, and did not know him, and had not seen him since, but that if the Mexican was shown to him he thought he would recognize him. So far as we understand this record appellant made no attempt to get this Mexican, or to show his presence at the time and place or in the town of Ennis where this burglary was committed. He denied entering the house or stealing the goods. Quite a lot of personal property taken from the house was inclosed in the suit case, the suit case itself being part of the stolen property. Some of the goods taken were not recovered. Appellant says he knew nothing of the contents of the grip. Among other things not recovered was a wrist watch. The case summed up seems to thus present itself: A burglary was committed and property stolen. Appellant is found in possession of the property early the next morning; he leaves it at a restaurant without making any statement, but later, when challenged, says that it was left with him by an unknown Mexican who was leaving the country. We are of opinion this evidence is sufficient to overcome the reasonableness of appellant's explanation; at least that the jury was justified in disbelieving his explanation. We think, under this evidence, this judgment should be affirmed; and it is accordingly so ordered.

MITCHELL v. STATE. (No. 5810.)

(Court of Criminal Appeals of Texas. May 5, 1920. On Motion for Rehearing, June 23, 1920.)

1. Criminal law \S 542—Former testimony of deceased witness admissible on second trial.

On the second trial of a homicide case, the former testimony of decedent's wife, who died before the second trial, was properly admitted.

2. Criminal law \S 547(1)—Former testimony of deceased witness provable by agreed statement used on appeal in former case.

Where the stenographer testified to the correct transcription of her lost notes of testimony of former trial, and that the narrative statement of a deceased witness offered in the second trial was correct, and the statement of facts was agreed on as correct on appeal in the first trial, the statement was admissible to prove the former testimony of such witness.

3. Criminal law \S 614(1)—Second continuance properly refused for no diligence and for cumulative character of expected testimony.

A second continuance was properly refused, where no diligence was shown to secure the witness, and other witnesses testified to the facts expected to be testified to by the absent witness.

4. Witnesses \S 380(3) — Statement by deceased witness admissible to contradict her former testimony admitted on second trial.

Evidence of a contradictory statement by a deceased witness should have been allowed to impeach her testimony admitted on a second trial as against objection of no predicate and that former testimony of the impeaching witness contained no such impeachment.

5. Criminal law \S 1170(2)—Rejection of evidence of contradictory statement of former testimony used on second trial held harmless error.

On second trial of a homicide case, error in rejecting a contradictory statement of a deceased witness, whose former testimony was used, and which stated that no pistol was found on decedent, her husband, was harmless, in view of cumulative evidence contradicting her, and failure of such contradictory evidence to justify defendant in striking deceased.

On Motion for Rehearing.

6. Criminal law \S 614(3) — Application for second continuance for absent witness must show diligence.

It is incumbent on applicant for a second continuance for absent witness to allege or show what diligence has been exercised.

7. Criminal law \S 1144(7)—Application for continuance presumed a subsequent one.

In absence of an affirmative showing that an application for continuance is the first, it is presumed that it is a subsequent application.

8. Witnesses \S 67—Defendant's attorney was competent witness to prove agreed statement showing former testimony of a deceased witness.

Defendant's attorney might, when called by the state, testify to the authenticity of an agreed statement of a former trial containing testimony of a witness since deceased.

9. Homicide \S 332(2)—Finding supported by evidence of deadly character of weapon used will be upheld.

Unless it affirmatively appears that there was no evidence supporting the jury's finding as to the deadly character of the weapon used, or that such finding is against the weight of the testimony, it will be upheld.

Appeal from District Court, Limestone County; A. M. Blackmon, Judge.

W. H. Mitchell was convicted of manslaughter, and appeals. Affirmed.

J. A. Tucker, of Thornton, Wm. Kennedy, James Kimbell, and W. T. Jackson, all of Groesbeck, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was tried in the district court of Limestone county on a charge of murder, was convicted of manslaughter, and his punishment fixed at five years in the penitentiary. This is the second appeal of this case. See 209 S. W. 743.

Deceased and appellant married sisters, and from the testimony of several witnesses it appears that they had been hostile toward each other for some time, but that on the night of the homicide appellant and his family came to a public dance and ice cream supper at the home of deceased. Some time after midnight deceased and a son of appellant seem to have engaged in some kind of wordy altercation out in the yard, at some stage of which the appellant hastily approached deceased and struck him on the head with the breast yoke of a wagon, which blow caused the death of deceased some time during the day following. The evidence presents sharply conflicting stories, as same comes from the witnesses for the state or the appellant; but these matters of conflict have been settled by the jury, and the record contains ample facts upon which to predicate this conviction.

[1] The wife of deceased was a witness upon a former trial of the case, but has since died. The state was permitted, over objection, to introduce her testimony on the instant trial, as given upon said former hearing. The objection to this matter, as presented by appellant's bill of exceptions, has so often been before this court, and by it analyzed, and the authorities collated and reviewed, that any further discussion now

would be repetition. We adhere to the rule that such evidence, when properly proven up, is admissible. *Dowd v. State*, 52 Tex. Cr. R. 563, 108 S. W. 389; *Nixon v. State*, 53 Tex. Cr. R. 325, 109 S. W. 931; *Porch v. State*, 51 Tex. Cr. R. 7, 99 S. W. 1122; *Robertson v. State*, 63 Tex. Cr. R. 216, 142 S. W. 533, Ann. Cas. 1913C, 440; *Sweat v. State*, 77 Tex. Cr. R. 287, 178 S. W. 554.

[2] Objection was made to the introduction of said testimony, because the original notebooks used by the stenographer in taking down the testimony were lost. The stenographer testified that her notes were correctly transcribed, and that the narrative statement of the said deceased witness, which was offered in evidence in the instant case, was correct and true. It was also shown that the statement of facts was agreed upon as correct, upon the appeal from the former conviction had at said former trial. There is no prescribed method or rule for reproducing testimony given at a former hearing, and it may be given by the stenographer, or other persons who heard it, and are able to affirm the correctness of the reproduction offered. *Pace v. State*, 69 Tex. Cr. R. 27, 153 S. W. 132; *Roquemore v. State*, 59 Tex. Cr. R. 568, 129 S. W. 1120; *Cornelius v. State*, 54 Tex. Cr. R. 173, 112 S. W. 1050.

[3] An application for continuance was made by appellant. The absent witnesses were Mrs. Alma Williams, Ura Bailey, and Clarence Johnson. The two latter appeared during the trial and testified in the case. This was a second application, and we think no diligence is shown to secure the attendance of Mrs. Alma Williams, and that it also appears that the same facts stated as expected from her were given in evidence by several other witnesses.

[4] Error is based on the refusal of the trial court to permit appellant to prove by Jim Walts that the wife of deceased, Mrs. Jordan, whose testimony had been reproduced by the state, had made a statement to him the next morning after the homicide, contradictory of her testimony as given on the former trial, and as reproduced on the instant hearing. It appears that this testimony was refused, because no predicate was laid for impeachment, and because the testimony of said Walts, as presented on the former trial in the shape of an affidavit, contained no such testimony as appears in the statement now sought to be elicited from him, impeaching the testimony of Mrs. Jordan. The appellant wished to prove by Walts that on the morning after the homicide Mrs. Jordan told him that she had taken a pistol off the body of her husband shortly after he was struck by appellant the fatal blow. The testimony was rejected for the reason stated. This testimony should have been admitted. *Lyles v. State*, 64 Tex. Cr. R. 621, 142 S. W. 592;

Hamblin v. State, 84 Tex. Cr. R. 368, 90 S. W. 1075.

[5] However, we are of opinion that its rejection in the instant case was harmless error. The only purpose of such testimony would have been to contradict or impeach Mrs. Jordan. Looking to her testimony as given on this trial, we find that she stated positively that she did not remove a pistol from her husband's bosom the night he was killed, and did not take any from his body; that her husband had no pistol on that night; that he owned no pistol. She further stated that John Mitchell found a pistol the next morning outside their fence, but it did not belong to her husband. Looking to the testimony of said witness Walts, it will be observed that he swore positively to seeing deceased with a pistol shortly before the fatal blow was struck, and directly afterwards he saw that same pistol in possession of Mrs. Jordan, and that he saw it in her hands the next morning. From the testimony of Felton Carroll and Evie Sanders it also appears that they testified fully for appellant, stating that Mrs. Jordan had a pistol that night, which came off the body of her husband, and which they were directed by her to take from his body. In other words, the record discloses that appellant introduced numerous witnesses whose testimony was wholly contradictory to that of Mrs. Jordan, and put her in the attitude of being impeached as completely as would the added statement of said witness Walts that she told him that she took the pistol from the body of her husband.

We think the error harmless, for the further reason that, if Mrs. Jordan had stated to the witness Walts that she had taken said pistol from the body of her husband, it would have afforded no justification for the act of appellant in striking deceased, as appellant did not claim himself, nor did any one for him claim, that appellant saw any pistol in possession of deceased before striking him. Appellant stated that deceased and the son of appellant were quarreling, and that deceased called the boy a "long-legged son of a bitch," and stated that he was going to kill him. Appellant said that, when he called his son this name and made this threat, deceased threw his hand back to his hip, and he thought that he had a pistol; that he was excited, and struck in defense of his boy. The trial court fully charged on appellant's right to act in defense of his son, whether the danger was real or only apparent, and no exceptions were taken to the court's charge. So, in view of the fact that appellant had the full benefit of abundant testimony contradictory of Mrs. Jordan's testimony regarding said pistol, and that at least half a dozen witnesses for him testified that deceased had a pistol on the occasion in question, we conclude that no possible harm could have result-

ed from the error of the trial court in refusing said impeaching testimony of said witness Jim Waits.

Having disposed of the various questions raised in this bill, and finding no reversible error in the record, the judgment of the trial court will be affirmed.

On Motion for Rehearing.

[6] This case was affirmed at a former day of this term, and is before us on appellant's motion for rehearing. It is urged in said motion that the application for continuance, made when the case was called for trial, should have been granted, because of the absence of Mrs. Alma Williams. Again examining the record in reference thereto, we find that said application contains no showing of any diligence whatever to secure the presence of said witness. The instant trial began January 26, 1920. The indictment shows to have been returned September 4, 1918, a year and a half before this trial. No subpoenas are attached to the motion, or appear in the record, and the one only statement in said application as to diligence is that "said witness had been duly subpoenaed." It is not stated that she was in attendance upon court at any time, nor that she had ever before disobeyed process, nor when the subpoena was issued. It is the plain duty of one asking for a continuance to place in the application such allegations, or make such showing, as that the trial court and this court may know what diligence has been used. *Massie v. State*, 30 Tex. App. 64, 16 S. W. 770; *Isham v. State*, 49 S. W. 594; *King v. State*, 67 Tex. Cr. R. 63, 148 S. W. 325.

[7] Appellant states in his motion that said application was the first one, but no such statement anywhere appears in the record. On the contrary, the bill of exceptions reserved to the action of the trial court in overruling this application states that it was a second application. This court has held that, in the absence of some affirmative showing that the application for continuance is the first one, it will be presumed to be a subsequent application. *Branch's Ann. P. C. vol. 1, § 313*.

[8] Error was also urged originally upon the ground that the trial court should not have permitted the state to put on one of appellant's counsel as a witness, and to prove by him that the carbon copy, which Miss Dierlam, the official court reporter had identified as a true statement of the testimony of the deceased witness, Mrs. Jordan, was a true copy of the statement of facts as agreed to by both parties and approved by the court upon the former trial. Neither as originally presented, nor in this motion, are we cited to any authority upholding this contention. The fact that the witness was an attorney of the accused was not a valid objection. Section 345, *Branch's Penal Code*, vol. 1. Miss

Dierlam, the official court reporter, had earlier testified that she took down the testimony of the deceased witness upon a former trial in shorthand; that she had searched for her original notes, but that they were lost; that she made a careful and accurate transcription of said notes of the former trial; and that the copy showed her, which was the same one shown the witness Jackson, attorney for appellant, was an exact carbon copy of such transcript; and she stated, after having read the statement, that the matter refreshed her memory, and that also by referring to her independent recollection, she was able to state that the same contained a true statement of the deceased witness. In this condition of the record, we do not think it error to permit the witness Miss Dierlam, and the witness Jackson, to testify that the copy identified was a true copy of the statement of facts, in so far as the testimony of Mrs. Jordan went. The original stenographic record was lost. If it had been in existence, Miss Dierlam's statement of its contents would have been uncontrovertible. If the copy did not speak the truth, appellant had every opportunity and right to assail same. No error appears in overruling this objection.

We have reviewed the facts of the case, and adhere to our former ruling that the rejection of the testimony of the witness Waits was harmless error.

[9] It is further insisted that the evidence was not sufficient to support the verdict, because of the lack of testimony showing that the breastyoke, with which appellant struck the fatal blow, was a deadly weapon, or such weapon as was reasonably calculated to produce death, and further that the weight of said breastyoke was not shown. The court duly defined to the jury a deadly weapon, and required them to believe that it was such a weapon, and that from its character, or the manner of its use, etc., by appellant, it was reasonably calculated to inflict death, and no exception to this charge appears in the record. In this same connection, and as a part of said definition, the court specifically told the jury that, if the instrument used was one not likely to cause death, it would not be presumed that death was intended. The breastyoke was that of an ordinary farm wagon. Appellant admitted that he struck deceased one blow on the head with same, further admitting that he may have used both hands. The blow was such as to render deceased unconscious, and he never at any time recovered consciousness before his death the day following. The physician said this blow caused the death of deceased; that it was a tolerably large wound, and cut through the flesh and muscles to the bone, and it seemed to him to make a dent on the skull. No requested charge on the character of the

weapon was asked, or can be found in the record.

Our statute (article 1082, Branch's Ann. P. C.) states that, if the death of deceased unquestionably resulted from the injury inflicted by the accused, the case is one of homicide. The trial court submitted both grades of homicide in a manner apparently satisfactory to the accused. With this charge before them, and probably remembering that the state's testimony showed that at the time appellant struck the deceased, the wife of the latter had hold of his hands, and was pulling him away from where appellant was, the jury declined to believe, or find him guilty of any lower grade of homicide than murder. The question of what is a deadly weapon is one of fact for the jury, under appropriate instructions of the court, and unless it affirmatively appear that there was no evidence supporting their finding, or that such finding is against the weight of the testimony, we will uphold the action of the trial court in refusing a new trial, based on the insufficiency of the testimony.

The motion for rehearing will be overruled.

GREER v. STATE. (No. 5450.)

(Court of Criminal Appeals of Texas. June 2, 1920. State's Rehearing Denied June 25, 1920.)

Criminal law §369(8)—Prior acts of intercourse not provable.

In prosecution of father for rape committed upon his daughter, under 15, evidence of prior acts of intercourse between the parties held inadmissible.

Appeal from District Court, Bexar County; W. S. Anderson, Judge.

O. H. Greer was convicted of rape on his daughter, and appeals. Reversed and cause remanded.

W. C. Linden and Joe H. H. Graham, both of San Antonio, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of rape upon his daughter, a girl just under 15 years of age, and allotted 20 years in the penitentiary.

There was no exception reserved to the court's charge, and several of the bills are so qualified by the judge that they present no reversible error. They are not therefore discussed.

By a bill of exceptions the question is presented that the court erred in admitting evidence of prior acts of intercourse between the father and daughter, running back for 5 or 6 years, some occurring at Beaumont, some

in Williamson county, and some in San Antonio. The details of these acts are unnecessary to be stated. Appellant objected on various grounds. The court signs the bill of exceptions with the statement that he admitted these acts under the holding of this court in *Hamilton v. State*, 36 Tex. Cr. R. 372, 37 S. W. 431. The *Hamilton* Case was overruled in *Barnett v. State*, 44 Tex. Cr. R. 593, 73 S. W. 399, 100 Am. St. Rep. 873. The rule laid down in the *Barnett* Case seems to have been generally followed. See *Hackney v. State*, 74 S. W. 556; *Smith v. State*, 74 S. W. 557; *Wiggins v. State*, 47 Tex. Cr. R. 541, 84 S. W. 821; *Clifton v. State*, 46 Tex. Cr. R. 22, 79 S. W. 824, 108 Am. St. Rep. 983. The same rule with reference to burglary has been followed in a number of cases (see *Glenn v. State*, 76 S. W. 758), and the same rule applied in arson (see *Smith v. State*, 52 Tex. Cr. R. 81, 105 S. W. 501), and incest (*Skidmore v. State*, 57 Tex. Cr. R. 507, 123 S. W. 1129, 26 L. R. A. [N. S.] 466; *Pridemore v. State*, 59 Tex. Cr. R. 563, 129 S. W. 1112; *Bohannon v. State*, 204 S. W. 1165). The general proposition is thus correctly stated:

"On a trial for rape where the prosecutrix is under the age of consent, testimony of former acts of intercourse are not admissible unless it has some unmistakable bearing on the case and tends to solve some issue in the case."

There may be and are cases arising where extraneous crimes and acts are permissible. Under such circumstances they are only admissible to explain some pertinent fact in the case such as *res gestæ*, showing intent, or to connect defendant with the matter under investigation. These acts are not admissible under any of the exceptions. The issue was fairly and squarely made in the case by the state that the act was committed as set out in the indictment by positive evidence of the girl with some sustaining evidence from other witnesses. The defendant, taking the stand in his own behalf, denied the intercourse. The prior acts as testified by the girl could not, therefore, be used under any of the exceptions to the general rule. They are not *res gestæ*, because some of them occurred years before, and all of them occurred some time prior to the particular act for which appellant was tried. There could be no question of intent. The testimony of the girl with reference to prior acts did not connect the defendant with this act. The best that could be said of this was that if appellant may have committed prior acts, therefore he may probably have committed the act charged in this case, but this character of evidence is not brought within the exceptions. Her corroboration, if it be sought to be used for that purpose, was of no greater cogency than her testimony in regard to this particular act. Incest is a crime not of a continuous nature, but each incestuous act would constitute a

separate offense for which the party might be punished, and is analogous on this phase of the law to rape. Under the state's view of this case appellant could have been tried for incest or rape. She was his daughter, and any act committed upon her when she was under 15 years of age would constitute either rape or incest, the difference being that the age limit does not apply to incest, whereas it does to rape without consent where the girl is under 15. We are of opinion that the evidence of the prior acts was inadmissible under this record.

The judgment will be reversed, and the cause remanded.

JOBE et al. v. PATTON et al. (No. 2242.)

(Court of Civil Appeals of Texas. Texarkana.
June 20, 1920. Rehearing Denied
June 24, 1920.)

1. Husband and wife §249—Burden of proof on children claiming as heirs of mother to show adverse possession completed before her death.

Plaintiffs suing as heirs of their mother, claiming she had title by limitations, had the burden of showing that her possession was adverse within the statute, also that it had continued as long as 10 years before the mother died, since possession of father after her death could not help plaintiffs, for, if adverse possession commenced by a husband and his wife has not continued long enough before the death of one occurs, and if the survivor continues such possession until the statutory title is complete, the title does not vest in the community estate, but vests in the survivor, and becomes part of his separate estate.

2. Appeal and error §101(1)—Finding on conflicting evidence conclusive.

Where finding of court on conflicting evidence as to adverse possession could not be said not to have support in the evidence, it is conclusive.

Appeal from District Court, Wood County;
J. R. Warren, Judge.

Suit by J. J. Jobe and others against A. Patton and others. From judgment for defendants, plaintiffs appeal. Affirmed.

M. D. Carlock, of Winnsboro, for appellants.

E. A. Tharp and Jones & Jones, all of Mineola, for appellees.

WILLSON, C. J. Appellants were the plaintiffs below. They were the children of Seaborn Jobe and his wife, Tildy. The latter died prior to 1901. Appellants' suit was against A. Patton. They claimed title to the east half of the C. R. Patton 320-acre survey in Wood county by force of the statute of limitations of 10 years. In their petition appel-

lants alleged that Patton was setting up some kind of claim to the land, and that the claim was a cloud on their title. They prayed for "judgment forever quieting them in their title," and for a writ of injunction "enjoining the said A. Patton asserting any claim or title to the land." Pending a trial of the suit Patton died intestate, and appellees, his only heirs, became parties defendant, filing an answer consisting of a general denial, a plea of not guilty, and a plea in the nature of a cross-action, in which they prayed judgment for the land. The appeal is from a judgment that appellants take nothing by their suit and that the title and interest they had in the land be divested out of them and vested in appellees.

The trial was to the court without a jury. The contention on the part of appellants was that the land belonged to the community estate between Seaborn Jobe and his wife, Tildy, and, she having died intestate, that they, as her children and only heirs, owned her part of it. In support of their contention appellants undertook to prove that during the lifetime of Tildy she and Seaborn had adverse possession of the land within the meaning of the 10-year statute of limitation long enough to vest title thereto in said community estate. Contentions on the part of appellees were that the possession Seaborn and Tildy had was not "adverse" within the meaning of the statute, and, moreover, if it was, that Tildy died before it had continued as long as 10 years.

Eight of the nine assignments in appellants' brief are predicated on the action of the trial court in admitting testimony appellants objected to. The contention presented by the other one is that the testimony did not warrant a finding that appellees had title to the land. In the view we take of the case, the assignments need not be considered; for, if they were sustained, the judgment should not therefore be reversed. The burden was on appellants to prove that they had the title to the land, and we think the trial court had a right to say they failed to discharge the burden. If they did, of course they were not entitled to recover, and are not entitled to a reversal of the judgment in appellees' favor, notwithstanding the trial court may have erred in admitting the testimony they objected to, and notwithstanding it may not have appeared that appellees had title to the land.

[1] Appellants did not claim they had title to the land in any other way than as heirs of their mother, and they did not claim that she had title otherwise than by force of the statute of limitations of ten years. The burden was on them to show not only that the possession Seaborn and Tildy had of the land was "adverse" within the meaning of the statute, but also that it had continued as long as ten

years before Tildy died; for possession continued by Seaborn after her death would not help appellants' case. It seems to be settled, if adverse possession contemplated by the statute of limitations commenced by a husband and his wife has not continued long enough to vest the title before the death of one of them occurs, and if the survivor continues such possession until the statutory period is complete, the title does not vest in the community estate, but vests in the survivor and becomes a part of his separate estate. *Sauvage v. Wauhup*, 143 S. W. 259; *Cook v. Oil Co.*, 154 S. W. 279; *Brown v. Lumber Co.*, 178 S. W. 787; *Simpson v. Oats*, 102 Tex. 186, 114 S. W. 105.

[2] We have read the testimony in the record. If it should be conceded, and we do not say it should be, that it appeared as a matter of law that appellants discharged the burden on them so far as it was to prove that the possession of Seaborn and Tildy was "adverse," it certainly cannot be said the testimony was so conclusive of the fact as to require the court to find that the possession by Seaborn and Tildy continued as long as 10 years. The testimony with respect to that feature of the case was conflicting, and, moreover, the part of it adduced by appellants to support their contention was uncertain as to the time when the possession commenced and as to the time when Tildy died. The testimony would have supported a finding either that the possession had or that it had not continued during the life of Tildy long enough to perfect the title in the community estate between her and Seaborn. That being the state of the case before the trial court, we cannot say he erred when he made the finding involved in the judgment that Tildy died before the 10 years' possession necessary to vest the title was complete. Therefore the judgment will be affirmed.

COMPTON et al. v. FRANKS. (No. 6160.)

(Court of Civil Appeals of Texas. Austin.
April 14, 1920. Rehearing Denied
June 9, 1920.)

1. Tenancy in common ⇨53—Co-owners held not bound by misrepresentations of another owner.

Where a father and children were entitled to undivided interests in land, and, sale having been negotiated, the father without authority from his children undertook to point out the premises sold, his representations are not binding on the children, and the deed which clearly described the premises, but did not include a portion of the lands pointed out, will not be reformed as to them.

2. Appeal and error ⇨1033(5) — Where charges were unduly favorable to defendant, held that he could not complain of conflicts therein.

Where the main charge was unduly favorable to defendant, and the special charge contained no affirmative error, defendant's assignment complaining of conflict between the two will be overruled.

3. Reformation of instruments ⇨43—Defendant seeking reformation of deed has burden of proof.

Defendant, who by cross-action seeks reformation of a deed, has the burden of proof.

4. Covenants ⇨100(5)—Covenant of warranty not breached because land pointed out was not included in the deed.

While, if one sells land which he does not own, the purchaser may obtain relief in equity for damages which he has suffered, yet, if the seller makes a deed which by its terms does not include some of the land pointed out, the purchaser cannot recover upon the warranty; for it is only where there is failure of title to part of the land which the deed purports to convey that the covenant of warranty is broken.

Appeal from District Court, Coryell County; J. H. Arnold, Judge.

Action by John Y. Franks against H. S. Compton and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Mears & Watkins, of Gatesville, for appellants.

McClellan & McClellen, of Gatesville, for appellee.

JENKINS, J. D. R. Franks, as the survivor of the community estate of himself and deceased wife, and her children were the owners each of an undivided one-half interest in about 200 acres in the Clayton survey, and also the land lying east and adjoining said survey. Franks and his children executed to L. E. Todd a warranty deed conveying 200 acres of the Clayton survey, describing the east boundary line of the land so conveyed as the east boundary line of said survey. Todd took possession of a strip of land lying east of the Clayton survey, which he subsequently sold to one Farmer, and Farmer sold the same to appellant Compton. Appellee, John Y. Franks, was one of the children of D. R. Franks and wife, and he, after the death of his father, purchased the interest of the other children in the land lying east of the Clayton survey. He brought this suit to recover the strip of land east of the Clayton survey, of which Todd had taken possession, describing the same by metes and bounds.

Appellant Compton, in addition to general denial and plea of not guilty, alleged that

the land in controversy was sold to him by appellant Farmer, and that the same was sold to Farmer by appellant Todd, and that the same was sold to Todd by Franks and his children. He alleged that Franks pointed out the land in controversy as being within the boundaries of the Clayton survey, and as the land sold to Todd.

Appellee denied these allegations, but alleged the truth to be that D. R. Franks informed Todd at the time said land was sold to him that he did not know exactly where the east line of the Clayton survey was, that he would either have the same surveyed, and sell it to him at \$75 an acre, or that he might take the tract, supposed to contain 200 acres, at \$15,000, and that Todd accepted the proposition last above stated. Appellee also pleaded the four-year statute of limitation.

The children of D. R. Franks other than appellant were made parties on their warranties, and judgment was sought against all of said children on their warranty deed to Todd.

Appellant Compton prayed that the deed from Franks and his children be reformed so as to include the land in controversy; the same being alleged to be the land actually pointed out and sold to Todd by Franks, Sr.

The court sustained exception as to the parties who were sought to be made liable upon their warranty. The issue as to limitation was not submitted to the jury.

In its main charge the court, after clearly defining the issues as made by the pleadings, instructed the jury, in substance, that if the land sold by D. R. Franks to L. E. Todd was correctly described in the deed, they would return a verdict for the plaintiff, but that, on the other hand, if they found that D. R. Franks pointed out the lines of the land that he was selling to Todd, and that such lines included the land in controversy, they would find for appellants.

[1] The court, at the request of appellee, gave the jury a special charge, in which it informed them that, where a party selling land goes upon the ground and points out the lines of the same, and thereafter a deed is executed to such land, which, by mistake, does not include the land so pointed out, such deed may be reformed, if such mistake was mutual to all parties.

Appellants assign error upon the action of the court in giving this special charge, and under said assignment submit the following proposition, to wit:

"A father and ten children, where the father owns an undivided one-half of the land conveyed, and the children own the other undivided one-half, and the father goes upon the land with the purchaser, points out the land, sells same, and puts the purchaser in possession of the land, and the consideration is paid by the purchaser, and each of the grantors to the deed accepts the consideration paid in proportion to their respective interests, the same is binding

upon each grantor; and if there was a mutual mistake between Dave Franks, Sr., and L. E. Todd as to the description of the land in the deed, the said deed could be reformed without all of the grantors at the time actually knowing of the mistake in the deed."

We do not think this is a sound proposition. If an owner of an undivided interest in land points out supposed lines of the land intended to be sold, and a deed is thereafter executed which does not include the land so pointed out, he might be responsible in equity to the extent of his interest in the land not included in the deed; but, if there are other grantors owning an undivided interest who did not authorize the grantor who pointed out the land to do so, and did not know of his having done so, the fact that they thereafter signed a deed to land which they owned, and which land was properly described in the deed, would not authorize the deed to be reformed as to them. They having made no representation other than contained in their deed, they would not be bound by representations made by a co-owner without their authority.

The second proposition under the first assignment of error is that the court erred in charging on the weight of the evidence, in that it assumes that the line pleaded by plaintiff is the correct line. This charge is not subject to such criticism.

The third proposition is that the main charge and the special charge given are contradictory.

[2] The main charge states a proposition of law which was more favorable to appellants than the law would have authorized. The special charge does not contain any affirmative error, for which reason we do not sustain appellants' third proposition.

[3] The second assignment of error complains of the charge of the court, in that it places the burden of proof upon the defendant on his cross-action, wherein he seeks to have the deed reformed. In this there was no error. *Railway v. Shirley*, 45 Tex. 377; *Moore v. Glesecke*, 76 Tex. 543, 13 S. W. 290.

[4] The third assignment complains of the action of the court in sustaining appellee's exceptions to appellants' allegations, wherein they seek to make the children of D. R. Franks liable upon their warranty. In this there was no error. It is true that, if one sells to another land which he does not own, the purchaser may obtain relief in equity for damages which he has suffered by reason of such land being sold to him, but, if the seller makes a deed which by its terms does not include some of the land pointed out, a purchaser cannot recover upon the warranty. It is only where there is a failure of title to the land, or a part thereof, which the deed purports to convey, that the covenant of warranty is broken. *Stark v. Homuth*, 45 S. W. 763, and authorities there cited.

Finding no error of record, the judgment of the trial court is affirmed.

Affirmed.

LANCASTER et al. v. TUDOR et al.
(No. 1123.)

(Court of Civil Appeals of Texas. El Paso.
May 27, 1920. Rehearing Denied
June 17, 1920.)

1. Trial \S 251(3)—Instruction in action for damage to cattle erroneous as not confining issues to negligence charged.

In action against receivers and railroads for damage to a shipment of cattle, charge not requesting finding as to whether either receiver was guilty of the acts charged, and whether such acts were negligence and the proximate cause of the injuries complained of, held erroneous, under Vernon's Sayles' Ann. Civ. St. 1914, art. 1971, as too broad, as permitting the jury to consider elements of negligence not pleaded by plaintiff, and as not confining issues to specific negligence charged.

2. Carriers \S 229(2)—Shipper's damages difference between value of cattle as they should have been and as they were delivered.

In action against railroads for damage to shipment of cattle measure of damages is difference between market value of cattle at time and place of delivery as actually delivered and their market value as they would have been without injury.

3. Carriers \S 228(3)—Proof of intrinsic value of cattle at destination admissible in absence of market value.

In action against railroads for damage to shipment of cattle, if the proof showed no market value at destination, proof of intrinsic value at the time and place was admissible for use in establishing damages.

4. Carriers \S 230(1) — Whether no market value for cattle at place of delivery a jury question.

In action against railroads for damages to shipment of cattle, where the evidence leaves it doubtful whether there was no market value at the place of delivery, the question becomes one for the jury.

5. Trial \S 338—Separate verdict against each defendant intelligible.

In action for damages to shipment of cattle against receivers of one railroad and against another road, the fact that the jury wrote a separate verdict as to each defendant did not render it unintelligible.

Appeal from District Court, Reeves County; Chas. Gibbs, Judge.

Suit by C. W. Tudor against J. L. Lancaster and Pearl Wight, receivers of the Texas & Pacific Railway Company, and against the Rio Grande, El Paso & Santa Fé Railway Company. From a judgment against them,

and in favor of the other defendants, defendant receivers appeal. Reversed and remanded as to defendant Wight, receiver of the Texas & Pacific Railway Company; affirmed as to the Rio Grande, El Paso & Santa Fé Railway Company and defendant Lancaster.

Jno. B. Howard, of Pecos, for appellants.

Ben Randalls and Palmer & Russell, all of Pecos, and Ellis Douthitt, of Sweetwater, for appellee.

HARPER, C. J. C. W. Tudor brought this suit against J. L. Lancaster and Pearl Wight, as the receivers of the Texas & Pacific Railway Company, and the Rio Grande, El Paso & Santa Fé Railway Company, for damages to 615 head of cattle shipped from Pecos, Tex., to La Tuna, Tex.

The grounds of negligence urged are that: First. By virtue of his contract and the promise of the agent of the receivers to have cars ready, the cattle were placed in the pens of the railway company at Pecos on October 21, 1917. That no cars were furnished, and cattle not shipped until October 28, 1917. That by reason of the cattle being range cattle, and being compelled to remain in the pens during said time, they lost strength, etc., and were thereby deteriorated in value. Second. That he was compelled to buy feed for them and to hire help, for which he incurred expenses. Third. That the cars were not properly bedded, which caused the cattle to fall down and be trampled upon, etc. Fourth. That after the cattle arrived at El Paso the defendants permitted them to remain upon the side track for 24 hours without unloading or feeding, etc. That by said acts of negligence some of the cattle were caused to die and others were injured, etc.

The receivers of the Texas & Pacific Railway Company answered by general and special exceptions, general denial, and specially that the cattle were received under a contract which limited its liability for damages to acts occurring upon its own line, and that a separate contract was made with the Rio Grande & Santa Fé Railway Company for transportation from El Paso to La Tuna; that all injuries to the cattle were caused by them being thin and weak and not by any act of defendant; that the cars were furnished within a reasonable time after legal demand for them was made, etc. The answer of the El Paso, Rio Grande & Santa Fé Railway Company is substantially the same.

Tried with a jury, submitted upon general charge, and upon the verdict for plaintiff against the receivers for \$1,750, and for the other defendants, judgment was entered for plaintiff against the receivers for said sum, and for the other defendants that plaintiff take nothing as to them, from which the receivers only have appealed. The appellant

assigns error upon the charge of the court that it is too broad, and permits the jury to consider elements of negligence arising during the trial not pleaded by plaintiff, and that it fails to confine the issues to the specific acts of negligence charged by plaintiff.

The charge complained of reads as follows:

"Gentlemen of the Jury: The plaintiff, C. W. Tudor, seeks to recover damages from the defendants Pearl Wight and J. L. Lancaster, as receivers of the Texas & Pacific Railway Company, and against the defendant Rio Grande, El Paso & Santa Fé Railway Company, alleged to have accrued to a shipment of cattle shipped by plaintiff over defendants lines of railroad from Pecos, Tex., to La Tuna, Tex. The defendant Pearl Wight has answered, admitting that he handled the shipment of cattle in question as receiver of said Texas & Pacific Railway Company; the defendant J. L. Lancaster has filed no answer; and, there being no evidence showing that said Lancaster handled said cattle as receiver, you will therefore return a verdict in favor of said J. L. Lancaster. The defendants plead a contract limiting their liability to such injuries, if any, as accrued to said cattle while in charge of the respective defendants; they also allege that such damages as accrued to plaintiff, if any, so accrued by reason of the poor and weak condition of said cattle, and by reason of their wild and vicious natures.

"(1) You are charged that it was the duty of the defendants and Pearl Wight, receivers of the Texas & Pacific Railway Company, to furnish cars for the transportation of said cattle upon such date, if any, as you may find that said receivers, through its agent, promised to furnish said cars, if any, and to promptly receive said cattle when tendered to it at such time and to transport the same with ordinary care to El Paso, and there to deliver the same to its codefendant, the Rio Grande, El Paso & Santa Fé Railway Company, and that it was the duty of the defendant the Rio Grande, El Paso & Santa Fé Railway Company to promptly receive said cattle when tendered to it at El Paso, Tex., and to transport the same to their final destination with ordinary care.

"(2) 'Ordinary care' is such care as a reasonably prudent person would have exercised under the same or similar circumstances, and a failure to exercise such care constitutes negligence.

"(3) If you find for the plaintiff, you will assess his damages at the difference, if any, between the intrinsic value at La Tuna, Tex., of the cattle in question, at the time and in the condition in which they should have arrived at their final destination, and their value at the time and in the condition in which they did arrive at their final destination, to which you may add the reasonable cost and expense of handling and caring for such cattle at Pecos, Tex., while waiting for cars, in the event you should find from the evidence that such cars were promised at an earlier date than they were furnished.

"(4) Neither of the defendants is liable for damages to plaintiff except such damages as you may find accrued by reason of the negligence of such defendant.

"(5) The defendants are not liable for damages that may have accrued to said cattle by

reason of their poor and weakened condition, nor by reason of their inherent viciousness.

"(6) The burden of proof is upon the plaintiff to establish his right to recover by a preponderance of the testimony, and unless he had done so you will find for the defendants."

[1] The charge does not request a finding by the jury as to whether or not either of the defendants were guilty of the acts charged and whether such acts were negligence, and the proximate cause of the injuries complained of, in fact, does not affirmatively submit any definite issue in the case; for such reason it is subject to the criticisms urged.

Article 1971, R. S. Vernon's Sayles', provides:

"The court 'shall so frame the charge as to distinctly separate the questions of law from the questions of fact; he shall decide on and instruct the jury as to the law arising on the facts, and shall submit all controverted questions of fact only to the decision of the jury.'"

The charge in this case falls short of the requirements of this statute.

[2] The next assignment is that it was error to permit witness to testify to the intrinsic value of the cattle at the point of destination. The measure of plaintiff's damages in this case is the difference between their market value at the time and place of delivery in the condition they were in at the time of their delivery and their market value in the condition they would have been in without injury.

[3, 4] If the proof showed no market value, then proof of intrinsic value at the time and place, etc., was admissible; however, in this case there was one witness testified "that there was no market value that he was able to find," and another testified positively that there was a market value at the place, and there is no other evidence upon the issue. We think it doubtful whether the evidence is sufficient to prove that there was no market value at the place of delivery; in such cases it becomes a question for the jury to determine. *Ara v. Rutland*, 215 S. W. 445; *G. H. & S. A. Ry. Co. v. Patterson*, 173 S. W. 274.

In view of another trial we make no comment upon the assignment charging excessive verdict.

[6] That the jury wrote a separate verdict as to each defendant does not make it unintelligible, as charged by the fifth.

Reversed and remanded as to the appellant receiver of Texas & Pacific Railway Company, Pearl Wight, and affirmed as to the Rio Grande & Santa Fé Railway Company and J. L. Lancaster. Tudor has not appealed from the judgment in favor of the latter defendants, and appellant does not complain of the decree, and for the further reason that the evidence shows a separate and distinct cause of action against each of the railway com-

panies. *Danner et al. v. Walker Smith Co.*, 154 S. W. 295; *Miller v. Bank & Trust Co.*, 184 S. W. 614; *Hamilton v. Prescott*, 73 Tex. 565, 11 S. W. 548; *Railway Co. v. Enos*, 92 Tex. 577, 50 S. W. 928; *Wimple v. Patterson*, 117 S. W. 1034.

RAYMOND v. ASHLEY et al. (No. 2287.)

(Court of Civil Appeals of Texas. Texarkana. June 8, 1920.)

Landlord and tenant —321—Contract held not to charge greater rent than allowed by law.

Where plaintiffs rented land to defendant, and were to furnish animals, feed, and everything necessary, except labor, and were to receive as rent one-half of all the crops, and agreed to feed one team of defendant's horses, and defendant was to let plaintiffs have the use of such team during the year for their feed, and plaintiffs turned the team over to defendant to be used by him in cultivation of the crop, it was not the intention of the parties that the value of the use of team above cost of feed should form and be a part of the rents and the contract was not void as charging rent greater than that allowed by law.

Appeal from District Court, Red River County; Ben H. Denton, Judge.

Action by H. T. Ashley and others against W. M. Raymond. Judgment for plaintiffs, and defendant appeals. Affirmed.

Travis T. Thompson, of Clarksville, for appellant.

Chambers & Dodd, of Clarksville, for appellees.

LEVY, J. Appellees as landlords sued the appellant, a tenant, to recover rents for a farm and on an account due for the year 1919. Appellant answered by a general denial, and specially pleaded that the rental contract sued on was void, because it charged a greater amount of rent than allowed by law, and by a cross-action sought affirmative relief. The case was tried before the court, and a judgment was entered for the plaintiffs.

The court made the findings of fact that the plaintiffs rented 40 acres of land to the defendant about January, 1919, upon the terms that they were to furnish the land, animals to work the land, feed for the animals, and all of the tools necessary for the cultivation of the land, and that the defendant was to furnish all labor necessary to make, gather, and market the crops grown on the land, the plaintiffs to receive as rent one-half of all the crops grown thereon; that plaintiffs furnished everything necessary for the proper cultivation of the whole 40 acres, except the labor; that defendant worked only 30 of the 40 acres, and failed to work 10 acres thereof; that—

"about the time the said rental contract was made the defendant purchased a horse from Dr. Thomason. I find that plaintiffs and defendant made a special arrangement by which plaintiffs agreed to feed one pair of the defendant's horses—the pair of horses being the horse purchased from Dr. Thomason and a brown mare—and the defendant was to let plaintiffs have the use of said team during the year for their feed. I find that the plaintiffs turned this team of horses over to defendant, to be used by him in the cultivation of his crop. I find that plaintiffs furnished ample feed for said team from the time of this special arrangement until the 28th day of July, at which time plaintiffs and defendant had a disagreement about the further use of said team."

The appellant insists that he should have a judgment in his favor on the facts found by the court, upon the ground that there appears a greater rental charge than the law authorizes. The point is that the special arrangement by which the appellees were to feed a team belonging to the appellant for its use constituted a part of the rental contract. It was not the intention of the parties, and the court does not so find, that the value of the use of the team above the cost of their feed should form and be a part of the rents; and there is nothing in the facts indicating that more than one-half of the crops was charged or agreed to as rents. We conclude the assignment should be overruled.

The second assignment does not present error, and it is overruled.

The judgment is affirmed.

—321—For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

BANK OF SLATER v. UNION STATION BANK. (No. 20799.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920. Rehearing Denied
June 25, 1920.)

1. Appeal and error ⇨205—Sustaining objections to evidence not reversible without an offer of proof.

The action of the trial court sustaining objections to questions asked by appellant is not reversible, where there was no offer to show what the answer of the witnesses would be.

2. Banks and banking ⇨154(1)—Indorsement of deposit slips for use of individual does not prevent crediting amount to that individual.

The fact that a bank, which deposited to the credit of another bank the amount of a note given by an individual, indorsed on the deposit slip that it was to the use of that individual, does not preclude recovery of whole deposit by the assignee of latter bank which had permitted the individual to draw from it the entire amount of deposit.

3. Banks and banking ⇨154(1)—Not liable for note of president which it did not sign.

To deny recovery by an assignee of the deposit credited to the assignor bank because the deposit was the proceeds of a note of the assignor's president would be to hold the bank liable on a note which it had not signed, contrary to Rev. St. 1909, § 9989.

4. Banks and banking ⇨154(9)—Directed verdict for recovery of deposit held proper.

Where the evidence was undisputed that plaintiff's assignor had the amount credited on deposit with defendant bank, and defendant offered no evidence to establish the alleged oral agreement limiting the disposition of the deposit, a directed verdict for plaintiff was proper.

5. Banks and banking ⇨178—Agreement to credit deposit to another bank to increase its book assets is not "loan."

An oral agreement by one bank to deposit to the credit of another an amount represented by the note of the president of the latter bank, to deceive the state bank examiner as to the assets of the latter bank, with a provision that deposit should not be drawn against, but should remain in former bank, is not a loan since to lend is to allow the custody and use of a certain thing on condition of return of the thing loaned or its equivalent in kind (citing Words and Phrases, First Series, Loan).

Appeal from St. Louis Circuit Court; Karl Kimmel, Judge.

Action by the Bank of Slater against the Union Station Bank. Judgment for the plaintiff, and defendant appeals. Affirmed.

This is a suit on the part of the Bank of Slater as assignee of the Farmers' & Merchants' Bank of Slater, Mo. (hereinafter called the Farmers' Bank) against the Union Station Bank, to recover a deposit of \$7,560.

43 claimed by plaintiff to have been due to the Farmers' Bank from the Union Station Bank. The assignment was dated July 1, 1913, and plaintiff demanded payment on July 5, 1913. Defendant refused to pay. The petition, in substance, set up the facts above stated.

The defense was a general denial, coupled with allegations to the effect that on or about September 15, 1910, defendant loaned the Farmers' Bank the sum of \$8,000, upon a parol agreement that the entire sum should remain on deposit with defendant to the credit of the Farmers' Bank; that the Farmers' Bank should pay defendant interest thereon at the rate of 6 per cent. per annum, and that defendant might, at any time, credit said loan with said deposit, and thereby discharge the indebtedness of the Farmers' Bank to it, but that this money was never to be drawn out of appellant's bank. The purpose of this arrangement was to swell the apparent assets of the Farmers' Bank to that extent, presumably for the benefit of inquisitive bank examiners, since appellant alleges that the loan was desired in order to keep up the reserve of the Farmers' Bank as required under the laws of Missouri. Since this purpose would be defeated by the execution of an obligation by the Farmers' Bank in evidence of this loan, it was further agreed by the borrowing and lending banks above named, as defendant alleges, that one I. W. Avitt should execute and deliver to defendant his personal note for \$8,000, bearing interest at 6 per cent. per annum, which he accordingly did. Defendant then credited the Farmers' Bank with \$8,000. Avitt was then president of the Farmers' Bank. It is alleged that the original note was renewed on March 1, 1913, subject to the same understanding; that the Farmers' Bank paid the interest, both on the original and the renewal notes, and that prior to July 1, 1913, defendant applied so much of the deposit as then remained in its hands, to wit, \$7,569.43, to the payment of the Avitt renewal note, given in evidence of the alleged loan to the Farmers' Bank, and thus closed the account. Defendant also averred that the money was loaned to the Farmers' Bank and not to Avitt, and that the Farmers' Bank got the benefit of the loan "as aforesaid." The reply was a general denial.

The evidence tended to support the allegations of the petition and answer, except as to the alleged parol agreement, concerning which no evidence was admitted. Whether or not any was offered will be determined later. The evidence also showed that upon the delivery of the original Avitt note, defendant issued to the Farmers' Bank a deposit slip, showing a deposit of \$8,000 to the credit of the last-named bank. The Farmers' Bank passed the amount to the credit

of Mr. Avitt, who promptly checked it out. This slip was in the usual form except that it bore this memorandum: "Use of I. W. Avitt, E. C." The letters "E. C." were the initials of Emerson Chanselor, who was the cashier of the defendant bank when the slip was made, but who was dead at the time of the trial. Mr. Avitt also executed to defendant another note upon which he secured the sum of \$8,000. By a contract bearing date of July 1, 1913, the Farmers' Bank in writing assigned to plaintiff certain assets, including the claim here in question, in consideration of an agreement upon the part of plaintiff to pay the claims of the depositors of the Farmers' Bank, and thereupon the last-named institution, being insolvent, went out of business. Mr. I. W. Avitt, in like unfortunate condition financially, took up his abode in Winnipeg, Canada, of which city he was a resident at the time this case was tried. It is alleged in the answer that "prior to, to wit, July 1, 1913," defendant applied the deposit in question to the payment of "the loan aforesaid," meaning thereby the loan of \$8,000 to the Farmers' Bank. The evidence showed the application was made August 8, 1913. This was the sum of plaintiff's evidence.

Defendant then asked for a peremptory instruction to the jury to find for defendant. This instruction was refused, and defendant excepted. No evidence being offered by defendant, the court thereupon gave to the jury a peremptory instruction to find for the plaintiff in the sum of \$7,569.43, with interest at the rate of 6 per cent. per annum from the date that payment was demanded by plaintiff. Defendant duly saved an exception to this instruction. The verdict was in favor of plaintiff in the sum of \$7,569.43 and interest at 6 per cent. per annum from July 5, 1913, or a total sum of \$9,504.12. A motion for a new trial having met with defeat, defendant has duly appealed. Its assignments of error are shown, in substance, in the opinion.

Marshall & Henderson, of St. Louis, for appellant.

Jones, Hocker, Sullivan & Angert, of St. Louis, for respondent.

WILLIAMSON, J. (after stating the facts as above). [1] Appellant's first assignment of error relates to the refusal of the trial court to permit appellant to prove the alleged parol agreement between itself and I. W. Avitt concerning the \$8,000 deposit. The record touching this matter is as follows:

The president of the appellant bank, called as a witness for respondent, testified that he instructed appellant's cashier to take I. W. Avitt's note for \$8,000 and place that amount to the credit of the Farmers' Bank. On cross-examination, he was asked by appellant to tell the jury what he knew about "the arrangement under which this note was exe-

cuted to the Union Station Bank." To this question respondent objected on the ground that the note was an obligation in writing, and that parol evidence concerning any negotiations leading up to its execution was inadmissible. The court sustained the objection. Later, this witness testified concerning the original \$8,000 note, in substance, that Avitt came to St. Louis to negotiate a loan, and, in the words of the witness:

"After talking over the matter with Mr. Chanselor, the latter telephoned to me, and then explained to me why he desired a loan of \$8,000."

At this point, respondent again objected on the grounds above stated, and the court sustained the objection. Appellant then asked the witness:

"What, in banking circles, is understood when a deposit ticket, such as this is, issued by a bank, by [bears] the words, 'Use of I. W. Avitt'?"

The witness answered that he knew the custom of his bank, but not of any others. He was then asked what was the purpose and intent of the Union Station Bank, in putting the words "Use of I. W. Avitt" on this deposit slip? Respondent's objection was sustained. The witness was then asked to what use this money was to be applied, and respondent's objection to that question was sustained. Appellant duly saved an exception to these rulings in each instance. This is all that appears in the record on this proposition. It will be noted that appellant made no offer to show what it expected to prove by the witness in this connection. So far as this record discloses, the witness might have been utterly ignorant concerning any matter to which these questions related. We cannot reverse a judgment on a speculation as to what a witness would have said had he been permitted to testify. In the absence of an offer of proof showing what appellant expected to prove by the answers of the witness to these questions, we must hold that the matter is not before us for review. This is the immemorial rule in this jurisdiction. *Arstrum v. Baker*, 214 S. W. 859, loc. cit. 860; *Smith v. Riordan*, 213 S. W. 61, loc. cit. 64; *Holzemer v. Railway Co.*, 261 Mo. 379, loc. cit. 411, 169 S. W. 102; *Shelby County R. R. v. Crawford*, 235 Mo. 489, loc. cit. 492, 139 S. W. 115. We rule this point against appellant.

II. Appellant's second assignment of error is that the trial court erroneously permitted respondent to prove that the Farmers' Bank passed the loan in question to the credit of I. W. Avitt, and that he thereupon checked that sum out of that bank. The essence of appellant's argument upon this point is that since Avitt was president of the Farmers' Bank, his knowledge was the knowledge of the bank, and therefore that bank was charged with notice of the arrangement al-

leged to have been made by Avitt with the appellant that the money was to remain on deposit with appellant, and was never to be drawn out either by Avitt or the Farmers' Bank. The fundamental fault in this argument is, of course, that there is neither proof nor an offer to prove that any such arrangement ever was made. We rule this point against appellant for that reason. Other reasons might easily be assigned, but this suffices.

[2] III. Appellant assigns as error the refusal of the trial court, upon the close of respondent's evidence, to give to the jury a peremptory instruction to find in favor of the appellant. In substance, appellant argues, under this assignment, that by the indorsement of the words "Use of I. W. Avitt" upon the deposit slip which it sent to the Farmers' Bank, that bank "became the trustee of the \$8,000, * * * and I. W. Avitt became the beneficiary of that money, and he alone had the right to draw it or assign his right to some one else, none of which was ever done."

Again appellant is confronted with the fatal flaw in its case that there is in this record neither proof nor an offer to prove that the use of this money by I. W. Avitt was subject to any limitation or restriction whatever. So far as this record discloses, the Farmers' Bank was merely notified that it had on deposit with appellant the sum of \$8,000, which was for the use of I. W. Avitt. So far as appears here, the Farmers' Bank might as well have had this \$8,000 in its own vaults as in the vaults of appellant. If it had had the money in its actual, physical possession, could there be any doubt of its right to credit it to Avitt's account and to honor his checks for the full amount. We think not. In effect, that is what it did. All that the Farmers' Bank knew was that Avitt was entitled to use \$8,000, which it had to its credit for his use. Avitt got the use of it. There is no doubt about that. It appears that appellant had loaned Avitt another \$8,000 also. There is no question about his right to use that sum. Now suppose that appellant had notified some bank other than the Farmers' Bank that appellant had credited such other bank with that second sum of \$8,000 for the "use of I. W. Avitt," and the bank so notified had thereupon cashed Avitt's check, drawn upon itself for \$8,000, would anybody question the right of such bank to collect \$8,000 from appellant? We cannot imagine upon what grounds such a contention could be entertained.

[3] But the whole matter may be disposed of upon another ground. In effect, appellant is asserting that respondent, as assignee of the Farmers' Bank, must pay a note which appellant holds against I. W. Avitt, and upon which, so far as appears in this record, the Farmers' Bank was never bound. This note is a renewal of another note which was executed in 1910. There was at that time, as

there has ever since been, a terse declaration in our statute relating to negotiable instruments, which reads as follows:

"No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided." Section 9939, R. S. Mo. 1909.

We do not know of any exception whose saving grace would relieve appellant from the effect of this sweeping statute, nor has appellant's eminent counsel pointed out such an exception. True, this is not an action brought by appellant upon that note, but observe the guarded language of the statute, "No person is liable on the instrument. * * *" To support appellant's contention here would be as effectually to hold the Farmers' Bank liable upon the Avitt note as if appellant were directly suing that bank upon that note. But if it be said that appellant is simply seeking to enforce a parol agreement made at the time the note was executed, we are again confronted with the insuperable objection that there is no proof nor offer of proof that there ever was such an agreement. There is no merit in this assignment.

[4] IV. As a fourth and last assignment of error, appellant asserts that the court erred in the instruction given to the jury, as above set out. This instruction is a peremptory direction to the jury to find for the respondent. The only matter left for the jury to determine was the date upon which respondent demanded and appellant refused payment. The determination of that date fixed the time from which interest should be calculated. There was substantial evidence to support the verdict upon that proposition. Unless the instruction was erroneous upon other matters, the appellant must fail on this point also. The undisputed facts are that on July 1, 1913, the Farmers' Bank had on deposit with appellant the sum of \$7,569.43; that on that day the Farmers' Bank for a valuable consideration assigned that credit to the respondent, and that on July 5, 1913, respondent demanded payment, and appellant refused to pay. There was neither proof nor offer of proof to the contrary. Appellant's argument under this assignment is based upon the assumption of error on the part of the trial court in refusing to admit evidence of the alleged parol agreement. For the reasons stated in paragraph 1 of this opinion, we hold that that point is not before us for review. No assault is made upon this instruction upon any other ground. We hold that this assignment is likewise without merit.

[5] V. Certain other phases of this case are worthy of consideration because of their peculiar character. Appellant's whole case is based upon the alleged parol agreement. As pleaded, this agreement was, in effect, merely a device to aid Avitt and the Farmers' Bank to mislead and deceive the officers of the law

whose duty it was from time to time to examine into and ascertain the financial condition of the Farmers' Bank, for the protection of its depositors and others having business dealings with it. Furthermore, the alleged loan was not a loan. To lend is to allow the custody and use of a certain thing, on condition of the return of the thing loaned, or, in the case of money, and perhaps other things, of its equivalent in kind. Webster's Dictionary; Century Dictionary; Anderson's Dictionary; Black's Dictionary; Words and Phrases, First Series, vol. 5, p. 4196; Griffen v. Train, 40 Misc. Rep. 290, 81 N. Y. Supp. 977, loc. cit. 981. But the very pith and marrow of this alleged contract of lending was that neither Avitt nor the Farmers' Bank was for a single instant to have the custody or use of any part of this money. Every dollar of it was to remain in the actual possession and control of appellant. Neither Avitt nor the Farmers' Bank was to get anything whatever, except an entry upon appellant's books—and that entry appellant reserved the right to cancel at any time without cause and without notice. Neither of the pretended borrowers had the right to use a single dollar of the money for any purpose whatever, except to deceive the state banking department. It was for that explicit reason that the alleged contract was not reduced to writing. No hint of it was written, except the cryptic phrase. "Use of I. W. Avitt," which, signed by initials only, appeared upon the deposit slip, but not upon the books of either bank. The transaction had one, and but one, earmark of a loan—it bore interest. In plain terms, appellant and Avitt, intending to evade the law, entered into a scheme whereby the assets of the Farmers' Bank were to be made to appear to be \$8,000 greater than they actually were, "in order to keep up its required reserve under the laws of the state of Missouri," but, to quote the answer itself, "as said bank did not want said loan evidenced by a note or bill payable which would show on its books a liability," it was agreed that the true nature of the matter should rest in parol. In other words, the books of both of the banks were to be falsified. The Farmers' Bank was to be liable, but was not to appear liable. For a money consideration, appellant lent its active aid to this plan, well knowing the full intent and purpose of it. The alleged parol agreement might well be held void for reasons of public policy.

"The law will not enforce contracts * * * that are against the public good, and therefore are forbidden by public policy." Harlan, J., in *Ritter v. Mut. Life Ins. Co.*, 169 U. S. 158, 18 Sup. Ct. 300, 42 L. Ed. 603; Miller, J., in *Sprott v. U. S.*, 20 Wall. 463, 22 L. Ed. 371.

"Public officers should act from high consideration of public duty, and hence every agree-

ment whose tendency or object is to sully the purity or mislead the judgments of those to whom the high trust is confided is condemned by the courts. The officer may be an executive, administrative, legislative, or judicial officer. The principle is the same in either case." Cyc. vol. 9, p. 485; *Greenhood on Public Policy*, p. 529.

Similar defenses are also barred in many well-considered cases on the ground of estoppel. *Lyons, Receiver, v. Benney*, 230 Pa. 117, 79 Atl. 250, 34 L. R. A. (N. S.) 105; *Harrington v. Connor*, 51 Neb. 214, 70 N. W. 911; *Pauly v. O'Brien (C. C.)* 69 Fed. 460; *State Bank v. Kirk*, 218 Pa. 452, 65 Atl. 932; *Lyons v. Westwater*, 181 Fed. 681, 104 C. C. A. 664; *State Bank v. Forsythe*, 41 Mont. 249, 108 Pac. 914, 28 L. R. A. (N. S.) 501; *Hurd v. Kelly*, 78 N. Y. 588, 34 Am. Rep. 587; *Best v. Thiel*, 79 N. Y. 15; *Murphy v. Gumaer*, 18 Colo. App. 183, 70 Pac. 800.

The facts in this case inevitably suggest the question we have discussed in this paragraph. Counsel for respondent, however, have not raised it, being deterred, doubtless, by the decision in *Title Trust Co. v. Brady*, 165 Mo. 197, 65 S. W. 308, where a contrary doctrine is countenanced, and we therefore refrain from ruling upon the proposition. We have touched upon it for the reason that if the *Brady Case*, supra, is considered as announcing "the Missouri rule" upon this topic, as some commentators have said, that rule is apparently in conflict with numerous and respectable authorities, and its soundness may admit of question.

For the reasons stated in preceding paragraphs, the judgment is affirmed.

All concur.

ARNOLD v. ARNOLD. (No. 20217.)

(Supreme Court of Missouri, in Banc. May 26, 1920. Motion for Rehearing Denied June 19, 1920.)

1. Divorce \S 1—Nature of proceeding.

A proceeding for divorce is an action at law, in that courts of general common-law jurisdiction are by statute vested with jurisdiction of such cases with all their incidents, although the proceeding also has some of the incidents of a criminal proceeding, in that the state is in effect a party thereto, and it may therefore be said to be *sui generis*.

2. Divorce \S 150(2)—Special findings of fact may not be required.

Statutory special findings of facts cannot be required in a divorce proceeding, such findings being equivalent to a special verdict and not binding upon the trial court.

3. Divorce \S 184(1)—Declaration of law may be disregarded on appeal.

A declaration of law by the trial court sitting in a divorce suit may be disregarded on appeal.

4. Divorce ⚡135—Evidence held insufficient to show "condonation" of indignities.

In a wife's suit for divorce on the ground of indignities, consisting of habitual intoxication and that defendant was affected with a venereal disease, evidence *held* to show that plaintiff had not condoned defendant's offenses, notwithstanding toleration and subsequent association; condonation being forgiveness and pardon for past offenses committed with full knowledge.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Condonation.]

5. Divorce ⚡108—Facts which may be proved under statutory allegation of indignities stated.

In a suit for divorce based upon indignities practiced by the husband towards the wife, although the petition does not allege infidelity, it, as well as that the husband is afflicted with a venereal disease, may be proved in support of the statutory allegation of indignities.

6. Divorce ⚡240(5)—\$25,000 alimony held not excessive.

In a wife's suit for divorce based upon indignities, decree providing for \$25,000 alimony to be paid by defendant at the expiration of a trust, and for \$75 per month during the existence of a trust, as well as \$1,000 for attorney's fees and \$599 for suit money on appeal, *held* to require modification by elimination of the allowance for counsel's fees, and, when so modified, *held* not excessive.

7. Evidence ⚡18—Courts take judicial notice of increase of real estate values.

It is a matter of common knowledge that since 1916 real estate values have increased generally.

8. New trial ⚡156—Continuance of motion carries case over with all incidental powers.

The pendency and continuance to a subsequent term of a motion for new trial carries the case over, and suspends a judgment until such time as the motion for new trial is passed upon, and the court then has the same power and disposition of the case as it had at the term at which the judgment was rendered for all purposes.

9. Divorce ⚡245(1)—Alimony in gross not subject to modification at subsequent term.

A decree awarding alimony in gross is not subject to modification of the court at a subsequent term, under Rev. St. 1909, § 2375.

10. Dower ⚡52—Divorce decree for fault of husband does not of itself divest wife of dower.

Under Rev. St. 1909, § 359, if a woman is divorced from her husband through the fault or misconduct of the husband, the judgment of divorce does not of itself divest her of her dower.

11. Divorce ⚡211—Temporary alimony within discretion of trial court.

The allowance of temporary alimony is largely a matter of discretion with the trial court, and is allowed solely upon the theory

that the wife has no means with which to prosecute her suit; it being entirely independent of the merits of the case.

12. Divorce ⚡213—Temporary alimony to pay counsel fees will not be granted to wife who has sufficient means.

In a divorce suit if the wife has sufficient property out of which to pay or secure counsel fees and other expenses of the suit, she will not be granted temporary alimony in view of Rev. St. 1909, § 2375.

13. Divorce ⚡225—Allowance for counsel fees held erroneous, where wife had sufficient means.

Where a wife, bringing suit for divorce, owned a house, in which she lived, unincumbered, and had property worth about \$17,000, incumbered for about \$2,000, out of which she received \$100 a month, and also received from her husband a monthly allowance of \$50 for support, an allowance of \$1,000 for counsel fees was erroneous.

14. Divorce ⚡286—Reviewing court will not consider allowance of suit money pending appeal made by separate order not appealed from.

Where in a divorce suit a wife was by a separate and distinct order after final judgment allowed \$500 for suit money pending an appeal, such allowance will not be considered by the reviewing court, where no distinct appeal was taken therefrom, in view of Rev. St. 1909, § 2381.

15. Divorce ⚡282—Allowance of suit money pending appeal will not be considered, in absence of motion for new trial.

Where in a divorce suit no motion for new trial was filed upon a separate order allowing suit money pending appeal, and no error preserved with reference thereto, it was not before the appellate court for review.

16. Divorce ⚡287—Supreme Court may modify and affirm judgment below.

It is within the authority of the Supreme Court on appeal from a decree of divorce to render judgment or to modify the judgment of the trial court in such manner as seems best, and to affirm it as modified.

Goode and Graves, JJ., dissenting in part.

Appeal from Circuit Court, Jackson County; Thomas B. Buckner, Judge.

Divorce action by Crystal C. Arnold against James H. Arnold. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Johnson & Lucas, Blackmar & Bundschu, and Holmes, Holmes & Page, all of Kansas City, for appellant.

McCune, Caldwell & Downing, of Kansas City, for respondent.

WHITE, C. The action is for divorce. The petition of the plaintiff filed May 10, 1916, alleges that the plaintiff and defendant were married in Jackson county, Mo., July 19,

1905; that there were born of the marriage two children, Crystal Aristo, a girl, who was at the time of filing the petition four years of age, and an infant son at that time five months of age.

The ground on which the plaintiff seeks a divorce from her husband is such indignities as to render her condition intolerable. Several acts of cruelty are alleged, the principal of which, and those supported by the strongest evidence, were the habit of the defendant to become intoxicated at frequent intervals, and the fact that he had contracted a venereal disease, which was likely to be communicated to the plaintiff.

The plaintiff testified at great length relating to the unhappy course of her married life. Her husband was drunk at their wedding, and drunk at frequent intervals during the time they lived together, often requiring medical attention on that account. The youngest child was born October 19, 1915. The plaintiff left the defendant's home on the 2d of December, 1915, when her baby was five or six weeks old, and never returned. About four months before the birth of this child the plaintiff discovered that her husband was afflicted with syphilis, an affliction which he admitted. We do not need to burden this opinion with the repulsive details regarding his condition. There was testimony that a blood test, called the Wasserman test, being applied to the defendant, showed positive, that is, unmistakable, indication of infection by him. The two children, it transpired in the evidence, had been treated for the disease; the boy because of positive symptoms indicating its presence, and the girl on account of mere suspicion that she might be infected. Defendant denied any infidelity to his wife during their marriage, and claimed that if he was affected with the syphilis it was inherited from his father. It was proved by the evidence that the defendant's father, James H. Arnold, Sr., was afflicted with locomotor ataxia and atrophy of certain optic nerves. It is said that those afflictions, particularly locomotor ataxia, were universally conceded symptoms of syphilis. He claimed that while his affliction was inherited it did not develop upon him until a short time before the birth of his last child. The expert evidence in general was to the effect that the infection of the disease from inheritance usually manifests itself at an early age, between birth and four or five years of age. This was offered to rebut the claim of the defendant as to the hereditary nature of the complaint. There was much expert testimony by physicians concerning whether or not the disease was curable. While it was the general opinion of the physicians that the disease, whether hereditary or acquired by contagion, was curable by the modern methods, the latest scientific discoveries and treatment with the specific known as 606, nevertheless

there was a possibility of contagion in case of pregnancy and childbirth.

There was much evidence relating to the award of alimony by the court. This award and the evidence relating to same, as well as evidence relating to other features of the case, will be more fully considered later in the opinion.

I. Appellant claims that the court committed error in refusing to make a special finding of facts under section 1972, R. S. 1909, as requested at close of the testimony. It is argued that the statute is mandatory in a suit at law, and, when requested by either party, the court commits error in refusing to make such a finding separate from its conclusions of law.

[1] A proceeding for divorce is an action at law in that courts of general common-law jurisdiction, as distinguished from the equity side of such courts, by statute are vested with jurisdiction of such cases with all their incidents. In practice many of the features of the English ecclesiastical courts, which had authority in such cases, obtain in our courts where specific provision by statute is not made. *Gilsey v. Gilsey*, 198 Mo. App. 505, 201 S. W. 588; *Chapman v. Chapman*, 269 Mo. 663, loc. cit. 668, 669, 192 S. W. 448; *Hauck v. Hauck*, 198 Mo. App. 381, loc. cit. 385, 386, 200 S. W. 679. The proceeding also has some of the incidents of a criminal proceeding, in that the state is in effect a party to it. It is therefore said to be *sui generis*. *Chapman v. Chapman*, 269 Mo. loc. cit. 668, 192 S. W. 448.

[2] The procedure in many respects is very like that which obtains in a court of equity. *English v. English*, 158 Mo. App. 330, loc. cit. 334, 139 S. W. 814; 9 R. C. L. p. 247. The reason why the statutory special finding of facts is not required in a case in equity applies with equal force to a divorce proceeding. Such finding is equivalent to a special verdict. *Land Co. v. Bretz*, 125 Mo. 418, loc. cit. 423, 28 S. W. 656. A special verdict is binding upon the court where there is evidence to support it. A trial court is not bound to make a finding in an equity case because such finding may be entirely disregarded by this court. This court must make its own investigation of the facts, and determine for itself the correctness of the finding of the trial court. *Miller v. McCaleb*, 208 Mo. 562, loc. cit. 574, 106 S. W. 655; *Blount v. Spratt*, 113 Mo. loc. cit. 64, 20 S. W. 967. In a divorce proceeding, while giving due deference to the finding of the trial court, this court is not bound by such facts as are found, but must review the evidence and make a finding of its own. *Cherry v. Cherry*, 258 Mo. loc. cit. 403, 167 S. W. 539; *Barth v. Barth*, 168 Mo. App. 423, loc. cit. 426, 151 S. W. 769. It was not error for the trial court to refuse to make a special finding which would be entirely futile and fruitless so far as to relieve this court from the necessity of reviewing the evidence.

[3] II. It is claimed by appellant that the

only matters for this court to consider are the facts in relation to the disease which afflicted the defendant, because the court gave declarations of law upon every other issue which tended to show a finding in favor of the defendant. For instance, the defendant asked the court to declare the law to be that the allegation that the defendant had frequently become intoxicated was unsustained by the proof or had been condoned by the conduct of the plaintiff, and the declaration was given. A similar instruction was given in relation to each other act of indignity mentioned in the petition except that in relation to the disease. However, since a special finding of facts by the trial court is not important and may be disregarded by this court, so a declaration of law may be disregarded as in an equity case. Besides, it might be inferred from the giving of that sort of declaration the trial court found the defendant was guilty of the drunkenness and the intolerable condition caused by it, but further found that it was condoned by the plaintiff, or that it was not of itself enough to create a ground for divorce. This court may consider the evidence in relation to that in connection with the other evidence in the case. The evidence is conclusive that the defendant was frequently drunk as alleged in the petition, even requiring medical attention. In fact, defendant admitted it. So, upon the entire record it is for this court to determine whether the allegations of the petition are sustained by the proof. Giving the deference ordinarily paid to a trial court in such a case, we find the evidence was sufficient to support the finding by that court that the petition was supported by the facts in relation to the indignities alleged. The only serious conflict in the testimony was whether or not the defendant's disease was curable so as to prevent infection after a period of time.

It was contended by defendant, and is argued by defendant's counsel with great earnestness, that plaintiff was afflicted with a hallucination; that she suffered with a sort of mania, syphilophobia, which affected her judgment so that she could not even accept the advice of a physician. The general finding of the trial court, however, was contrary to that contention, and the testimony of the plaintiff was clear, temperate, and indicated a normal state of mind.

III. It is further claimed by defendant that the plaintiff condoned all the offenses of the appellant by continuing to live with him after all that had occurred. This is stoutly contradicted by the plaintiff. She admits that she bore with his drunkenness and his cruelty with patience and forbearance for a long time, but that, added to his unfaithfulness, made her condition intolerable, and she never did condone the last. It is true she lived in the house with him after the discovery of his afflicted condition for four or five months,

but she explained that at the time of the discovery, a short time before the birth of her child, she was obliged to take the utmost care of herself and avoid any excitement; that it was her helpless condition at the time which prevented her leaving the house, and that she left him in five or six weeks after the child was born, as soon as her condition would permit. During a part of that period the defendant was away in Oklahoma, and during the rest of the time she refused to live with him as his wife, but held aloof from him, intending to leave him whenever she was able. She left at a time when her husband was absent in Oklahoma, where he was in some kind of trouble, the nature of which is not mentioned. True, he testified that at all times he had been faithful to her, but there was evidence tending to show that his disease had been contracted shortly before it was discovered. If the drunkenness and alleged acts of cruelty stood alone as the indignities which she claimed to have suffered, it is possible that it was condoned. But the indignities were cumulative, and she herself put her refusal to accept a reconciliation upon the ground that she had lost all confidence in him, and could no longer trust him even when he had promised to reform in the matter of drunkenness.

[4] Much stress is laid upon the proposition made by him to her to give him a trial; that they might live apart six months or a year or two years until he had thoroughly reformed, and there was proof that he was not only reformed, but cured. These protestations of his she refused to credit, and based her refusal upon her belief that she could no longer trust him. We think the evidence fails to show that his offenses were condoned. In the well-considered case of *Weber v. Weber*, 195 Mo. App. 126, 189 S. W. 577, Judge Sturgis of the Springfield Court of Appeals cited many cases illustrative of the different conditions under which offenses of the kind considered here might be condoned. Condonation is forgiveness and pardon for past offenses committed with full knowledge. Condonation for repeated acts of cruelty and indignities will not be inferred from toleration and association afterwards.

[5] It is argued by appellant that the petition does not allege, as a ground for divorce, the infidelity of the defendant. While that is true, and while the plaintiff urges the unfaithfulness of her husband as a reason for her refusal to return to him, nevertheless it is one of the indignities inflicted, as is the venereal disease, both of which may be proved in support of a statutory allegation of indignities. *Hooper v. Hooper*, 19 Mo. 355, loc. cit. 357; *McCann v. McCann*, 91 Mo. App. 1, loc. cit. 2, 3; *Goodman v. Goodman*, 80 Mo. App. loc. cit. 283.

IV. It was shown that the plaintiff possessed the house where she lived, valued at

\$3,250. She also owned a flat building worth \$17,000 or \$18,000, on which there was a mortgage for \$2,000. Her net income from that property was \$100 per month. The defendant owned in his own name, at the time of the decree, a residence which was valued at \$6,000, with a mortgage on it of \$4,000. He also owned a duplex building which rented for \$85 per month, and was estimated by Mrs. Arnold to be worth \$8,000, with a mortgage of \$3,250 on it.

James H. Arnold, Sr., father of the defendant, died in April, 1911. By his will he disposed of about 30 pieces of real estate in Kansas City, Mo., in the following manner: The title was vested in the two sons, James H. Arnold, defendant here, and Paul J. Arnold, as trustees, for a period of five years and during the natural life of the widow of James H. Arnold, Sr., J. Edna Arnold. It was provided that during the life of J. Edna Arnold the trustees should pay her \$100 per month; that at the expiration of the trust period at the end of five years or on the death of Edna Arnold, one-third of the property should become vested in J. H. Arnold and Paul Arnold, as trustees, for the benefit of the daughter of the testator, Mary Hood Arnold. They were required to pay her \$100 a month out of the income of the estate, and on her death the property should vest in the two sons, James H. Arnold and Paul J. Arnold. The remaining two-thirds of the property should vest at the expiration of the trust in the two sons, James H. Arnold and Paul J. Arnold.

[6] The decree of the court provided for \$25,000 alimony in gross to be paid by the defendant at the expiration of the trust mentioned in the will; that is, at the expiration of five years or at the death of J. Edna Arnold if she should live beyond that period. In the meantime the defendant was ordered to pay the plaintiff \$75 per month during the existence of the trust. In addition the plaintiff was allowed \$1,000 as attorney's fees for services rendered in the case, and \$500 suit money on the appeal.

It will thus be seen that this alimony in gross awarded the plaintiff was to be paid out of the interest of appellant in his father's estate on the termination of the trust; that is, as soon as the title to the property vested in him. The property mentioned in which the defendant should receive a third interest was estimated by the witnesses for the defendant to be \$214,000 and by the witnesses for the plaintiff \$266,500. While a good deal of the real estate included in the estate produced no income, the rents received from the balance amounted to about \$1,240 a month. The estate owed debts amounting to \$9,800, to be paid out of that property, leaving, according to plaintiff's valuation, a net value of the estate of \$256,700. In addition to that the appellant was vested with a remainder, a half-interest in the one-third devised to his sister

for life. The individual property of the appellant, not acquired through the will, and valued at \$6,500 with a mortgage of \$4,000, was paid for in part by the plaintiff, who contributed \$1,700 to the purchase. Appellant's deposition showed that he owed individual debts amounting to \$9,300.

Assuming that the trial court found the net value of the estate in which the defendant had a one-third interest valued at \$256,000, then the defendant's one-third interest would be \$85,560. Deducting his indebtedness of \$9,300 would leave about \$76,000 as his individual property at the termination of the trust out of which the alimony was to be paid. This without counting the remainder in his sister's estate. Defendant's individual property mentioned above may also be disregarded. He has filed affidavits in this court, since the appeal, to show it was sold at a net price to him of \$2,500 and that Mrs. Arnold, plaintiff, got most of the money, presumably the \$1,700 which he owed her.

The appellant figures, by taking the lesser valuation put upon the estate by the defendant's witnesses, that after the payment of the alimony in gross, suit money, and the attorney's fees, the defendant would have left net, out of his entire resources, something over \$32,000. Since the evidence was conflicting upon the values and fairly balanced, we will assume that the court correctly found the values to be as testified to by plaintiff's witnesses.

[7] This decree was rendered in 1916. Both parties by this decree took the hazard of the fluctuations of value of real estate. If it should decline in value the plaintiff's burden would be relatively increased, and if it should increase in value it would be relatively lightened. It is a matter of common knowledge that the latter condition has obtained in regard to real estate generally.

The defendant makes several objections to this award of alimony, claiming that it is grossly excessive for several reasons. First, it is urged that since the decree of divorce is granted in favor of the plaintiff the defendant is the guilty party, and she is not thereby divested of dower in his estate if he should die before her. The motion for new trial filed at the May term, 1916, was continued until the next September term, and at the September term the court modified the decree by adding this paragraph:

"The award of alimony herein made shall be in lieu of all dower and property and marital rights of the plaintiff in or against the estate of defendant."

[8] This order was made and the motions for new trial and in arrest of judgment were overruled on the same day. Appellant asserts that this part of the decree was ineffective because made at a term subsequent to that at which the original judgment was rendered.

The pendency and continuance to a subsequent term of a motion for new trial carries the case over; that is, it suspends a judgment until such time as the motion for new trial is passed upon, and the court then has the same power and disposition of the case as it had at the term at which the judgment was rendered, for all purposes. That is, the court might set aside or modify in any manner the judgment, as he might do at the term at which the judgment was rendered. *Childs v. K. C., St. J. & C. B. Ry. Co.*, 117 Mo. 414, loc. cit. 427, 23 S. W. 373; *State ex rel. v. Ellison*, 267 Mo. 321, concurring opinion of Faris, J., loc. cit. 331, 184 S. W. 963.

[9] It is true, a decree awarding alimony in gross is not subject to modification of the court at the subsequent term under section 2375; *Meyers v. Meyers*, 91 Mo. App. 151 loc. cit. 155; *Biffle v. Pullam*, 114 Mo. loc. cit. 54, 21 S. W. 450. That rule does not affect the order made in this case modifying the decree because it was made at the term at which the court had absolute control over the judgment.

[10] At common law, on the divorce of husband and wife, the marital interest of either in the property of the other was annulled so that the husband had no curtesy in the property of his deceased wife from whom he had had divorce (*Doyle v. Rolwing*, 165 Mo. 231, 65 S. W. 315, 55 L. R. A. 332, 88 Am. St. Rep. 416), and the wife had no dower in the real estate of her deceased husband. Under section 359, R. S. 1909, if a woman is divorced from her husband through the fault or misconduct of the husband she does not thereby lose her dower; that is, the judgment of divorce itself does not divest her of her dower. That does not mean that the court in adjusting the matter of alimony and property between parties could not make any order affecting the wife's dower interest; on the contrary, it has been held by this court that a trial court might award alimony on condition that the wife release her dower. *Aylor v. Aylor*, 186 S. W. 1068, loc. cit. 1071, 1072. The paragraph in modification of the decree in this case, quoted above, is sufficiently explicit to show it was the intention of the court that the award should be on that condition. If it is not sufficiently explicit to express that condition, then a nunc pro tunc entry would make it so. The court possesses great latitude in disposition and division of the property of the parties when a decree of divorce is granted.

It is further contended by appellant that the obligation to support the child is still upon the husband, notwithstanding the allowance of alimony; that the \$25,000 in gross for plaintiff was for her own benefit and would not relieve her husband, although divorced, of his obligation to support the children, and she could recover of him the expenses incurred in such support.

While the husband would be liable in a suit by the divorced wife for the maintenance of the children, nevertheless the courts do sometimes take into consideration that the wife had their custody in awarding her alimony; that there are many things in connection with the care of children aside from the mere expense of support and education that entail the expenditure of money, and doubtless in such suit the court would take into consideration the circumstances of the parties at the time. There are many cases in which the allowance of alimony in a proportion of the husband's estate, equal to that considered here, has been upheld by this court. *Gercke v. Gercke*, 100 Mo. 237, 13 S. W. 400; *Viertel v. Viertel*, 212 Mo. 562, 111 S. W. 579; *Lemp v. Lemp*, 249 Mo. 295, 155 S. W. 1057, Ann. Cas. 1914D, 307; *Harner v. Harner* (App.) 206 S. W. 385.

[11] V. As a part of the decree the court adjudged that the plaintiff might recover the sum of \$1,000, "to be paid to her or to her attorneys of record for their services in this case." The plaintiff did not, at the beginning of the suit, file any motion for temporary alimony for the purpose of defraying the expenses of the suit, including attorneys' fees. The allowance of temporary alimony is largely a matter of discretion with the trial court, but is allowed solely upon the theory that the wife has no means with which to prosecute her suit. *Hedrick v. Hedrick*, 157 Mo. App. 633, loc. cit. 635-637, 138 S. W. 678; *Blair v. Blair*, 131 Mo. App. 571, 110 S. W. 652. The allowance is independent of the merits of the case. *Libbe v. Libbe*, 166 Mo. App. 240, loc. cit. 243, 244, 148 S. W. 460. In the case of *State ex rel. Gercke v. Sedon*, 93 Mo. 520, 6 S. W. 342, this court discussed the propriety of an order of court granting temporary alimony. The court said (93 Mo. loc. cit. 522-523, 6 S. W. 343):

"The power of the court to order and enforce an allowance for alimony pendente lite, although an adjunct of the action of divorce, is an independent proceeding standing upon its own merits, and in no way dependent upon the merits of the issues in the divorce suit, or in any way affected by the final decree upon those merits. It grows, ex necessitate rei, out of the relations between the parties to the controversy."

[12] It must be considered entirely apart from the merits of the case. If the wife has sufficient property out of which to pay or secure counsel fees and other expenses of the suit, the courts do not grant temporary alimony. *Penningroth v. Penningroth*, 71 Mo. App. 438. The statute allows such an order "where the same would be just" (section 2375, R. S. 1909); that is, where it would be just, independent of the merits of the case. This has been interpreted to mean where the wife is without means to prosecute the suit, and of necessity relies upon her husband to

furnish the means. *Rutledge v. Rutledge*, 177 Mo. App. 469, loc. cit. 473, 119 S. W. 489; *Coen v. Coen*, 130 Mo. App. 480, 109 S. W. 1083; *Robertson v. Robertson*, 137 Mo. App. loc. cit. 95, 119 S. W. 533; *Dowling v. Dowling*, 181 Mo. App. 675, loc. cit. 679, 164 S. W. 643; *Scism v. Scism*, 184 Mo. App. 543, 167 S. W. 455; *Smith v. Smith*, 192 Mo. App. 99, 180 S. W. 568.

[13] If the wife has sufficient property to defray the expenses of her suit, it does not matter what property the husband has; an allowance pendente lite would not be made. In this case the wife had a house, in which she lived, unincumbered. She had property valued at about \$17,000, incumbered for about \$2,000, out of which she received an income of \$100 per month. She also was receiving \$50 per month from her husband for support. While it might be said that the income she had was only sufficient for her to live on and maintain herself and two children pending the suit, nevertheless she had sufficient property to secure her attorneys' fees. The question is put at rest in this case by the fact that she did not ask temporary alimony; she did employ counsel and they furnished the necessary services; she had sufficient property to justify that employment, and did not ask allowance until the end of the suit. This was a tacit confession that she did not need an allowance from her husband to enable her to prosecute the suit. Counsel for respondent assert that the allowance of \$1,000 for her attorneys was not temporary alimony, but a part of her permanent gross allowance. The very wording of the decree negatives that suggestion; the allowance is for the service of her attorneys which they have rendered in the case.

[14] VI. When the appeal was taken, on motion of the plaintiff the court made a further allowance of \$500 for suit money pending the appeal. This is the basis of a complaint by appellant. That order the court in its discretion might well make in this case, and the appellant is precluded from the consideration of the subject here because that was a separate and distinct order after final judgment, from which he might have prosecuted a separate and distinct appeal. Section 2381, R. S. 1909.

[15] No motion for new trial upon that order was filed by defendant; no error preserved with reference to the same, and therefore it is not before this court for review. *State ex rel. Gerecke v. Seddon*, 93 Mo. loc. cit. 523, 6 S. W. 342; *Smith v. Smith*, 192 Mo. App. loc. cit. 105, 180 S. W. 568.

[16] VII. It is within the authority of this court to render judgment here in cases of this character, or to modify the judgment of the circuit court in such manner as seems best, and affirm it as modified. *Henry County v. Salmon*, 201 Mo. 138, loc. cit. 172, 100

S. W. 20; *Chilton v. Nickey*, 261 Mo. 232, loc. cit. 243, 169 S. W. 978; *State ex rel. v. Trust Co.*, 209 Mo. 472, loc. cit. 494, 108 S. W. 97; *Majors v. Maxwell*, 120 Mo. App. loc. cit. 287, 96 S. W. 731; *Mangold v. Bacon*, 249 Mo. loc. cit. 50, 155 S. W. 393.

The judgment of the trial court is therefore modified so as to eliminate the allowance of \$1,000 counsel fees, and, as modified, it is affirmed.

PER CURIAM. The foregoing opinion of **WHITE**, Commissioner, is adopted as the opinion of the court in banc.

WALKER, C. J., and **WILLIAMS, BLAIR**, and **WOODSON, J.J.** concur.

GOODE and **GRAVES, J.J.**, dissent on question of alimony.

WILLIAMSON, J., not sitting.

BUCHANAN v. RALLS COUNTY. (No. 20816.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

1. Counties \S 73—Must furnish treasurer with suitable office.

It is the duty of the county to furnish the treasurer with suitable office space, heat, lights, and janitor service.

2. Counties \S 73—Whether office for county treasurer sufficient held for jury.

Whether the space provided for the county treasurer in a room already occupied by the county clerk was obviously insufficient, the only other place where the treasurer could have office being a jury room, plainly unsuitable, held a question for the jury, as reasonable men could honestly differ; there being nothing requiring privacy in such offices.

3. Evidence \S 48—The court will not take judicial notice that room furnished a county treasurer was insufficient.

In an action by a former county treasurer for the expenses of maintaining an office, where the treasurer might have used a room with the county clerk, and the number of the assistants and the business of the office did not appear, the court will not take judicial notice that the room, which was about 14 by 18, with vault, was insufficient for the two officials, but the question should be submitted to the jury.

4. Evidence \S 483(1)—Opinion as to suitability of room for county office not competent.

Opinion evidence as to the suitability of a room for an office for county treasurer is not competent.

5. Counties \S 73—Statute relating to contracts by counties does not apply to expenditures by treasurer in furnishing office.

Rev. St. 1909, \S 2778, relating to contracts by counties and municipalities, is inapplicable

to action by county treasurer, who sought to recover amount expended in maintaining an office, which the county failed to furnish.

6. Counties \Leftrightarrow 73—County, failing to provide treasurer with office, is bound to pay cost thereof.

Where the county failed to provide the treasurer with an office, it is bound to pay the reasonable cost of an office, janitor service, etc., provided by the treasurer.

7. Estoppel \Leftrightarrow 62(3)—That treasurer provided her own office held not to estop the county from denying liability therefor.

Where county treasurer, instead of occupying a room jointly with the county clerk, as had been done by preceding treasurers, with knowledge of county court provided an office elsewhere, it does not estop the county from denying its liability to pay for such office.

8. Counties \Leftrightarrow 73—Failure of county treasurer to demand that county provide office not bar to recovery.

Where the county court was fully advised of the situation, the failure of the county treasurer to demand that she be provided an office will not bar recovery for \$7.50 per month expended for rent, light, and janitor service, the maxim "*de minimis lex non curat*" applying in such case.

Appeal from Circuit Court, Ralls County; W. T. Ragland, Judge.

Action by Estella Buchanan against the County of Ralls. There was a judgment for plaintiff, and defendant appeals. Reversed and remanded.

This is a suit on the part of Estella Buchanan against Ralls County for certain expenses paid by her while she was treasurer of the defendant county. Plaintiff had judgment below, and the county duly appeals. Plaintiff alleged, in substance, that she was the duly elected, qualified, and acting treasurer of Ralls county from the 1st day of January 1909, until the 1st day of January, 1917; that as such official she was by law required to keep an office at the county seat of said county, and to attend to the same during the usual business hours, there to receive and disburse the funds of the county, and that it was also her statutory duty to keep the books, records, and papers pertaining to her office; that during that time it was defendant's duty to provide her with a suitable office room, properly equipped, lighted, and maintained, but that it failed to do so; that as a result of such failure she was compelled to supply and did supply the office, and defray the expenses of lights and janitor service therefor, and pay therefor out of her own funds; that she had expended the sum of \$720 in so doing; that that sum was the reasonable value thereof; and that payment of said sum had been demanded and refused.

By its answer defendant admitted plaintiff's official position, followed this admission

with a general denial, and then averred, in substance, that during the period aforesaid it maintained a county courthouse for the use of the county officials at the county seat, wherein it supplied the things which plaintiff claimed to have supplied; but it appears from the answer that it was necessary, if plaintiff kept her office in the courthouse, that she should occupy one room jointly with the county clerk, unless she chose to occupy a room on the second floor, which, as the evidence showed, was used by the grand jury and petit jury when court was in session. Defendant further averred that plaintiff maintained a separate office elsewhere than in the courthouse for her own business convenience; that during her term of office she made periodical settlements with the county court of Ralls county, and upon said settlements being made she was duly paid all that was due her, and all that she then demanded, and in consequence was estopped to claim more; that so much of her claim as accrued prior to five years next before the filing of her petition was barred by the statute of limitations; and that no contract in writing for said expenses was ever made by defendant. The reply was a general denial.

The evidence for plaintiff tended to show that she maintained a separate office in the central portion of New London, the county seat of Ralls county; that rent, lights, and janitor service cost \$7.50 per month, which was a reasonable charge; that the county clerk's office was too small for joint occupancy; that the only unoccupied room in the courthouse was the jury room; that a short time before her term expired she presented her demand to the county court and payment was refused. A demurrer to the evidence was overruled. Defendant's evidence tended to show that the county court offered to fit up the jury room for plaintiff's use when court was not in session; that some former treasurers had occupied the county clerk's office jointly with him, and that others, at their own request, had maintained offices elsewhere in New London by permission of the county court. Defendant also offered, but was not allowed, to prove that in the opinion of various witnesses plaintiff could have maintained her office in the county clerk's office in joint occupancy with him. No further evidence of any importance was offered by either party. Defendant's request for a peremptory instruction was refused. The court instructed the jury that plaintiff was entitled to recover the reasonable expenses paid by her for rent, light, and janitor service, at not exceeding the rates shown in the evidence, separately assessing the amount of each, for a period not longer than five years before the date of the filing of the petition. Defendant asked an instruction, No. 2, to the effect that unless there was a

written contract plaintiff could not recover; another, No. 3, to the effect that if "there was sufficient room, space, and conveniences in the courthouse for the plaintiff to have, keep, and maintain her office of county treasurer therein," including light, heat, and janitor service, and if such room was subject to plaintiff's use, but that plaintiff for reasons of her own kept her office elsewhere, then she could not recover; another, No. 4, to the same effect; another, No. 5, substantially to the effect that plaintiff could not recover without first showing a demand upon defendant to furnish appropriate accommodations; No. 6, on the burden of proof; and No. 7, on the theory of estoppel—all of which were refused, and defendant excepted. A verdict was rendered in favor of plaintiff for \$300. The usual steps followed, with the usual result, and defendant duly appealed.

Thos. E. Allison, of New London, and Charles E. Rendlen and Harry Carstarphen, both of Hannibal, for appellant.

D. H. Eby and Ben E. Hulse, both of Hannibal, for respondent.

WILLIAMSON, J. (after stating the facts as above). [1-3] It was the duty of the appellant to furnish respondent with suitable office space, heat, lights, and janitor service. *Ewing v. Vernon County*, 216 Mo. 681, loc. cit. 689, 116 S. W. 518, and cases there cited. Respondent claims that appellant neglected to discharge this duty, and appellant asserts the contrary. The evidence shows, we think, that the jury room, which, it is said, respondent might have occupied, was obviously unsuitable. Apparently the only practicable arrangement was for respondent and the county clerk jointly to occupy the room in the courthouse designated as the county clerk's office, or to have a separate office elsewhere in the county capital. There is nothing inherent in the nature of the duties of these two offices, which so imperatively demands privacy, as to enable the court to say as a matter of law that separate offices must be provided. That being true, the question of whether or not the joint use of the county clerk's office by that official and respondent was or was not reasonably practicable, and whether or not such room was reasonably suitable room for respondent's use, under the circumstances, becomes a question of fact, unless, in the light of the evidence, the impracticability or unsuitableness of such an arrangement is so obvious that the minds of reasonable men could not honestly differ about it. The county clerk's office is shown by the evidence to be about 14 feet wide by 18 feet long. There is a vault in connection with it, the size of which is not shown. It appears that respondent, in her official capacity, had charge of about one dozen large record books. It may be assumed that she would need, and the evidence in fact discloses that she used, a desk,

a typewriter, a table of moderate size, and a few chairs. It does not appear that there was not sufficient space in the vault for the records of both of these officials. Some of respondent's predecessors and her successor in office did, in fact, make use of these quarters in conjunction with the county clerk. Whether a room the size of this room was reasonably suitable for the use of both would obviously depend upon the volume of business usually done there, the number of persons usually employed in the two offices, and the number of persons who had occasion to be in that room on business connected with one or the other of the two offices, and, perhaps, upon other considerations. On these matters the record is silent.

It is, perhaps, possible for a room either to be so large or so small as to justify the court, in declaring as a matter of law that such room was or was not reasonably suitable for the joint use of two or more county officials, provided the volume of business, the number of assistants, and the extent to which the public had occasion to resort to the offices in question, and other relevant circumstances, were also shown. But we cannot take judicial notice of these things, nor could the trial court do so. As stated, practically nothing except the size of the room in question is shown in this record. Under these circumstances, a practically peremptory instruction in favor of the respondent was not justified. The interests here involved are not large, and it is regrettable that we cannot make final disposition of this case here and now; but, considering the functions of this court, our duty seems plain. Our ruling on this instruction makes it necessary to send this case back for a new trial. For that reason we indicate our opinion on some questions raised by appellant.

[4-8] Opinion evidence as to the suitability of a given room for respondent's use as an office is not competent. Section 2778, R. S. 1909, is not applicable to the case at bar, and for that reason no error was committed in refusing appellant's instruction No. 2. *Ewing v. Vernon County*, supra, 216 Mo. loc. cit. 693, 116 S. W. 518; *Gammon v. Lafayette County*, 79 Mo. 223. If this case is again tried, we think the jury should be instructed that, if the appellant failed to provide for the use of respondent reasonably suitable space in the courthouse or elsewhere in the county seat in which to maintain her office and transact her official business, then respondent had the right to provide such office, and to provide heat, light, and janitor service therefor, and that the county is bound to pay the reasonable cost of the same. The evidence, as shown by the record before us, does not, in our opinion, justify an instruction on the theory of estoppel, nor upon the necessity of a demand by respondent upon appellant that it should supply her with a suit-

able office, before she was justified in renting an office elsewhere. It seems that all parties were familiar with the situation. No one was misled. The expense actually incurred by respondent for rent, light, and janitor service was only \$7.50 per month. It could hardly have been less. The omission of a formal demand on respondent's part has harmed no one. Courts—including county courts—should not be mere “snappers-up of unconsidered trifles.” The maxim “de minimis lex non curat” is one graciously to be borne in mind at times, and this is one of those times.

For the reason stated, this cause is reversed and remanded for further proceedings consistent with this opinion.

All concur.

KRIBS v. UNITED ORDER OF FORESTERS. (No. 20485.)

(Supreme Court of Missouri, Division No. 1. October, 1919. Rehearing Denied and Opinion Modified April 10, 1920.)

Courts §231 (6)—Where contentions based on ruling statute inapplicable, and not on constitutionality, appeal is to Court of Appeals.

Where constitutional contentions are all based ultimately on the ruling and instruction that Rev. St. 1909, § 6962, did not apply to the insurance contract in suit, and it was not contended that the statute is unconstitutional, the appeal is to the Court of Appeals, and not the Supreme Court.

Appeal from St. Louis Circuit Court; Kent K. Koerner, Judge.

Action by Henry Kribs against the United Order of Foresters. Judgment for plaintiff, and defendant appealed to the Supreme Court. Cause transferred to St. Louis Court of Appeals.

Douglas W. Robert, of St. Louis, for appellant.

Conrad Paeben and J. T. Roberts, both of St. Louis, for respondent.

BLAIR, P. J. This cause has been tried five times in the circuit court, and heard twice in the Court of Appeals. On the first trial plaintiff was nonsuited. The Court of Appeals (171 Mo. App. 87, 156 S. W. 571) sent the case back for trial. On the second trial the verdict and judgment were for the defendant. On appeal the judgment was reversed and the cause remanded. 191 Mo. App. 524, 177 S. W. 766. On the third trial

a verdict for plaintiff was set aside in the trial court. The fourth effort resulted in a hung jury. On the fifth trial judgment went for plaintiff in the sum of \$4,250.50, and defendant appealed to this court.

It is contended jurisdiction is vested in this court by reason of the presence of a constitutional question. Whether this is true is the first question for decision. One of the decisive issues in the case is whether the insurance contract involved is on the assessment plan, or whether it is such as may be entered into by a fraternal beneficiary association. On the second appeal the Court of Appeals held the contract was on the assessment plan, and that section 7913, R. S. 1899 (section 6962, R. S. 1909), exempting fraternal benefit societies from the operation of the statutes on assessment insurance was inapplicable to the case, because the insurance contract in suit was “not such as a fraternal benefit society is authorized to enter into, but rather one on the assessment plan.” On the trial which followed this decision the trial court gave and refused instructions on the theory that the above-mentioned section of the statutes did not apply to the contract in suit. To these rulings or instructions defendant objected, on the ground that they infringed certain of its constitutional rights. It is argued in the brief that defendant (1) was denied the equal protection of the laws; (2) deprived of the privileges and immunities granted to all fraternal beneficiary associations by section 6962, R. S. 1909; (3) and was deprived of its property without due process of law.

Defendant's constitutional contentions are all based, ultimately, upon the fact that the trial court ruled and instructed that section 6962, R. S. 1909 (formerly section 7913, R. S. 1899), did not apply to the insurance contract in suit. These instructions were given and refused in an effort to comply with the ruling of the Court of Appeals, on the second appeal, that the section did not apply. It is not contended the statute is unconstitutional. A practically identical question of jurisdiction was examined by the court en banc in *McManus v. Burrows*, 217 S. W. 512, and resolved against defendant's present contention. The opinion of the Commissioner in this case antedated that action of court in banc. It reached the same conclusion by a different route.

On the authority of *McManus v. Burrows*, supra, this cause is transferred to the St. Louis Court of Appeals. All concur, except **WOODSON, J.**, absent.

BUSH v. STUMPE. (No. 20617.)

(Supreme Court of Missouri. Division No. 1.
June 2, 1920.)

1. Railroads ¶67(2)—Evidence held to show equitable title to land along right of way.

In a railroad's suit to enjoin maintenance of a stone wall along its right of way, evidence held to show equitable title to the land on which the wall bordered and was erected in defendant's predecessor, who had exchanged lands with the railroad.

2. Boundaries ¶3(5) — Boundaries control further description of lot as wedge-shaped.

The boundaries being given by a deed, whether the lot was actually wedge-shaped or not as described, the deed conveyed the land within the boundaries, which controlled.

3. Property ¶9—Possession evidence of ownership.

Defendant being in possession of land under a bona fide claim of ownership, his possession was evidence that he was owner as against plaintiff and all the world, except the true owner, if defendant was not such owner.

4. Evidence ¶213(2)—Testimony not inadmissible as offer of compromise.

In a railroad's suit to enjoin maintenance of stone wall by defendant along road's right of way on a lot claimed by defendant, court properly permitted defendant to testify road's representatives approached him to buy or exchange other property for a part of his on which to build side track; testimony being recognition of defendant's title, and not an offer of compromise.

Appeal from Circuit Court, Franklin County; R. A. Breuer, Judge.

Suit by B. F. Bush, receiver of the Railroad and other property of the Missouri Pacific Railway Company, against August Stumpe. From judgment dismissing the petition, plaintiff appeals. Affirmed.

Jesse H. Schaper, of Washington, Mo., and C. D. Corum, of St. Louis, for appellant.

D. W. Breid, of Union, for respondent.

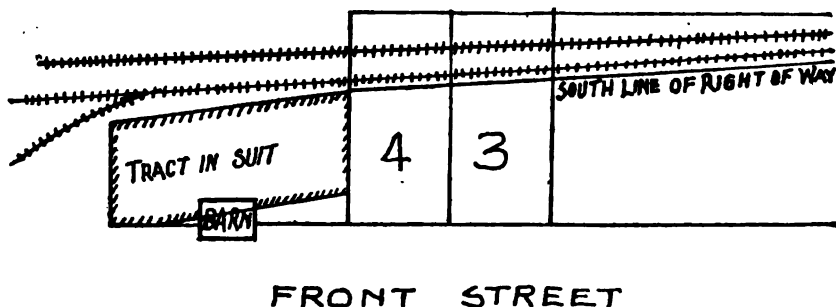
SMALL, C. I. Injunction. Petition filed October 5, 1917. Plaintiff alleges that the

Missouri Pacific Railway Company, of which he is receiver, was entitled to the possession of a certain strip of ground 144 feet long, 69.6 feet wide at the west end, and 74 feet wide at the east end, as part of its right of way in the city of Washington in said county; that defendant unlawfully entered and took possession thereof, and to annoy plaintiff and his employees in operating said railroad erected a stone wall within 4 feet of the south rail of plaintiff's "passing" track; that said wall is about 2 feet high, but defendant intends to build it 6 or 8 feet high, which will endanger the lives and limbs of the employees operating and switching trains on said track; that unless enjoined the defendant will complete said wall, and thereby expose the said employees to unnecessary danger, and said railway will be unable to transact its business; that plaintiff and said railway have no adequate remedy by an action for damages, etc. Wherefore plaintiff prays for an order restraining defendant from constructing said wall, or any wall on said premises, and from in any manner interfering with the possession and title of said railway, and for general relief.

A temporary injunction was granted by the county court of said county October 7, 1916. At the November term, 1917, defendant filed a motion in the circuit court to dissolve the temporary injunction, which the court sustained, and final judgment was then entered dismissing plaintiff's petition. After his motion for new trial was denied, plaintiff appealed to this court.

The following sketch illustrates, in a general way, the "lay of the land."

Without deciding, for the purposes of this case, we assume that plaintiff's evidence tended to show that the lot in question was originally embraced in the deed of June 30, 1853, from McLean and wife to the Pacific Railroad Company, the predecessor in title of the Missouri Pacific Railway Company. But there is no evidence that any part of said lot was ever used by the railroad company for its right of way. Front street runs east and west. Lots 3 and 4, block 9, McLean's addition, run north and south, and



each had a frontage of 66 feet on the north line of Front street, and extend north about 132 feet in depth. They adjoin each other. The lot in question runs 144 feet, the long way east and west, the east end, being 74 feet wide, abuts against said lot 4, and the west end is 69.6 feet wide, and adjoins plaintiff's right of way. The south side of the lot sued for, part of the way, is separated from Front street by a wedge-shaped tract, which is 18 or 20 feet wide at the east end, where it adjoins said lot 4 and runs to a point on Front street, as shown by a deed made in 1865, or 8 feet wide at that point, according to scale of plaintiff's plat put in evidence. On this wedge-shaped tract, and partly (about one-half) on the land in question, a barn had been built by the defendant's predecessor in title, as early as 1865 or 1866, and continuously occupied by the successive owners up to the time suit was brought. In the conveyance of the property in 1865, this small wedge-shaped tract was described as "lying between Front street and the land deeded to the Pacific Railroad Company by Dr. McLean, being 18 or 19 feet where it joined said lot 4 and running to a point some distance westwardly." Subsequently and until purchased by Philip Mueller, the title deeds described it as "a wedge-shaped lot adjoining said lot 4 of block 9 of McLean's addition, upon which wedge-shaped lot stands a brick stable," without stating the dimensions of the wedge-shaped lot. In the deed to said Mueller, made March 15, 1892, it was described as follows:

"Lot 4 of block 9 of McLean's addition to Washington. Also a certain wedge-shaped piece of land in said city adjoining the aforementioned lots on the west side of the whole of both tracks aforesaid, being bounded east by lot 3 of said block, south by Front street, north and west by the Missouri Pacific Railroad."

The railroad tracks and the right of way originally, and until 1902, ran across and occupied the north 40 feet of said lots 3 and 4. In 1902 the railroad company desired to widen its right of way. Accordingly a deed was obtained from Philip Mueller, the then owner of the remainder of said lots 3 and 4, dated August 30, 1902, and filed for record October 1, 1902, by the Missouri Pacific Railway Company, conveying to it a 7-foot strip of ground off the north end of Mueller's property. This deed recited that he makes the conveyance "in consideration of the sum of \$1.00 and exchange of ground." Mueller died about 8 years before the trial. There was no deed shown in evidence conveying to Mueller the ground which he was to receive from the railroad company in exchange for said 7-foot strip. But on behalf of the defendant several witnesses testified on that subject. Joseph Mueller, about 85 years of age and son of said Philip Mueller, testified:

That in 1902 the representatives of the railroad company came to his father, and said the company wanted to widen its right of way along his property, and proposed that if he would give the company a strip 7 feet wide off the north end of his land the company would give him land adjoining his property on the west, where the lot in controversy was located. That his father made the company a deed to the 7-foot strip, and the company moved its right of way fence on lots 3 and 4 back to the south 7 feet, and built a fence inclosing the lot in controversy on the north and west sides. His father built a fence along Front street, and the lot in suit abutting said lot 4 on the west was thus completely inclosed. That thereafter, said Mueller and his heirs claimed and kept possession of the said lot and used it for a garden until said heirs made their deeds to the defendant. That he (Joseph Mueller), after making his deed, claimed no interest in the lot in question.

Edward Maschman testified: That he was the city marshal of Washington, and was born and raised there. Was section foreman for the Missouri Pacific Railway Company for 8 years. That the railroad company was never in possession of the lot in litigation. The fences around the lot were built by the railroad company. They have always been there on the north and west sides, and are there to-day. Does not remember any change. He, himself, once helped to build them.

Henry Nolte testified that he was then at the time of the trial, section foreman for the Missouri Pacific Railway Company, and had been for 15 years; had known the property in suit for 32 years; during that time the railroad company had not, to his knowledge, been in possession of the property. Philip Mueller was living upon it. Witness had charge of the section along this lot. About 14 years before the trial, the railroad company built a new track along the lot. He was a laborer at the time, and helped build the track, and "Mueller gave the company some land off the north side of his land. They did not have room enough to build the track, and they gave Mueller land on the west of his lot." The railroad company tore down the right of way fence along Mueller's lots 3 and 4, and moved it further south, and tore down Mueller's fence on the west of lot 4, and moved it further west, making a larger lot adjoining lot 4. The west fence was pushed out to the west to where it is to-day. But he did not know how far they moved it. Did not hear the agreement to exchange lands made. Heard about it from the section foreman. The railroad company moved the fence. Did not see the fence moved or erected, but the railroad company took the ground away, and the fence dropped in. "I seen that work done." It was done by the fencing gang.

Alex Brown testified: That he was section man. Had worked for the railroad 34 years

in that vicinity. Knew this property since he was a boy. The railroad company was never in possession of it that he knew of. It has been in possession of other parties who lived on and occupied it. There was a fence there on the north side of this wedge-shaped lot until last spring, when it was knocked down. Remembered the building of the new track about 14 years before. But only knew about the exchange of property and building of the fence from what he had heard.

Judge John W. Booth testified that he put his horse up in the barn of the wedge-shaped tract in 1885 or 1886, when he went there to visit Maj. Lewright, who lived there. He had noticed the property frequently since then, and it had always been occupied by private parties, but he paid no particular attention, and could not fix the boundaries of the wedge-shaped lot.

August Stumpe, the defendant, testified, that he was in possession of the lot in suit, and had been ever since he purchased it, about 2 years before, from the heirs of Philip Mueller. At this point defendant introduced in evidence his deeds from said Mueller heirs. They were dated May 8, April 9, November 20, and ———, 1914. In three of them the property was described as follows (after conveying said lots 3 and 4):

"And a certain wedge-shaped piece of land in said city of Washington, adjoining the aforesaid lot 4 on the west side, bounded on the south by Front street, and on the north and west by the Missouri Pacific Railroad."

And in one of said deeds, as follows:

"And a wedge-shaped piece of land adjoining said lot 4 on the west."

At and shortly before the suit was brought, the plaintiff was constructing a side track near the property sued for on its right of way. Defendant built a stone wall on the property in suit within 4 or 5 feet of said track, which would render the use of the track dangerous to the employes of the plaintiff in moving and switching trains. The plaintiff, therefore, tore down this wall, but defendant threatened to put it up again. Plaintiff had also torn down part of the north fence around said property. The defendant testified that he built the wall as a retaining wall. He also testified that the plaintiff's representatives approached him and offered to buy the ground necessary to build and operate this side track, or exchange other property for it, but no agreement was reached; that they did not claim to own it until after they could not agree. Then they said the company had some right to it. Plaintiff objected to this testimony on the ground that it was an effort to compromise, but the court overruled the objection.

[1] II. We hold that the evidence shows an equitable title in said Mueller. The deed

he made to the railroad company for the 7-foot strip recited that it was made in consideration of \$1 and exchange of property. What property was exchanged, or was to be exchanged, was not stated, but the evidence is clear that at that time, the railroad company set its right of way fence back 7 feet, so as to take possession of the 7-foot strip conveyed to it by Mueller, and also erected a fence on the north and west sides of the lot sued for, and Mueller erected a fence along Front street. It was thus inclosed and ever afterwards occupied as a part of the Mueller premises. This contemporaneous and long-continued construction of the transaction and exchange of property mentioned in the Mueller deed to the railroad company could reasonably mean but one thing, and that is that the railroad company gave him that portion of their property west of his lot 4, which they inclosed within this fence, in exchange for his 7-foot strip, which they ever afterwards retained.

We hold, therefore, that the equitable title to the lot in suit was vested in Philip Mueller and his heirs prior to the conveyance of the latter to the defendant, Stumpe.

[2] III. But plaintiff claims that defendant did not obtain title for the land in question by his conveyance from the Mueller heirs. His deeds describe the land as "a certain wedge-shaped piece in said city adjoining the above-mentioned lot 4 on the west side, bounded on the south by Front street, north and west by the Missouri Pacific Railroad." The land embraced within this description was somewhat wedge-shaped. It included, not only the original wedge, but the land received from the railroad company in exchange for his 7-foot strip by Philip Mueller in 1902, which was the land in suit. But the boundaries being given, whether the lot was actually wedge-shaped or not, the land within the boundaries would pass. The boundaries would control. The Mueller heirs conveyed their deeds as conveying this land to the defendant, because they surrendered possession of it to him under their deeds. He had been in possession ever since, and Joseph Mueller testified that he claimed no further interest in it.

[3] IV. But, in any event, the title and right to possession of the property was not in the railroad company of which plaintiff is receiver, when this suit was instituted. Defendant being then in possession, under a bona fide claim of ownership, his possession was evidence that he was the owner of the property, as against the plaintiff and all the world, except the true owner, if he himself was not such true owner.

[4] V. The lower court properly permitted the defendant to testify that the plaintiff's representatives approached him to buy or exchange other property for a part of this property upon which to build the new side track.

He says they did this before any controversy as to ownership arose. They did not claim the railroad company had any interest in the property until afterwards. This was a recognition of the defendant's title, not an offer to compromise.

We find no error in the rulings of the learned chancellor below, and affirm the judgment.

BROWN and RAGLAND, CC., concur.

PER CURIAM: The foregoing opinion of SMALL, C., is adopted as the opinion of the court.

All concur, except WOODSON, J., absent.

BUSH v. STUMPE. (No. 20293.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1920.)

1. Adverse possession § 14(1)—Evidence held not to show possession in defendant's predecessors.

In ejectment by railroad against defendant claiming wedge-shaped lot adjoining right of way, evidence held not to show any of persons under whom defendant claimed were in possession of whole tract in controversy, or in possession under color of title of part thereof, in name of whole, prior to August 1, 1886, the date of taking effect of the statute, now Rev. St. 1909, § 1886.

2. Ejectment § 26(1)—Defendant can invoke equitable title acquired by predecessor from plaintiff.

Defendant in ejectment, if he so elects, can invoke as a defense to the action the equitable title acquired by his predecessor from plaintiff.

Appeal from Circuit Court, Franklin County; R. A. Breuer, Judge.

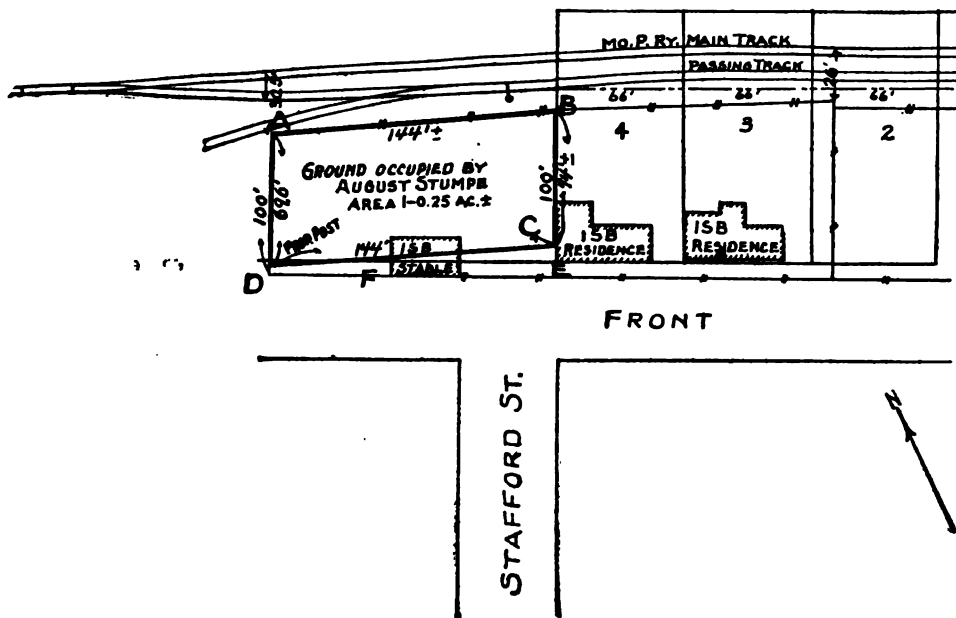
Ejectment by B. F. Bush, as receiver of the railroad and other property of the Missouri Pacific Railway Company, against August Stumpe. From judgment for defendant, plaintiff appeals. Reversed, and cause remanded.

C. D. Corum, of St. Louis, and Jesse H. Schaper, of Washington, Mo., for appellant.
D. W. Breid, of Union, for respondent.

RAGLAND, C. Ejectment for recovery of the possession of about one-fourth of an acre of ground in the city of Washington, Franklin county, claimed by plaintiff to be a part of the right of way of the Missouri Pacific Railway Company of which he is receiver.

The petition is in the usual form. The answer admits that the defendant is in possession, but denies generally the other allegations of the petition. It further avers that the defendant and those under whom he claims have been in the adverse possession of the premises for more than fifty years.

Prior to the institution of the suit the plaintiff caused the premises to be surveyed. From such survey he made the following plat which he introduced in evidence at the trial:



The ground enclosed within the lines A B C D is that in dispute. It is conceded that the railroad company owns the ground north and west of it and the defendant lots 3 and 4 on the east and the wedge-shaped piece within the lines C E F. It was admitted that one McLean is the common source of title. June 30, 1853, McLean conveyed to the Pacific Railroad Company, the Missouri Pacific Railway Company's predecessor in title, a strip of ground 160 feet in width on which that part of its road and road bed from "station No. 970.20" westwardly to "station No. 1023.10" had been located, approximately a mile in length. That part of the strip that lay south of the center line of the track was 100 feet wide, that part that lay north was 60 feet wide. According to plaintiff's survey, "station No. 970.20" is the point of intersection of the west line of lot 4 with the center line of the railroad company's main track, and points C and D are each just 100 feet distant from the center line of the main track. It follows that, if the survey is correct, the ground in dispute is a part of that which was conveyed by McLean to the Pacific Railroad Company. The evidence affirmatively shows, however, that neither that company nor any of its successors ever occupied or used any of the ground for any purpose, or attempted to do so, until shortly before the commencement of this controversy which was occasioned by the plaintiff's effort to get possession preparatory to constructing or extending a switch track over a part of it.

Defendant put in evidence the deed records showing the chain of title under which he claims lot 4 and "the wedge-shaped lot adjoining said lot 4 upon which stands a brick stable." They are as follows: Deed from Elijah McLean to Benjamin F. Burch, dated February 23, 1856; deed from Burch and wife to Martha A. Lack, dated December 1, 1865; deed from Wm. J. Lack to Mary V. Lewright, wife of James N. Lewright, dated November 19, 1872; deed from Luther M. Lack and wife to Mary V. Lewright, dated February 22, 1873; deed from Mary V. Lewright and husband to I. W. Boulware, dated January 10, 1873; deed from I. W. Boulware and wife to Philip Mueller, dated March 15, 1892; and deeds from the heirs of Philip Mueller to defendant in 1914. In the deed from Burch to Martha A. Lack the "wedge-shaped lot" is described as follows:

"The said wedge-shaped piece of ground hereby deeded to said party of the second part extending westwardly from said lot 4 in block 9 of McLean's addition and lies between the northern line of Front street when extended westwardly and the land deeded to the Pacific Railroad Company by Dr. E. McLean, being eighteen or twenty feet wide where it joins said lot 4 and running to a point some distance westwardly, the contents not being precisely known, together with the buildings thereon,

said wedge-shaped piece of ground being the same on which stands a stable built by the said B. F. Burch."

In the subsequent deeds down to the one from Boulware to Mueller it is described simply as a wedge-shaped lot adjoining lot 4 upon which stands a brick stable. In the latter deed made in 1892 the entire tract conveyed is described as follows:

"Lot 4 of block 9 of McLean's addition to Washington. Also a certain wedge-shaped piece of land in said city adjoining the aforementioned lot on west side of the whole of both tracts aforesaid, being bounded east by lot 3 of said block, south by Front street, north and west by Missouri Pacific Railroad."

In the deeds from the Mueller heirs to defendant this parcel is described as "a wedge-shaped piece of land adjoining the said lot 4 on the west side."

A residence on lot 4 and the brick stable on the wedge-shaped piece of ground had been built and were occupied and used in connection with each other as early as the fall of 1865. Philip Mueller purchased and received a conveyance of the premises in 1892, and immediately went into possession. He also acquired the title to lot 3 on the east. In 1902 the railroad company, desiring more room, offered Mueller other ground in exchange for a strip 7 feet wide off the north ends of lots 3 and 4 where they abutted the right of way. Mueller accepted the offer, and conveyed to the company the 7-foot strip, the deed of conveyance reciting that it was made "in consideration of the sum of one dollar, and exchange of ground." The railroad company, however, never made a conveyance to Mueller of the ground it gave him in exchange for the strip off of lots 3 and 4. The agreement between them rested entirely in parol, and, but for what they did in carrying it out, it would be impossible from the other evidence in the case to identify the ground that was to be conveyed to Mueller pursuant to its terms. Joseph Mueller, a son of Philip Mueller (then deceased), was the only witness offered by defendant who had any personal knowledge of the transaction. He stated that he heard the conversation between his father and the representative of the railroad company, and that it was agreed between them that for the strip of 7 feet his father was to get some ground "on the west end." He was unable to state more definitely what ground, or how much, his father was to get by the exchange, so far as the terms of the agreement which he heard were concerned. He testified, however, that immediately thereafter the railroad company set their fence back south a distance of 7 feet across lots 3 and 4, continued it thence westwardly along the northern line of the tract now in contro-

versy, and thence southwardly along the western side thereof to Front street. That is, that the company at that time built its right of way fence from B to A and from A to D, as those points are designated on the foregoing plat, thereby inclosing the ground in question within Mueller's premises. He further testified that his father occupied and used the entire tract in controversy thereafter. So that the railroad company put Philip Mueller into the possession of whatever part of the ground in dispute that he was not at that time already occupying.

The evidence shows conclusively that defendant and those under whom he claims have been in the open adverse possession of the ground in controversy since 1902. It also shows a similar possession as to lot 4 and the "wedge-shaped lot" as far back as 35 years prior to the trial in 1916. But whether any of the ground in dispute, and, if so, what part of it, was included in the designation "wedge-shaped lot" by the witnesses is not clear. The only evidence as to the possession of any part of it prior to August 1, 1866, is the testimony of Judge John W. Booth. He testified that in the late fall of 1865 he rode from Indian Prairie, where he was living, to Washington, to visit his friend, Maj. James N. Lewright. He found Maj. Lewright living in the brick house just east of the brick stable, and his horse was put in the stable by his host. He was under the impression that the residence and the stable were under one inclosure, but he paid no attention to the boundaries, or whether it was in fact fenced, and consequently was unable to say whether Lewright occupied or used any of the lands surrounding the stable.

At the instance of the plaintiff the court instructed the jury that the deeds read in evidence by the plaintiff vested the record title to the lands sued for in the plaintiff for railroad right of way purposes. At the request of defendant the jury was further instructed to return a verdict for him "if the evidence shows that the defendant, and those under whom he claims, have been in the open, notorious, uninterrupted, exclusive, and adverse possession of the premises in controversy for a period beginning prior to August 1, 1866, up to the time of the commencement of this suit." The verdict and judgment were for defendant. Plaintiff appeals.

[1] 1. Among others, appellant assigns as error the giving of the instruction asked by defendant. This because the evidence was not sufficient to warrant it. At defendant's instance the case went to the jury on the sole issue of whether he and those under whom he claims had been in the adverse possession of the land in question for a period beginning prior to August 1, 1866, and extending down to the commencement of this suit. By his instruction he seems to concede that the

ground in dispute was originally granted for and as a part of the railroad right of way and hence to a public use within the meaning of section 1886, R. S. 1909; Hannibal & St. Joseph Railroad Co. v. Totman, 149 Mo. 657 51 S. W. 412; Dice v. Hamilton, 178 Mo. loc. cit. 89, 77 S. W. 299. So much, therefore, will be assumed. As already stated, the only evidence as to the possession of any part of the premises prior to August 1, 1866, is the testimony of Judge Booth. From that it may be inferred that James N. Lewright was in possession of the brick stable in the fall of 1865. An inspection of the preceding plat discloses that about one-half of the stable is on the ground in dispute. At the time of Booth's visit the record title to lot 4 and the wedge-shaped lot that adjoined it and lay immediately north of the railroad ground was in Burch or Mrs. Lack. Burch conveyed to Mrs. Lack December 1, 1865, and, as heretofore noted, the wedge was described in that deed as lying between the northern line of Front street when extended westwardly and the land deeded by McLean to the railroad company, and being 18 or 20 feet wide where it joins lot 4. Mrs. Lack's heirs did not convey to Lewright's wife until 1872. The character of Lewright's possession is wholly undisclosed. Whether he claimed in his own right, or held under or in privity with Mrs. Lack, does not appear. In any event, such possession could not have been under color of title to a wedge-shaped lot exceeding 18 or 20 feet in width at its base. The wedge limited to that dimension would probably include all of the ground on which the stable stands, and but very little more of that in controversy. As the evidence does not tend to show that any of the persons under whom defendant claims was in the actual possession of the whole tract in controversy, or in possession, under color of title, of a part thereof in the name of the whole, prior to August 1, 1866, it does not support the verdict, and the judgment will have to be reversed.

[2] In the case of Bush v. Stumpe (No. 20,617) 222 S. W. 1006, a companion case to this, in which plaintiff sought to restrain defendant from building a stone wall along the northern boundary of the ground in dispute, decided at this term, we held on the same facts in proof in this case that Philip Mueller, having fully complied on his part with the terms of the agreement entered into between him and the Missouri Pacific Railway Company for an exchange of ground, and the company having put him in possession of the land in controversy pursuant to the agreement, he thereby acquired the equitable title to it, and that the defendant is now the owner of such title. That title defendant can, if he so elects, invoke as a defense to this action. Shaffer v. Detle, 191 Mo. 377, 90 S. W. 131; Tibeau v. Tibeau, 19 Mo. 78, 59 Am. Dec. 329.

The judgment is reversed, and the cause remanded.

BROWN and SMALL, CC., concur.

PER CURIAM. The foregoing opinion of RAGLAND, C., is adopted as the opinion of the court.

All the Judges concur, except WOODSON, J., absent.

ALES v. EPSTEIN et al. (No. 21238.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920. Rehearing Denied June
25, 1920.)

1. Pleading \S 365(3)—Allegations taken as true on motion to strike.

In passing on motion to strike out paragraph of answer, the allegations thereof must be taken as true.

2. Aliens \S 6(2)—Title procured by alien in violation of statute forfeited only by state.

Under Rev. St. 1909, \S 750, making it unlawful for an alien to own real estate, where an alien had received a deed conveying an absolute title, the state alone could attack the conveyance, declare a forfeiture, and take the property.

3. Aliens \S 6(1)—Alienage of plaintiff good defense in action to declare constructive trust.

In action to declare a constructive trust, it was a good defense that plaintiff and her husband were aliens, and therefore prohibited from owning real estate under Rev. St. 1909, \S 750.

Appeal from Circuit Court, Jasper County; R. A. Pearson, Judge.

Action by Ruth Ales against Harry Epstein and others. Judgment of dismissal, and plaintiff appeals. Affirmed.

This is a proceeding in equity, and was commenced in the circuit court of Jasper county, Mo., at Carthage, on January 17, 1918. The cause was transferred to the circuit court of said county at Joplin, and tried there. The petition alleges that in December, 1917, the legal title to lot 6 in Moffet's subdivision, an addition to Joplin, Jasper county, Mo., was vested in the heirs of Mahala J. Chamberlain, deceased, namely, Albert Heanell, Nellie Elliott, Beulah Hennell, Anna G. Thompson, Mabel Hennell, and Kate Hennell, as tenants in common; that at the November term, 1917, of the Carthage circuit court, there was pending therein a partition suit between said Albert M. Hennell, as plaintiff, and the other tenants in common, supra, as defendants, in which a decree was rendered, providing for the sale of above lot, at public vendue, by L. C. Wormington, special commissioner; that said commissioner advertised said property for sale at the

Carthage courthouse on December 20, 1917; that for a long time prior to said last-named date plaintiff herein had been in possession of said real estate as tenant; that said property was reasonably worth \$4,525 and more; that plaintiff and defendant Harry Epstein had been personal friends for a long time, and she often went to him for counsel and advice in matters pertaining to her business ventures; that, relying on said defendant's superior ability and sagacity, and relying upon his honesty and fair dealing with plaintiff, she requested him to go with her to attend said sale, to act in her behalf, and to assist her in purchasing said property; that plaintiff agreed to pay him, in addition to his expenses, a reasonable sum for his said services; that said defendant agreed to act for her and perform the services aforesaid; that they were both present at above advertised sale; that plaintiff bid for said property \$4,525, it being the highest bid, and which said sum she was willing, ready, and able to pay therefor; that said commissioner declared said property had been sold to plaintiff for above sum; that the undertaking and agreements aforesaid were by parol.

It is further alleged that said Epstein, in violation of said undertaking and agreement, wrongfully and fraudulently, for the purpose of cheating and defrauding plaintiff, in order that he might become the owner of said property, represented that it was to her interest that the deed from the commissioner for said real estate should be made, and delivered, to said Epstein; that he promised, without delay, to convey the same to this plaintiff; that, relying upon said defendant, as heretofore stated, she consented to above conveyance being made to him; that thereafter said defendant, in violation of his said agreement, for the purpose of cheating and defrauding her, conspired and confederated with the defendants Benjamin Raymond and David Raymond, whereby they procured said deed to be made to said Epstein and said Raymonds; that at all times since said sale she has been ready, able, and willing to take the title to said property in accordance with said agreement made with said Epstein, and to pay said \$4,525, with the reasonable expenses and charges of said defendant, etc., and tenders the same into court.

The petition concludes by asking the court to declare that defendants hold the property in trust for plaintiff; that the court ascertain the amount of all moneys, if any, expended by said Epstein; to determine the interest thereon from date of said sale; to fix reasonable compensation to said Epstein for his said services; and that said defendants be divested of the title to said property, and the same be vested in plaintiff.

Defendants' answer contains: First, a gen-

eral denial; second, it alleges that the agreements alleged to have been made in petition were not in writing, and are contrary to the statute of frauds; third, that plaintiff released in writing whatever claim she may have had to said property mentioned in petition; fourth, that the petition states no cause of action upon which plaintiff can recover in equity against defendants, or either of them; fifth, it charges that plaintiff and husband are aliens, and, as such, have no right to maintain this action.

Plaintiff moved to strike out the fifth ground above stated, and her motion was overruled. She then filed a reply denying the allegations of said answer.

We will consider the evidence and rulings of the court in the opinion to follow.

On May 18, 1918, the court found the issues against plaintiff, dismissed her bill, and judgment was entered accordingly. A motion for new trial was filed by plaintiff, which was overruled, and the cause duly appealed by her to this court.

John J. Wolfe, of Joplin, for appellant.

Haywood Scott, of Joplin, for respondents.

RAILEY, C. (after stating the facts as above). Appellant in her first assignment of error contends that the trial court erred in refusing to sustain her motion to strike out the fifth paragraph of defendants' answer, which reads as follows:

"That plaintiff and husband are aliens and subjects of the kingdom of Russia and not citizens of the United States, and have not lawfully declared their intention of becoming such, and under the law cannot hold real estate, and cannot maintain this suit for said lot, even though she might otherwise have some interest therein."

[1] In passing upon said motion, the allegations of paragraph 5, supra, must be taken as true. Section 750, R. S. 1909, among other things, contains the following provisions:

"It shall be unlawful for any person or persons not citizens of the United States, or who have not lawfully declared their intention to become such citizens, * * * to hereafter acquire, hold or own real estate so hereafter acquired, or any interest therein, in this state, except such as may be acquired by inheritance. * * *"

Appellant is here asking a court of equity to declare in her favor a constructive trust, and to vest the title to the real estate aforesaid in her, regardless of the plain provisions of above statute.

[2] If the plaintiff had received a deed to the real estate in controversy, conveying to her the absolute title to same, and these defendants were seeking to divest her of said title, on the ground that she is an alien and could not hold the real estate, then it might be well said that the state alone could attack the conveyance, declare a forfeiture,

and take the property. If it was unlawful, as declared by above statute, for plaintiff, under the circumstances of this case, to take and hold the real estate aforesaid, it would be equally as unlawful for a court of equity to aid her in violating said law.

[3] We are therefore of the opinion that said paragraph 5 of defendants' answer constitutes a valid defense in this cause, and that the trial court committed no error in overruling appellant's motion to strike out same. *Fishing & Hunting Club v. Kessler*, 252 Mo. loc. cit. 436, 159 S. W. 1080; *Davis v. Realty Co.*, 241 Mo. loc. cit. 259, 260, 145 S. W. 424; *Garrett v. Kansas City Coal Mining Co.*, 113 Mo. loc. cit. 339, 20 S. W. 965, 35 Am. St. Rep. 713; *Pacific R. R. Co. v. Seely et al.*, 45 Mo. 212, 100 Am. Dec. 369; *Case v. Kelly*, 133 U. S. loc. cit. 28, 10 Sup. Ct. 216, 33 L. Ed. 513; *United States v. N. Pac. R. Co.*, 152 U. S. 300, 14 Sup. Ct. 508, 38 L. Ed. 443; *Baker v. Schofield*, 243 U. S. 120, 37 Sup. Ct. 333, 61 L. Ed. 626; *Barnes v. Multnomah County (C. C.)* 145 Fed. loc. cit. 700; *South & North Ala. R. R. Co. v. Highland Ave. & Belt R. Co.*, 119 Ala. 105, 24 South. 114; 4 *Clark & Marshall, Private Corporations*, § 230, p. 3254; 3 *Thompson on Corporations* (2d Ed.) § 2393.

In *Case v. Kelly*, 133 U. S. loc. cit. 28, 10 Sup. Ct. 220, 33 L. Ed. 513, Mr. Justice Miller, in discussing the subject before us, said:

"It is next objected to the principle adopted by the court that the limitation upon the power of the corporation to receive land is one which concerns the state alone, and the title to such lands in a corporation can only be defeated by a proceeding in the nature of a quo warranto on behalf of the state. The case of *National Bank v. Matthews*, 98 U. S. 621, is strenuously relied on to support this view. We need not stop here to inquire whether this company can hold title to lands, which it is impliedly forbidden to do by its charter, because the case before us is not one in which the title to the lands in question has ever been vested in the railroad company, or attempted to be so vested. The railroad company is plaintiff in this action, and is seeking to obtain the title to such lands. It has no authority by the statute to receive such title and to own such lands, and the question here is, not whether the courts would deprive it of such lands if they had been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones, and that, while a court might hesitate to declare the title to lands received already, and in the possession and ownership of the company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the company in violating the law and enabling the company to do that which the laws forbids."

The same principle is clearly stated in 1 *Ruling Case Law*, § 32, pages 822, 823, as follows:

"In the absence of statutory prohibition against an alien holding real estate it follows, as in the case of a direct grant or purchase, that a use or trust in real estate for the benefit of an alien is valid until inquest and office found; but equity will never raise a resulting trust in fraud of the laws of the land, and therefore where an alien purchases land and takes an absolute conveyance in the name of a citizen, without any agreement or declaration of a trust, the law will not raise a trust in favor of the alien purchaser, who cannot hold the land, any more than it would cast it by descent upon an alien heir, who cannot hold it against the state. The result in such a case must be, either that the nominal grantee takes the land, discharged of any trust, by mere implication of law, or that there is a resulting trust in behalf of the people of the state, which they alone can enforce against the grantee in the deed."

The other authorities cited, including the latest utterance of this court in *Fishing and Hunting Club v. Kessler*, 252 Mo. loc. cit. 436, 159 S. W. 1080, are to the same effect.

The most casual reading of the case of *Pembroke v. Huston*, 180 Mo. 627, 79 S. W. 470, relied on by appellant, will disclose its inapplicability to the case at bar. In the above case, plaintiff sought to rescind a land contract which had been fully performed on each side, on the ground that he was an alien and had no right to hold the land which he traded, etc. Judge Valliant concluded the opinion in said cause, at page 642 of 180 Mo., at page 473 of 79 S. W. as follows:

"The plaintiff was not entitled to a rescission of the contract on any theory presented by him." (Italics ours.)

The above case is clearly distinguished from the one at bar, by the Supreme Court of the United States, in *Baker v. Schofield*, 243 U. S. 120, 37 Sup. Ct. 333, 61 L. Ed. 626.

The trial court was within the law, in refusing to strike out of defendant's answer paragraph 5, supra. Turning to plaintiff's own testimony, we find that she and her husband have lived in the United States more than four years; that they are citizens of Russia; that they have never been admitted as citizens of the United States, nor have they ever declared their intention of becoming citizens of this country, etc. We are therefore of the opinion that under the law and facts of this case the trial court committed no error in dismissing plaintiff's bill.

The judgment below is accordingly affirmed.

WHITE and MOZLEY, CC., concur.

PER CURIAM. The foregoing opinion of RAILEY, C., is hereby adopted as the opinion of the court.

All concur.

STATE v. WICKER. (No. 21908.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

1. Witnesses \S 379(1)—Extrajudicial statements admissible for impeachment.

Generally, where a witness has made statement out of court in conflict with his testimony at the trial such statements may be shown to discredit his testimony.

2. Witnesses \S 388(3)—Cross-examination of defendant as to inconsistent statements improper.

Under Rev. St. 1909, \S 5242, providing that a defendant shall be liable to cross-examination as to any matter referred to in his examination in chief and may be contradicted or impeached as any other witness, cross-examination of defendant, to lay foundation for impeachment, as to whether the testimony of the prosecuting witness was not practically the same as his testimony at the preliminary trial and whether defendant had not stated that the prosecuting witness had sworn the truth concerning the difficulty, was improper.

3. Criminal law \S 695(1)—Objection that the question was immaterial insufficient.

An objection that a question as to where defendant secured a pistol was immaterial is no objection at all.

4. Witnesses \S 277(4)—Where defendant testified to using a pistol, cross-examination as to whether he was in the habit of carrying a pistol was proper.

In a prosecution for assault with intent to kill by using a pistol, where defendant on examination in chief testified as to using the pistol, cross-examination as to where he got the pistol and as to whether he habitually carried a pistol was germane to the direct examination, under Rev. St. 1909, \S 5242, despite objections that it tended to disclose a distinct offense.

5. Homicide \S 300(12)—Instruction not objectionable in failing to present the theory of self-defense.

In a prosecution for assault with intent to kill, an instruction requiring the jury to find that the act was committed on purpose and of malice aforethought, drawn under Rev. St. \S 4481, was not objectionable in failing to present the theory of self-defense.

6. Homicide \S 300(12)—Instruction not objectionable in failing to present the theory of self-defense.

In a prosecution for assault with intent to kill, where an instruction drawn under Rev. St. 1909, \S 4482, required the act to have been done without just cause or provocation, defendant cannot complain that the theory of self-defense was not presented.

7. Criminal law \S 823(6)—Error in an instruction on self-defense cured by others.

In a prosecution for assault with intent to kill, an instruction that a person is not justified in using any more force than is reasonably necessary, while erroneous in failing to tell

the jury that a person is not required to nicely gauge the amount of force to repel an attack, was not cured where subsequent instructions announced the rule that defendant could act upon appearances and use whatever force was necessary to protect himself.

8. Criminal law §785(16)—Instruction on right of jury to disregard testimony of false witness not erroneous.

Where the court instructed that if any witness testified falsely the jury could disregard such false testimony, the failure of the instruction to announce that the jury could disregard all or any part of the testimony of such a witness was not erroneous.

9. Criminal law §747—Conflict in testimony for jury.

Where a witness as to defendant's peaceable character testified that he had heard defendant was convicted on a charge of common assault, and in another place that he was convicted of a charge of assault with intent to rape, the conflict was for the jury.

10. Criminal law §400(2)—Record of a previous conviction is the best evidence.

The record of a previous conviction is the best evidence, and is the proper objection to a question as to whether a witness had heard defendant had been convicted.

11. Criminal law §722½—Statement by prosecutor in argument that defendant had been charged with assault to rape not erroneous.

Where witness to the peaceable character of defendant, charged with assault with intent to kill, on cross-examination testified without objection that he had heard defendant had been convicted of assault with intent to rape, and in another place called the offense common assault, it was not erroneous for the prosecutor to state in argument that defendant had been charged with assault with intent to rape.

12. Homicide §163(1)—Where defendant introduced testimony as to his peaceable character the state may prove his former conviction.

Where defendant charged with assault with intent to kill offered testimony as to his previous peaceable character, it is competent for the state to prove defendant had been convicted of assault, etc.

Appeal from Circuit Court, Howell County; E. P. Dorris, Judge.

William Wicker was convicted of assault with intent to kill, and he appeals. Reversed and remanded.

W. N. Evans and M. E. Morrow, both of West Plains, for appellant.

Frank W. McAllister, Atty. Gen., and Henry B. Hunt, Asst. Atty. Gen., for the State.

WALKER, J. Appellant was charged by information in the circuit court of Howell county with having feloniously, with intent to kill, assaulted one Earl Vaughan by shooting him with a pistol. Upon a trial the ap-

pellant was found guilty and his punishment assessed at two years' imprisonment in the penitentiary. From this judgment he appeals.

In the early part of the day of the shooting J. F. Vaughan, father of the prosecuting witness, and the appellant met in a public highway; no one else being present. Bad feeling existed between them, arising from a controversy in regard to the opening of a public road. Following an inquiry made by Vaughan as to the appellant's connection with this transaction the latter became angry and began to throw stones at the former; one of them striking him on one of his arms. Upon being struck he said to the appellant, "I believe you have broken my arm." To which appellant replied, "I don't care if I had broken your d—d head." Vaughan asked the defendant the cause of his anger and he said Vaughan had made a statement, evidently regarded as derogatory, to a neighbor in regard to him. Vaughan denied having done so; appellant said there would be another day, and they separated. Appellant stopped at a house on the highway and Vaughan went on his way and met his son Earl and another in a buggy about an eighth of a mile from where he had met the appellant. Vaughan had a talk aside with his son and they started down the road towards where Vaughan had left the appellant. When opposite the house where the latter had stopped, they saw him sitting in the doorway. Earl Vaughan called to him, saying, "If you want to throw rocks, come out and I will have a round with you." Appellant declined, when Earl offered him \$10 to go down on the road with him. Vaughan, the father, added that if Earl did not have the \$10 he would furnish it. Appellant then approached, and when distant about six feet he pulled out a pistol and fired at Vaughan, who had jumped off his horse on the opposite side from where appellant was standing. This shot went wild. Appellant then turned and shot Earl, who, with his companion, was sitting in the buggy. One of the shots struck him in the back of the head, inflicting a flesh wound, and the other, more serious, inflicted a wound in one of his knees. Appellant thereupon turned and went back to the house from whence he had come. Earl was making no offensive demonstrations at the time he was shot. There was evidence that some time prior to the shooting he had threatened to attack appellant with a pitchfork, and that the father had also previously made vague threats against appellant. This rancor all arose from the road controversy. Appellant and a witness, his brother-in-law, who testified in his behalf, stated that after some abusive words had passed between appellant and the father and son the latter leaned over in the buggy, looked back over his shoulder, and appellant began to shoot. There was

testimony that Vaughan, the father, was of a quarrelsome disposition, but that the son was a quiet and peaceable citizen. There was a contrariety of opinion in regard to the reputation of the appellant, there being testimony that he was truthful and law-abiding, but subsequently the same witness stated that he had been convicted of an assault.

The errors assigned upon which appellant relies for a reversal, which we note in the order of the presentation, are: The improper cross-examination of appellant; the giving of certain instructions; and the remarks of the prosecuting attorney.

[1, 2] I. The language of the statute (section 5242, R. S. 1909) which it is alleged was violated in the trial of this case is that—

"A defendant shall be liable to cross-examination, as to any matter referred to in his examination in chief, and may be contradicted or impeached as any other witness in the case."

The examination of the appellant to which objection is urged was as to whether the testimony of the prosecuting witness was not substantially the same as his testimony at the preliminary examination. Upon appellant answering that he did not recollect, he was further asked if he had not stated that the prosecuting witness had sworn the truth concerning the difficulty at that examination, to which he answered, "No, sir." The state then introduced other witnesses who contradicted the appellant concerning his statements as to the testimony of the prosecuting witness at the preliminary examination.

Generally, where a witness has made statements out of court in conflict with his testimony at the trial, such conflicting statements may be shown to discredit his testimony. *State v. Burgess*, 259 Mo. loc. cit. 390, 168 S. W. 740. This rule, however, is to be applied under the limitations of the statute to a defendant testifying in his own behalf in a criminal proceeding.

Under the provisions of a statute enacted in 1877 (Laws 1877, p. 356), a defendant whose competency to testify in his own behalf was authorized by that act was, upon taking the stand as a witness, subject to cross-examination as any other witness (*State v. Hathorn*, 166 Mo. loc. cit. 239, 65 S. W. 756); but in 1879 (section 1918, R. S. 1879) the law was so amended as to confine the cross-examination of a defendant witness to any matter referred to in his examination in chief, and so the law has remained without change to this time (section 5242, R. S. 1909). The purpose evident from the questions put to the defendant and the examination of other witnesses was to lay the foundation for his impeachment. We have had occasion in recent cases to review this statute. In *State v. Sherman*, 264 Mo. loc. cit. 381, 175 S. W. 73, while treating it with the utmost liberality consonant with its terms

and purpose, we said in effect that the cross-examination of a defendant in a criminal case was not to be confined to a mere categorical review of the matters stated in the direct examination, and that to warrant a reversal on account of its improper exercise the statute must be given a reasonable construction and the cross-examination must be in regard to matters material to the cause concerning which the defendant did not refer in his examination in chief, or, if immaterial, must be upon subjects tending to prejudice the jury against the defendant. Further, in *State v. Stewart*, 274 Mo. loc. cit. 659, 204 S. W. 10, the rule of construction announced in the *Sherman Case*, supra, and which has prevailed ever since the enactment of the statute in 1879, was reaffirmed, with the added statement that the cross-examination of the defendant should, to avoid reversible error, be limited to matters which by reasonable construction could not be regarded as material to the cause or from their nature could not prove prejudicial to the defendant. To the same effect is *State v. Bowman*, 272 Mo. loc. cit. 501, 199 S. W. 161, and cases. The cross-examination of the appellant transcended the limits indicated as permissible in the cases cited, and constituted error.

[3, 4] The inquiry made of the appellant on cross-examination as to where he got the pistol was objected to as immaterial. This constituted no objection. *State v. Castleman*, 255 Mo. loc. cit. 208, 164 S. W. 492. To the subsequent question put to the appellant as to whether he was in the habit of carrying a pistol, the objection was interposed that the inquiry tended to disclose a separate offense for which appellant was not on trial. On his examination in chief appellant had testified to using a pistol. His cross-examination, therefore, in regard to the weapon, was not improper. Section 5242, supra; *State v. Rumpfelt*, 228 Mo. loc. cit. 452, 128 S. W. 737; *State v. Mitchell*, 229 Mo. loc. cit. 630, 129 S. W. 881, Ann. Cas. 1912A, 908; *State v. Sherman*, supra; *State v. Stewart*, supra.

[5, 6] II. Objections are urged to instructions numbered 1 and 4 given by the court. The first is drawn under section 4481, R. S. 1909, and requires that the offense be shown to have been committed on purpose and of malice aforethought; the fourth is drawn under section 4482, which defines an assault to kill or do great bodily harm. The objection made to each is that it does not present appellant's theory of the case, viz., that his act was in self-defense. The instructions are not lacking in the usual formal requisites required in a case of this character. The first instruction required the jury to find that the act was committed on "purpose and of malice aforethought." The incorporation of these words in the instruction required the jury to find the facts negating the defense of self-defense before a verdict could be returned,

and hence was not subject to the objection urged against it. *State v. Stubblefield*, 239 Mo. loc. cit. 533, 144 S. W. 404; *State v. Lewis*, 248 Mo. loc. cit. 504, 154 S. W. 716.

The fourth instruction contained the words "without just cause or provocation," the omission of which, it was held, rendered an instruction in *State v. Helton*, 234 Mo. loc. cit. 565, 137 S. W. 987, erroneous. *State v. Janke*, 238 Mo. loc. cit. 381, 141 S. W. 1136.

[7] Appellant contends that instruction numbered 10 is erroneous because it told the jury that a person is not justified in using any more force than is reasonably necessary to repel his assailant; that the instruction should have told the jury that a person is not required to nicely gauge the amount of force necessary to repel an attack.

In the cases of *State v. Higgeson*, 157 Mo. loc. cit. 401, 57 S. W. 1014, and *State v. McQuitty*, 237 Mo. loc. cit. 236, 140 S. W. 869, instructions somewhat similar to the one under discussion, although more fully stating the law, were approved. Said instructions numbered 10, when read in connection with instructions numbered 11 and 12, brings instruction numbered 10 substantially within the instructions as mentioned in the *Higgeson* and *McQuitty* Cases and avoids the rule in *State v. Hopkins*, 213 S. W. 126. Instructions numbered 11 and 12 each announce the rule that appellant could act upon appearances; that he could use whatever force and means were reasonably necessary to protect himself; that it was not necessary that the danger should have been real or actual; that if he believed he had reasonable cause to apprehend death or great bodily harm he had the right to use the pistol in the way he did. Instruction numbered 10, standing alone, is subject to criticism, but taken in connection with instructions numbered 11 and 12, the law of self-defense was fairly stated to the jury.

Appellant's contention that the instructions on self-defense precluded appellant's right to act on appearances, even though there was in fact no real danger, is not well taken. Instructions numbered 10, 11, and 12 embody the principles set forth and approved in the cases of *State v. Shultz*, 25 Mo. loc. cit. 153; *State v. Pennington*, 146 Mo. loc. cit. 35, 47 S. W. 799; *State v. Hudspeth*, 159 Mo. loc. cit. 196, 60 S. W. 136; *State v. Gee*, 85 Mo. loc. cit. 650; *State v. Parmenter*, 213 S. W. loc. cit. 441.

[8] Instruction numbered 9 was not erroneous, in that it did not tell the jury they

could reject the whole or any part of the testimony of any witness who testified falsely. In the cases of *State v. Hicks*, 92 Mo. loc. cit. 434, 436,¹ *State v. Mounce*, 106 Mo. loc. cit. 229, 17 S. W. 226, and *State v. Orr*, 64 Mo. loc. cit. 344, instructions as to the credibility of witnesses, wherein the jury were permitted to reject the whole of the testimony of any witness who testified falsely, without the words "whole or any part" being used, were approved.

A glance at instruction numbered 9 discloses that the court used the following language: "You are at liberty to reject such false testimony." This instruction could not have harmed the appellant because the court instructed the jury to reject false testimony only. This contention is therefore without merit.

[9-12] III. Counsel for the state was not in error in telling the jury that the appellant had been charged with the crime of assault with intent to rape. A witness for the appellant, on cross-examination, testified that he had heard of appellant having been convicted on a charge of assault with intent to rape. Appellant did not object to the question or the answer. On redirect examination this witness testified that he heard that appellant's conviction was for common assault. This conflict in the testimony of the witness was a question for the jury. *State v. Weber*, 272 Mo. loc. cit. 480, 199 S. W. 147. Appellant's appropriate objection was that the record of the conviction was the best evidence. Having interposed no such objection, he cannot complain that the record shows that he was convicted of an assault with intent to rape. This witness was examined in chief by the appellant as to the trait of character involved in the suit, to wit, "for being a peaceable man." Having made this trait of appellant's character an issue in the case, it was competent for the state to prove his former conviction. *State v. Beckner*, 194 Mo. loc. cit. 288 et seq., 91 S. W. 892, 3 L. R. A. (N. S.) 535; *State v. Spivey*, 191 Mo. loc. cit. 110, 111, 90 S. W. 81; *State v. Freeman*, 238 Mo. 395, 141 S. W. 1095. This former conviction appearing in the record, the evidence authorized counsel for the state to argue that the appellant had been charged with the crime of assault with intent to rape.

For the errors noted, the judgment of the trial court is reversed and the cause remanded. It is so ordered.

All concur; WILLIAMS, P. J., in paragraphs 1 and 3 and the result.

¹ 4 S. W. 742.

JONES et al. v. PARK. (No. 21093.)

(Supreme Court of Missouri, Division No. 1.
June 2, 1920.)

1. Judgment ¶825—Adequacy of notice to sustain foreign judgment depends on law of the foreign state.

In a partition suit, where the court gave effect to a judgment in partition in a foreign state, whether the proceedings to give notice in such foreign state to nonresident defendants were adequate for that purpose is controlled by the law of such state.

2. Evidence ¶82—Foreign court presumed to have jurisdiction of proceedings forming basis of suit in this state.

Where, under Gen. St. 1883, c. 28, art. 4, § 1, a Kentucky circuit court is shown to have general legal and equitable jurisdiction, it will, in a partition suit in this state, be presumed to have had jurisdiction of a suit brought by administrators for partition of lands belonging to the estate, and to appoint trustees needed to carry out the provisions of the will and for a construction thereof; such proceedings constituting the basis of the suit in this state.

3. Judgment ¶17(1)—Notice essential to bind parties.

Although all property title to which is affected by a judgment in partition was before a foreign court and in its territorial jurisdiction, notice, either actual or constructive, to the parties interested was essential to conclude them by a decree concerning their titles.

4. Wills ¶436—Presumed made with reference to law of testator's domicile.

It will be presumed that testamentary dispositions of property were made with reference to the law of the testator's domicile, and his intentions should be ascertained in the light thereof.

5. Judgment ¶822(4)—Foreign decree controls investments in this state, where beneficiary had constructive notice.

A foreign decree in partition, construing a testator's will, held to control the title to property bought in this state for the benefit of a resident of the state, provided such resident had constructive notice of the foreign suit.

6. Estoppel ¶15—Joinder in deed pursuant to foreign decree held not to estop grantor from attacking decree.

That a married woman joins in a deed conveying lands in a foreign jurisdiction pursuant to a partition decree granted in such jurisdiction held not to estop her as against other parties in interest, to deny the decree determining her interest, particularly where the other claimants have not acted in reliance upon such conveyance.

Appeal from Circuit Court, Platte County;
Alonzo D. Burnes, Judge.

Action by William Zollie Jones and others against Elihu Park and others for partition.

Judgment for plaintiffs, and defendant named appeals. Reversed and remanded.

Haff, Meservey, German & Michaels and Samuel D. Newkirk, all of Kansas City, and Anderson & Carmack, of Platte City, for appellant.

Guy B. Park and A. D. Gresham, both of Platte City, for respondents.

GOODE, J. This action was instituted against eight defendants besides the appellant Elihu Park, for the partition of 445.76 acres of land in Platte county, Mo. As all the other parties submitted to the judgment of the court below, the appellant will be spoken of as the defendant, and as he acquiesced in the judgment in so far as it affected 29 acres of the total number of acres involved, that parcel will be understood as not included, unless specially mentioned, when we speak of the lands affected by the judgment.

Elihu Park was the husband of Laura Park, who died June 6, 1916, owning the lands in suit. They were married in Kentucky, where Mrs. Park resided, November 8, 1871, and immediately thereafter came to Platte county, Mo., where they lived until 1914. One daughter, Mary Park, was born to them October 4, 1874. She married Stuart Thompson, and died June 4, 1900, in the lifetime of her mother, leaving no children or descendants surviving her. Before her marriage Laura Park was Laura Ragan (or Regan; the name is spelled both ways in the record), one of the eight daughters of William Ragan, of Montgomery county, Ky., who died in 1881, leaving a last will, which was admitted to probate in the county court of Montgomery county, December 21, 1881. The will was signed, published, and witnessed September 2, 1867; but a codicil was added April 20, 1871. The eight daughters, who were the only children of the testator, were living at the dates of the will and of the codicil; and six of them were then married; but Laura (after November 8, 1871, Laura Park) and Anna Eliza (later Anna E. Burchett) were unmarried. Portions of the will are not relevant to the points involved in the present appeal, except that they show the intention of the testator was to equalize the distribution of his estate among his daughters, and, with that statement of their effect, they will be omitted. The material parts are as follows:

"Second. It is my will that my children Louisa Patterson, Mary C. Reid, Elizabeth Everett, Willie Benton, Sarah Bridges, Fannie Jones, Laura Ragan, Anna Eliza Ragan, shall have equally all my real and personal estate but the lands shall belong to them and their children for their own separate use and benefit not subject to the control, debts or liabilities of their said husbands; and the same shall belong exclusively to my said daughters. It is my will that if any of my daughters should die, before or after I do, the portion so coming to

my daughter to come to and belong to her child or children. * * *

"I will that my personal estate consisting of money, stock, bank stock, etc., shall be sold by my executors and be equally divided among my heirs, but the same shall be laid out in land by my executors, and the lands so purchased, with said money, shall belong to my daughters and their children for their separate use and benefit, but it is my will if my daughters Laura and Anna Eliza, or either of them are unmarried at my death, their portion of my personal estate shall not be invested in land, but the same put to interest by my executors, who shall manage the same and the interest paid annually to my said daughters, and this with their portion of my real estate (the rent thereof) I deem sufficient for their support, but after my said daughters' marriage, or before if they so desire, the said fund shall be vested in land as before named, my executor shall execute this trust, and the land so purchased shall belong to my said daughters exclusively, for their own use and benefit and their children.

"It is my will and desire that if the portion of land that falls to either of my daughters shall not be suitable to their condition, the same may be sold, but the proceeds invested in other lands, and no title pass to said land until the title to the land so purchased shall be vested in my daughters and her children, as aforesaid. * * *

"I hereby appoint and constitute Willis Bridges and N. P. Reid, my sons-in-law the executors of this my last will and testament.

"Given under my hand and seal this 2d day of September, 1867. William Ragan [Seal].

"Attest:

"Wm. Hoffman.

"John W. Clay."

The parts of the codicil which need to be considered are as follows:

"I desire to make this additional paper a codicil to the will executed by me on the 2d day of September, 1867, and in the presence of Wm. Hoffman and John W. Clay. The same to be taken and considered a part of said will.

"First. My son-in-law Willis Bridges being in extremely poor health and not able to take upon himself the labors of settling up an estate I hereby revoke his appointment as one of my executors, leaving N. P. Reid my sole executor.

"Second. My two younger daughters Laura and Anna Eliza Ragan being unmarried should either or both of them die without issue, I hereby will and bequeath her or their share of my estate to the surviving sisters and if any of them be dead, the children of such shall take their mother's share, under the same limitation and restrictions that the original will conveys their share to them, viz. that it is to be their sole and separate property and not subject to the debts or control of any husband they now have or may have hereafter.

"Third. If I should decide upon dividing my lands out among my children the portion given to each is to be charged to her at such price as I shall fix upon it and if any one of my daughters gets more than her share of my es-

tate she is to make the rest equal to her by refunding sufficient for that purpose. * * *

"Given under my hand and seal this 20th day of April, 1871. W. Ragan.

"Attest:

"Wm. Hoffman.

"B. A. Seaver."

The executor named in the codicil refused to serve and so, on December 24, 1881, W. R. Patterson and W. H. Daugherty were appointed administrators with the will annexed. Said administrators and some of the persons interested as devisees and legatees provided for in the will, or as children of the devisees and legatees, filed a suit in the circuit court of Montgomery county, Ky., against the other persons interested as devisees and legatees, or as heirs of said legatees and devisees, for a partition of the lands whereof the testator died seized and which he had devised, and for a construction of the will in order to ascertain the interests of the various parties; also for the appointment of trustees to carry out testamentary directions, as far as trustees were required for that purpose.

Laura Park, her husband, Elihu Park, and her daughter, Mary Park, who was unmarried and a minor at the time the suit was filed, were named as defendants. These defendants were neither residents of nor in Kentucky, but were residents of and in Missouri at the time the suit was commenced, and there was no personal service of process on them. For that reason defendant Elihu Park asserts the decree rendered in the Kentucky case was not binding upon him or his wife, Laura, or daughter, Mary, and does not affect the title to which he succeeded as the husband of his wife and as the heir of her and of his daughter in the lands sought to be partitioned in this action; but plaintiffs say defendant, his wife, and their daughter Mary were made parties by constructive service obtained in accordance with the law of the state of Kentucky. At the foot of the petition in the Kentucky case, was this affidavit:

"State of Kentucky, Bath County.

"W. R. Patterson and W. H. Daugherty say the statements of this petition are true.

"W. R. Patterson.

"W. H. Daugherty.

"Subscribed and sworn to before me by W. R. Patterson and W. H. Daugherty, March 14, 1882.

"T. H. Brown, Examiner Bath County, Ky."

The affiants were the administrators of the will of William Ragan.

On the back of the petition were the following notations:

"William Ragan's Administrators, etc., v. Elizabeth Everett, etc. Petition in Equity.

"Filed in office and summons and sixteen copies issued to Montgomery county and summons and two copies issued to Fayette county. Warning order entered and Atty. Apdt. to defend.

"March 16, 1882.

"John R. P. Tucker, C. M. C. C."

"Montgomery Circuit Court.

"William Ragan's Administrator, etc., Plaintiffs, v. Elizabeth Everett, etc., Defendants. Warning Order.

"The defendants Laura Park, Elihu Park, Mary Park, Fannie Jones, J. H. Jones and W. Z. Jones

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"W. A. Wilson, a regular practicing attorney of this court appointed to defend said nonresidents, and he hereby accepts said appointment.

"Given under my hand as clerk of the Montgomery circuit court, March 16, 1882.

"J. R. P. Tucker, M. C. C. O."

This notation follows the last notation supra:

"The order appointing the warning order attorney is mutilated and torn and the above is an exact copy as it now appears from said record now in my office. J. H. Blount,

"Clerk Montgomery Circuit Court, Ky."

There was also an entry of record in the Kentucky case, under date May 25, 1882, that the attorney for the nonresidents had filed a statement and was allowed \$5 to be paid and taxed as costs. The statement of the attorney is as follows:

"The atty. for the nonresident defts. herein, viz. Laura Park, Elihu Park, Mary Park, Fannie Jones, J. H. Jones and William Z. Jones, states that he has written to said nonresidents, duly informing them of the pendency of this suit; that he has received no reply to such communication from said nonresidents, or any of them.

"Wherefore he knows of no defense to make to this action and sees no reason why judgment should not be made, and prays the court to protect the interests of said nonresidents."

"Wm. A. Wilson,

"Attorney for Nonresidents."

A guardian ad litem was appointed for all the minor defendants, including Mary Park, and the order recited that they all had been duly summoned in this action. Said guardian ad litem answered, denying knowledge of the truth or falsity of the allegations of the petition, admitting those beneficial to his clients, and denying those that were prejudicial.

The portion of the decree material to the matter in hand is as follows:

"It is not the duty of the administrators to sell any of the land, which may be allotted to any of the devisees out of the testator's real estate, or to reinvest the proceeds in other lands, should the portion or portions allotted to any of the testator's children be not suitable to their condition or should they desire it sold and reinvested as provided by the will, but this court has power and will appoint a trustee or commissioner for that purpose, who will be required to be sworn and to execute bond with good security to faithfully discharge his duties. * * *

"Six of the testator's children, viz. Louisa Patterson, Mary C. Reid, Sarah Bridges, Elizabeth Everett, Willie Benton and Fannie Jones, by the will take a separate estate for life in their respective shares in the testator's estate and testator's grandchildren by said children take a vested remainder in fee in their respective mother's share subject to her said life estate. Two of the testator's children, viz. Laura Park and Anna Ragan, take a separate estate for life in their respective shares in the testator's estate, with the remainder in fee to the respective issue should they leave any, but if either dies without leaving issue, her share of testator's estate passes to her surviving sisters in fee, or if any of them be dead, the children of such take their mother's share in fee."

On June 5, 1882, a little more than a month after the decree and at the same term of the Kentucky court, William Mitchell was appointed trustee for Laura Park, to collect her share of the personality from the administrator of the estate and to reinvest the same in real estate—

"with the title taken to said Laura Park for her separate and exclusive use, free from the control of her husband for and during her natural life and at her death the remainder in fee to her child or children; but in the event of the death of said Laura Park *without having issue*, then the title to her share shall pass to her surviving sisters in fee, or if any of them be dead, the children of such to take their mother's share in fee—said trustee will report his acts to this court in writing with a certified copy of such deed or deed as he may obtain in making such instrument" (sic). (Our italics.)

On December 14, 1882, at the November term of the Montgomery county Kentucky circuit court, final judgment in partition was rendered, confirming the report of the commissioners theretofore appointed, which report was that day filed, and showed the lands of William Ragan's estate had been divided by the commissioners among the devisees according to the decree of the court. The court in its final judgment confirming said report made slight changes in it to equalize the interests of the various devisees, and directed John Jay Cornelison, who had been appointed master commissioner, to "execute deeds of partition conveying all the right, title, and interest of the parties herein, legal and equitable, in accordance with the will of the testator as herein construed, for the respective lots as assigned and set out in the report of division to the parties thereto entitled." The said master commissioner thereupon produced such deeds, and they were acknowledged in open court, examined, approved, and indorsed by the court and ordered to be recorded. The deed to Laura Park conveyed a parcel containing 138 acres of land, which had been set apart to her by the commissioners in partition as her share of her father's real estate, and contained a habendum clause different

from the provision in the order appointing Mitchell trustee, in that the land was to be held by Laura Park—

"for her sole and separate use and as her separate estate for and during her said life, not subject to the debts of her present or any future husband, with remainder in fee to the issue of her body, if she have any, but if she dies *without leaving issue*, the remainder in fee to pass to her surviving sisters, or if any of them be dead, the children of such to take their mother's share in fee." (Our italics.)

The order appointing Mitchell said, "Without *having issue*." The same land so conveyed to Laura Park was conveyed by her and Elihu Park, her husband, and their daughter Mary (then Mary Thompson) and her husband, Stuart Thompson, and H. B. Kinsolving, the trustee selected by Laura Park to act under the will of her father, to Anna E. Burchett, formerly Anna E. Ragan, the daughter whose interest in the lands depended, as did Laura Park's on the codicil to their father's will. This conveyance was dated December 31, 1897, and contained the same habendum clause as the one contained in the deed from the master in chancery to Laura Park. With the proceeds of this land and of Laura Park's interest in the personal estate of her father, William Ragan, the land involved in the action at bar was purchased, except the aforesaid 29 acres; and Elihu Park says, except 91 acres more, for which he claims he paid part of the purchase price. All but one or two of the deeds (which followed the language of the order appointing Mitchell), conveying to Laura Park the lands involved in the present case, that were acquired from different vendors, contain this recital:

"The consideration paid for this deed is part of a trust fund arising from the will of William Ragan, late of Montgomery county, Kentucky, who was the father of Laura Park, and said land by the terms of said will, is her separate estate for life, with remainder in fee to her issue, should there be any; *but if she dies without leaving issue*, to vest in her surviving sisters in fee, or if any of them be dead, the children of such to take their mother's share in fee." (All italics ours.)

One of the deeds was made by the defendant Elihu Park directly to his wife Laura. It conveyed 160 acres of land, recited a consideration of \$5,000, and contained a habendum clause, including the words "without leaving issue," immediately following the description of the land conveyed.

Another of the deeds, conveying land in Missouri to Laura Park (namely the deed wherein Oscar Wells was grantor), contained a habendum clause in this language:

"To have and to hold the premises aforesaid with all and singular the rights, privileges, appurtenances and immunities thereunto belonging or in any wise appertaining unto the said party

of the second part as her exclusive, separate estate, free from any debts or interest or control of her present or any future husband, for life, with remainder in fee to her issue, if any survive her; if not, then to her sisters surviving her and the children of such as may be dead, forever."

The court below in its decree in the present case ascertained the respective interests in the lands in controversy of the various parties to the action, but those findings need not be given except as they concern the rights of Elihu Park. Putting aside the ruling regarding his interest in the aforesaid 29 acres, about which there is no controversy, the court found the remaining 416.76 acres, at the death of Laura Park, descended to and became the property of the various plaintiffs and defendants according to their respective interests as found by the court, except that the defendants Elihu Park and Stuart Thompson, the surviving husband of Mary Park, who, as said, was the daughter of Elihu and Laura Park, were decreed to have no right, title, or interest in said 416.76 acres or any part thereof.

In rendering this judgment the court below gave effect to the decree of the Montgomery county, Ky., circuit court, construing the will and ordering partition of the lands of William Ragan's estate, and held the Parks, husband, wife, and daughter, were bound by said decree.

Defendant, contending the decree was not binding on them, claims to own an undivided three-eighths in fee simple in the 416.76 acres, upon the following theory: That Laura Park took a life estate under the will of her father, with a vested remainder in her daughter, Mary, after the birth of the latter. Mary Park married Stuart Thompson, and died leaving him surviving; said Stuart under the law of Missouri inherited one-half of the interest of Mary Park in the lands in controversy; Laura Park, her mother, inherited one-fourth, and defendant Elihu Park the other one-fourth. At the death of the mother, defendant inherited one-half of her interest, that is, one-eighth, which, plus the one-fourth or two-eighths he had inherited from his daughter, vested in him an undivided three-eighths. He also claims that as there was issue born of his marriage with Laura Park, he is entitled to an estate by the curtesy in the undivided one-eighth of Laura Park's interest, which passed to her collateral heirs. This appeal was taken by him from the judgment.

Other facts will be stated, if necessary, in the course of the opinion.

[1] We stated the facts in this case in full for the purpose of disposing of the appeal on the merits. To do so it would be necessary to decide whether or not defendant, his wife and daughter, were affected by the decree of the Kentucky court, ascertaining and defining the interests of the wife and daughter under the

will of William Ragan, an inquiry the answer to which depends on the sufficiency of the steps taken to give constructive notice to the Missouri defendants of the pendency of the suit. Whether the proceedings to give notice were adequate for that purpose is a matter controlled by the law of Kentucky, and not by that of Missouri. 13 Ency. Law (2d Ed.) p. 991; *Monroe v. Douglass*, 4 Sandf. Ch. (N. Y.) 126, affirmed 5 N. Y. 447; *Hunt v. Mayfield*, 2 Stew. (Ala.) 124; *Cassidy v. Leitch*, 2 Abb. N. C. (N. Y.) 315.

[2] The circuit court of Montgomery county was shown, by a statute of Kentucky which was put in evidence, to possess general, legal, and equitable jurisdiction, and to have cognizance of all cases not exclusively delegated to some other tribunal. G. S. of Ky. 1883, c. 28, art. 4, § 1. This being so, it will be presumed to have had jurisdiction of the subject-matter of the suit brought by the administrators of the will of William Ragan for partition of the lands belonging to his estate, the appointment of trustees needed to carry out the directions of the will regarding the estates devised to the daughters, the investment of the personalty in land, and for a construction of the will to make clear the duties of the administrator in carrying out the trusts the testator had created. *Butcher v. Brownsville Bank*, 2 Kan. 70, 83 Am. Dec. 446; *Specklemeyer v. Dailey*, 23 Neb. 101, 36 N. W. 356, 8 Am. St. Rep. 119; *Leach v. Linde*, 70 Hun. 145, 24 N. Y. Supp. 176; 13 Ency. Law (2d Ed.) p. 997, and citations in notes.

[3] All the property, both real and personal (the res), title to which would be affected by the judgment in the suit, was before the court and in its territorial jurisdiction; but notice, either actual or constructive, to the parties interested, was essential to conclude them by a decree concerning their titles. 2 Freeman, Judgments (4th Ed.) §§ 556, 557, 611; *Monroe v. Douglass*, supra; *Windsor v. McVeigh*, 93 U. S. 279, 23 L. Ed. 914; *Bradstreet v. Ins. Co.*, 3 Sumn. 600, Fed. Cas. No. 1798; *Hassall v. Wilcox*, 130 U. S. 493, 9 Sup. Ct. 590, 32 L. Ed. 1001. This rule has been applied in suits to partition lands when some of the owners were nonresidents of the states where the lands lay and the suits were brought. *Kreiger v. Sonne*, 151 Ky. 739, 152 S. W. 936; *Mason v. Messenger & May*, 17 Iowa, 261, 270. But though notice is required, actual notice is not. Cases supra.

The plaintiff introduced in evidence certain sections of the Kentucky statutes to show constructive notice of the suit in the Montgomery circuit court was given to the three Park defendants therein; and plaintiffs have cited in their brief certain decisions of the Court of Appeals of Kentucky construing the statutes providing for a warning order to nonresidents; construing also the appointment of an attorney "to make diligent efforts to inform" said defendants "by mail

concerning the pendency and nature of the action against" them, as one of the statutory provisions reads. This method of notifying nonresidents of litigation to which they were parties took the place in Kentucky, at the time of the suit in Montgomery county, of notice by an order of publication, and the steps prescribed must have been followed substantially for the notice to be effective. Carr's *Adm'r v. Carr*, 92 Ky. 552, 18 S. W. 453, 36 Am. St. Rep. 614. Sections 57, 58, and 59 of Bullitt's Code of 1883, were proved; but section 60, which the Kentucky decisions hold fixes and determines the moment when jurisdiction is completely acquired by following the steps prescribed to notify a nonresident, was not proved. Nor were any of the decisions of the Kentucky Court of Appeals, which have adjudicated the effect of said statute, put in evidence, or their doctrines otherwise proved; and no stipulation was made that the relevant law of Kentucky might be noticed without proof of it. The question of whether there was notice to the Missouri defendants of the suit, if it should be decided without the aid of the omitted Kentucky law, would be answered in the negative. The statement filed by the warning attorney of what had been done did not show he had made diligent efforts to inform the Missouri defendants by mail of the pendency of the action, or that he had made any effort to inform them of its nature; but merely said he had written to them of the pendency of the suit, and had received no reply. Nor did the statement say where he had addressed his letter, though section 58 of Bullitt's Code provided that in the affidavit required to be made by the plaintiffs in a suit in order to obtain a warning order should be stated the post office nearest the place where said defendants resided; no doubt for the purpose of having the warning order attorney communicate with them by correspondence addressed to that post office. Other sections of the Kentucky Statutes bearing upon when the Montgomery court acquired jurisdiction of the Missouri defendants so as to bind them by its decree, and the decisions construing those statutes, were they before us, might show jurisdiction had been obtained so far as to make the decree good against attack in this collateral action. As to that we cannot decide in the condition of the present record.

[4] Not only is the record deficient in the evidence needed to pass upon the question of jurisdiction, but no statute of Kentucky or other evidence of the law prevailing there was put in evidence to elucidate, perchance, the meaning of the words "die without issue," and "die without leaving issue," yet the effect of William Ragan's will and of the Kentucky decree construing it may depend on the meaning of said words as defined in the law of that state. This controversy ought to be determined by said law; for the testamentary dis-

positions made by William Ragan presumably were made with the law of his domicile in mind, and his intentions should be ascertained in the light of it. *Ford v. Ford*, 70 Wis. 19, 33 N. W. 188, 5 Am. St. Rep. 117; *Staigg v. Atkinson*, 144 Mass. 564, 12 N. E. 354. Although we would be justified, perhaps, in deciding the case according to our own law, we have concluded to remand it to the court below for a retrial, in order that the parties, if they desire, may make proof of any Kentucky statutes or decisions which bear upon the questions involved.

[5] The plaintiffs say Laura Park took by her father's will, either a life estate or at most a defeasible fee which terminated when she died without leaving surviving issue; that therefore, regardless of the decree of the Montgomery circuit court, at Laura Park's death, her daughter having predeceased her, the limitation over in the codicil to her surviving sisters and the heirs of any sister who was dead took effect. We are cited to several Missouri cases supposed to support that proposition. We will not undertake to decide whether they do or not, but again say the matter should be determined by Kentucky law. The property disposed of by the will in favor of Laura Park was land and personal property, directed to be invested in land for her when she married, or before, if she desired. This was an imperative direction, and left the executors, or whosoever should execute the testamentary trust, no discretion. It was a conversion of the personal assets into land, at least upon Laura Park's marriage. And in fact the personalty actually was invested in land. If she, her daughter and husband were notified constructively of the Kentucky suit, then, wherever the proceeds of the property willed to her were invested, the decree in the suit controlled the title to the investment. *Monroe v. Douglass*, 4 Sandf. Ch. (N. Y.) 126. But even if the decree was not binding and the estates taken by her and her daughter under the will must be ascertained without reference to it, the determination, as said above, should be according to the law of the testator's domicile.

The proposition is asserted that defendant is estopped to deny the Kentucky decree is controlling as to his interest in the lands in controversy, even if the notice attempted to be given therein to him, his wife and daughter was not effective. If that position is well taken, the decree ought to be given effect regardless of the question of notice. Whether or not it is well taken turns on what was done by Mary Park subsequently to the decree, although plaintiffs say it turns, too, on what defendant and his wife, Laura, did. We have shown, in stating the facts of the case, that two-eighths of the title claimed by defendant is as a direct heir of his daughter, Mary, and one-eighth is as the heir of his wife, to one-half of a two-eighths interest alleged to

have been inherited by his wife from their daughter. He also claims an estate by the curtesy in the other one-eighth interest his wife is alleged to have inherited from the daughter. Therefore the entire estate claimed by defendant is derived, either immediately or mediately, from Mary Park; and, unless said Mary was estopped herself to deny the binding force of the Kentucky decree as regards her estate in the lands involved in this action, the defendant is not estopped by reason of privity with her—is not estopped to claim partly by direct inheritance from her and partly from his wife, who had inherited from her. The fact relied upon to raise an estoppel is the sale and conveyance of the 138 acres of Kentucky land conveyed to Laura Park by John Cornelson, master commissioner, as the portion of the lands of the estate of William Ragan allotted to Laura Park by the commissioners appointed to make partition among the devisees of said testator. This land was sold to Anna E. Burchett, and conveyed to her by a deed executed by H. B. Kinsolving, the trustee appointed to execute, for Laura Park, the power conferred in William Ragan's will to dispose of the land devised to any of his daughters, if it became unsuited to her condition in life, and to reinvest the proceeds in other land. Elihu, Laura, and Mary Park (then Mary Thompson) and her husband, Stuart Thompson, joined with the trustee Kinsolving in the execution of the deed to Anna E. Burchett. The land was conveyed 15 years after the date of the Kentucky decree. Mary Park was a minor when the decree was rendered. Assuming that Mary Park was not notified of the suit by the warning order, and hence was not bound by the decree, then, if there was no estoppel to prevent her from asserting her interest in her grandfather's estate, defendant stands in the same position in that regard, as he himself did nothing except to sign said deed to enable his wife to pass her title. *Gill v. Fauntleroy*, 8 B. Mon. (Ky.) 177.

[6] We hold the fact that Mary Park joined the deed conveying the Kentucky lands did not estop her (as against the other devisees in the will) to deny that the decree defining her mother's interest and her interest determined her interest in the Missouri lands purchased with the proceeds of her mother's portion of the property, real and personal, of William Ragan's estate. When Mary Park signed said deed, probably she knew of the decree; but the act relied on was too slight and remote a recognition of the decree, if a recognition at all, to raise an estoppel. Moreover, it nowhere appears anything was done by the parties who claim against defendant in the present case, or those under whom said parties claim, on the strength of Mary Park having joined in said deed, which would be prejudicial to the present claimants against Elihu Park were it not held Mary Park, and

defendant Elihu, in asserting a title derived from her, were estopped to dispute she was bound by the decree. *State v. Lales*, 52 Mo. 396. If she was not constructively a party to the Kentucky suit, then her title and interest in the land in controversy here should be ascertained by an independent construction of the will, but, as said above, according to the law of the testator's domicile.

The case of *McCune v. Goodwillie*, cited by plaintiffs, is not apposite; for there the court held an Ohio judgment determined the rights of the parties to the suit in Missouri lands because, if some of the parties had not been brought before the Ohio court (and really it was held they had been), they had all made partition among themselves in pursuance of the Ohio decree. 204 Mo. 306, 336, 102 S. W. 997. There was no partition among the devisees of William Ragan to carry out the findings of the Kentucky decree, but only a sale of Laura Parks' land to Anna E. Burchett.

Possibly defendant is estopped, by the recitals in the conveyance he made to his wife of some parcels of the lands involved in this action, to assert an interest in those parcels, contrary to the effect of his recitals; but this question, as well as what the effect is, should be reserved for decision after the Kentucky law is proved, as the force of some of the recitals turns on that law.

The judgment is reversed, and the cause remanded.

All concur, except WOODSON, J., absent.

SORRELL et al. v. BRADSHAW. (No. 20841.)

(Supreme Court of Missouri, Division No. 2.
June 4, 1920.)

1. Descent and distribution §17—Brothers and parents inherit from deceased sister remainderman.

Where the grantor conveyed land to his wife for life, remainder to his daughter, and the daughter died childless and intestate, her estate, under the statutes of descent and distribution, would descend to her parents and her surviving brothers and sisters.

2. Estoppel §47—Conveyance carries after-acquired interest.

Where a life tenant conveyed land by warranty deed, after-acquired title which descended on the life tenant upon death of the remainderman passed under the deed by operation of law.

3. Husband and wife §119(3)—Deed direct from husband to wife carries the equitable, but not legal, title.

Where a husband by direct conveyance granted land to his wife for life, the remainder to his daughter, the deed vested the wife with

the equitable title to the life estate, but the legal title remained in the husband in trust for the wife's use and benefit, and upon death of the husband during wife's life the legal title would vest in her.

4. Homestead §167—Conveyance of property and departure from the state is an abandonment of a homestead.

Where a husband who had established a homestead on land conveyed the same to his wife for life remainder to his daughter, and then departed from the state, never returning, his homestead rights, under Act March 24, 1873 (Laws 1873, p. 16) were abandoned, so where judgment was subsequently obtained against the husband and the land sold under execution the purchaser acquired all title which the husband had at the time of rendition of the judgment.

5. Estates §10(2)—Merger of equitable and legal estate.

Where a wife, by virtue of her husband's direct conveyance, received equitable life estate, and thereafter all of the rights of the husband were sold on execution and acquired by the wife, the equitable life estate of the wife became merged in the legal estate and fee thus obtained, if the legal title passed by the execution sale.

6. Homestead §129(1) — Execution against grantor not enforceable against homestead where grantees were purchasers for value.

Where a husband for valuable consideration conveyed land to his wife for life, remainder to his daughter, and they stood in the position of purchasers in good faith for value, their title cannot be divested on sale of husband's interest on execution under judgment subsequently obtained, notwithstanding the husband abandoned his homestead in the lands and the wife failed to file the homestead declaration as authorized by Acts 1895, p. 185.

7. Execution §41—Legal title of trustee cannot be sold on execution.

Where the judgment debtor merely held the legal title as trustee, it does not pass on execution sale.

8. Quietting title §19—Statutory suits to determine title may or may not be equitable, depending on the rights involved.

Suits under Rev. St. 1909, § 2535, are statutory proceedings which may or may not be equitable actions, depending on the issues involved; hence where no equitable rights were set up by either party such a suit is not equitable in its nature.

Appeal from Circuit Court, Maries County:
J. G. Slate, Judge.

Suit to determine title by Wm. Sorrell and others, against Joanna Bradshaw, who filed cross-bill. From a judgment for plaintiffs, defendant appeals. Reversed and remanded, with directions.

Plaintiffs brought suit to ascertain and determine the title to a tract of land in Maries county. They alleged ownership in them-

selves as heirs of their father, E. J. Sorrell, and of their sister, Fannie E. Sorrell Tayloe, subject to the life estate of their mother, Mary M. Sorrell. Defendant filed an answer and cross-bill, denying plaintiff's alleged title and claiming ownership in fee in herself, and by a second count claiming title by adverse possession. Judgment went in favor of the plaintiffs, and defendant has duly appealed.

The following facts appear in the record: The three plaintiffs are the sons of E. J. Sorrell, deceased, and his wife, Mary M. Sorrell, who is still living. A fourth child, Fannie E. Sorrell Tayloe, married and died in 1901 childless and intestate, so far as this record shows. The land in question belonged to F. J. Sorrell. On April 27, 1878, E. J. Sorrell, while occupying the land as a homestead, conveyed it to his wife, Mary M. Sorrell, and to his daughter, Fannie E. Sorrell, by warranty deed, granting, however, a life estate only to the wife, with remainder over to the daughter. He then went to Texas and never returned. The wife and children remained on the homestead for 10 or 11 years thereafter. The land in suit was sold on October 15, 1879, under an execution issued upon a judgment rendered against E. J. Sorrell on April 17, 1879, and William Smith became the purchaser and on the same day received a deed therefor. This deed purported to convey all of the "right, title and interest of E. J. Sorrell." On January 19, 1880, Smith and wife conveyed the land to Mrs. Sorrell. At the time of the trial Mrs. Tayloe's husband had not been heard of for 10 or 12 years, and, according to rumor, had died in Texas about 1903 or 1905. E. J. Sorrell died about 1908 or 1909. On August 2, 1898, Mary M. Sorrell, "as a single person," conveyed the land by warranty deed to William Smith and J. W. Nieweg. By means of conveyances the title passed to defendant in 1903, and she took possession and paid taxes. How long defendant remained in possession or paid taxes the record does not show.

No other material evidence appears. No declarations of law were asked or given. The judgment is to the effect that plaintiffs are the owners of the land, subject to a life estate for the term of the life of Mary M. Sorrell, and that defendant is the owner of that life estate.

J. J. Crites and J. Ellis Walker, both of Rolla, for appellant.

Frank H. Farris, of Rolla, and L. B. Hutchison, of Vienna, for respondents.

WILLIAMSON, J. (after stating the facts as above). [1, 2] The common source of title in this case is E. J. Sorrell. He conveyed a life estate to his wife, Mary M. Sorrell, with remainder over to his daughter, Fannie E. Sorrell, afterwards Mrs. Tayloe. The daughter died childless and intestate in 1901, and

whatever interest she had vested by inheritance, under our statutes of descent and distribution, in her three brothers, respondents, and her father and mother; each inheriting an undivided one-fifth interest in the remainder estate. Whatever title Mary M. Sorrell had she conveyed to appellant in 1898, by warranty deed. The question to be determined is, What title passed from Mary M. Sorrell to appellant? It is undisputed that she conveyed an estate for the term of her own life. If she had, or thereafter acquired, any other title, it also passed, by operation of law. *Wood v. Smith*, 193 Mo. 484, loc. cit. 490, 91 S. W. 85. Upon the death of E. J. Sorrell in 1908, his undivided one-fifth interest in the estate in remainder vested in his three sons, the respondents in this action, subject to the dower rights of Mrs. Sorrell, and such rights as Mrs. Sorrell thus acquired also passed to her grantee, the appellant. Since Mrs. Sorrell was already the owner of a life estate in this land, the interest she thus acquired became merged in that estate and need not further be considered.

[3] The conveyance from E. J. Sorrell directly to his wife vested the equitable title to the life estate in her, but the legal title remained in the husband, in trust, however, for her use and benefit. *Stark v. Kirchgraber*, 186 Mo. 633, loc. cit. 422, 85 S. W. 868, 105 Am. St. Rep. 629, and cases there cited. Upon the death of the husband during the lifetime of the wife the trust terminated, and the legal title to the life estate would then have vested in Mary M. Sorrell but for the fact that she had theretofore conveyed the property to appellant by warranty deed. By reason of that conveyance, this subsequently acquired legal title also passed to the appellant. Mrs. Sorrell also inherited an undivided one-fifth interest in the estate in remainder from her daughter, Mrs. Tayloe, and this subsequently acquired estate also passed by her conveyance to the appellant. Unless affected by the execution sale and the conveyances thereunder, the respondents are the owners of an undivided four-fifths interest in the estate in remainder, and the appellant is the owner of the remaining undivided one-fifth interest, and also of the life estate. The effect of the sale under the execution remains to be determined.

[4-6] E. J. Sorrell acquired a homestead in the lands in question about 1876. A judgment was obtained against him in April, 1879, an execution was issued thereon, and the lands were sold on October 15, 1879. But on April 27, 1878, Sorrell had conveyed the lands to his wife and daughter, and had gone to Texas, leaving his wife and children in possession of the homestead. Appellant contends that Sorrell thus abandoned the homestead; that under the law as it then was no homestead right accrued to Mrs. Sorrell or the children, and that the sale of the lands

under execution vested perfect title in the purchaser, Smith, and that his title so acquired has been vested, by subsequent conveyances, in the appellant. This contention suggests an inquiry into the state of the law respecting homesteads at the time these transactions occurred.

[7] By an act approved March 24, 1873 (Laws 1873, p. 16) the General Assembly allowed to every head of a family a homestead of not exceeding 160 acres, and of a value not exceeding \$1,500, and provided that such homestead should be exempt from sale under execution. It was further provided by this act that—

"Any married woman may file her claim to the tract or lot of land occupied or claimed by her and her husband, or by her, if abandoned by her husband, as a homestead; said claim shall set forth the tract or lot claimed, that she is the wife of the person in whose name the said tract or lot appears of record, and said claim shall be acknowledged by her before some officer authorized to take proof or acknowledgment of instruments of writing affecting real estate, and be filed in the recorder's office, and it shall be the duty of the recorder to receive and record the same."

This law was in effect until 1895. See Acts of 1895, p. 185. The lands here involved were, both as to quantity and value, within the amounts allowed by the statute and subject to its provisions, if applicable. Mrs. Sorrell never complied with the requirements of the statute above mentioned. At the time the judgment against E. J. Sorrell was rendered he had abandoned his homestead and the judgment lien attached immediately upon the rendition of the judgment, if it attached at all. It follows that the purchaser at the execution sale acquired all of the title which Sorrell had at the time of the rendition of the judgment in April, 1879. *Smith v. Thompson*, 169 Mo. 553, loc. cit. 562, 69 S. W. 1040. It is a further consequence that when the title acquired by the purchaser under the execution was vested in Mrs. Sorrell her equitable life estate became merged in the legal estate in fee thus obtained by her, if, in fact, the legal title passed by the execution sale. *Bassett v. O'Brien*, 149 Mo. 381, loc. cit. 391, 51 S. W. 107. That E. J. Sorrell had abandoned his homestead is clear, not only from the fact of the conveyance to his wife and daughter, but also from the fact that he left the state and never returned. But we need not long trouble ourselves about the homestead or the execution sale, for the conveyance from the husband to the wife and daughter was not a gift. It was a sale for a valuable consideration. The good faith of the transfer is not assailed. The wife and daughter stood in the position of purchasers in good faith and for value. At the time of the rendition of the judgment against

Sorrell the wife and daughter were the owners of these lands, and a sale under an execution against him was, of course, ineffective to divest their title. E. J. Sorrell held the legal title to the life estate in trust for his wife, but trust property cannot be sold to pay the personal debts of the trustee, in the absence of a beneficial interest on his part. *Morrison v. Herrington*, 120 Mo. 665, loc. cit. 673, 25 S. W. 568. No such interest was vested in the trustee in this instance. Hence the rights of all the parties remain as they would have been had there been no execution sale at all.

[8] Waiving the proposition, suggested but not argued by respondents, that appellant's plea of the statute of limitations is fatally defective, and waiving also the question as to whether or not, under the facts of this case, appellant could claim adverse possession as against respondents, it suffices to say that the evidence of appellant wholly fails to establish title under the statute of limitations. On that point the evidence merely shows that appellant went into possession at the date upon which she received a deed to the property. There is no suggestion that she did not then have at least constructive notice of the condition of the title. How long she remained in possession, what the character of her possession was, whether peaceful, notorious, open, and adverse, or otherwise, nowhere appears. The plea of title by adverse possession under the statute of limitations seems practically to have been abandoned in the trial court. This is a suit at law and not in equity. No equities are pleaded by either party. Suits under section 2535, R. S. Mo. 1900, are statutory proceedings which may or may not be equitable actions, depending upon the issues involved. *Lee v. Conran*, 213 Mo. 404, loc. cit. 414, 111 S. W. 1151; *Hauser v. Murray*, 256 Mo. 58, loc. cit. 84, 165 S. W. 376.

In view of the fact that our rulings upon these matters lead to a final disposition of this case, it becomes unnecessary to discuss various interesting questions presented and argued with much ability by learned counsel.

Since the decision of the trial court is at variance with the conclusions here announced, it follows that the judgment should be reversed and the cause remanded, with directions to set aside the judgment entered in this cause and to enter a decree adjudging the respondents to be the owners of an undivided four-fifths interest in the land herein involved, subject to a life estate in favor of appellant during the term of the natural life of Mary M. Sorrell, and further adjudging the appellant to be the owner of the remaining undivided one-fifth interest and of a life estate in said land for the term last above mentioned. It is so ordered.

All concur.

GILBERT v. HILLIARD. (No. 15923.)

(St. Louis Court of Appeals. Missouri. Argued and Submitted May 11, 1920. Opinion Filed June 8, 1920. Rehearing Denied June 23, 1920.)

1. Appeal and error ⇨930(1)—Party who secured verdict entitled to presumptions in favor of testimony.

Plaintiff, having secured verdict, on appeal is entitled to every reasonable presumption in favor of his testimony.

2. Master and servant ⇨286(11)—Negligence in furnishing vicious team held for jury.

In action for injuries to driver of a wagon when ordered to get on top while driving to hold down a load of wet shingles, he having been thrown off under wagon by attempt of horses to jump a drain, assignment of negligence in respect of the viciousness of the team or one of them, and that the team on some previous occasion had run away, *held* for jury under evidence.

3. Master and servant ⇨286(39)—Negligence of foreman in requiring plaintiff to drive from unstable load a jury question.

In an action for injuries to a driver ordered to get on top while driving to hold down a wagon load of wet shingles, he having been thrown off under wagon by attempt of horses to jump a drain, question of negligence of defendant employer's foreman in requiring plaintiff to drive from the load *held* for jury.

4. Master and servant ⇨222(1)—Driver ordered to drive from unstable load did not assume risk.

Driver of a team loaded with wet shingles, ordered by his foreman to drive from the load did not assume the risk of getting upon the load accordingly, though the facts relied on by the master when sued for injuries may be taken into consideration in determining the question of contributory negligence.

5. Master and servant ⇨245(4)—Servant not negligent in doing thing ordered.

Where both master and servant have equal knowledge of the danger incurred by the servant in obeying an order, the jury may assume the servant is free from negligence in doing it.

6. Negligence ⇨4—Term defined; "ordinary care."

"Negligence" is properly defined in an instruction as failure to use ordinary care, which is the care which reasonably prudent men would use under the same and similar circumstances.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negligence; Ordinary Care.]

7. Trial ⇨219—Instruction not defining "dangerous" not erroneous.

The word "dangerous" has so common and well-understood a meaning that an instruction in a servant's action for injuries, merely using and not defining it, is not erroneous.

Appeal from St. Louis Circuit Court; Charles B. Davis, Judge.

"Not to be officially published."

Action by Charles F. Gilbert against George Hilliard. From judgment for plaintiff, defendant appeals. Affirmed.

George W. Lubke and George W. Lubke, Jr., both of St. Louis, for appellant.

Sears Lehmann and Lehmann & Lehmann, all of St. Louis, for respondent.

REYNOLDS, P. J. This is the second appearance of this case in our court. When here on a former appeal the judgment of the circuit court was reversed and the cause remanded, as will be seen by an examination of our opinion, as see 187 S. W. 594, not to be officially reported. It was recited in the petition then before us, that the defendant's agent "negligently ordered the plaintiff to stand upon the wagon overloaded with wet shingles on which his footing was insecure," etc. Our court held that there was no evidence in the case of any such specific order and no direction in the instructions on which to base a finding of the giving of any such order, and at first reversed the judgment without remanding the cause. On a motion for rehearing being filed, the court modified this order, reversed the judgment of the circuit court and remanded the cause, on the theory that on a new trial, if one was had, the petition might be amended in such manner as to show that the negligent order in evidence in the case, that the plaintiff should drive from the wagon, might have meant, under the facts in the case, that the plaintiff was to stand on the wagon, that is, considering the condition and kind of load, that it would naturally be inferred that he was to stand while driving and that that was what the foreman intended.

An amended petition was filed, in which it is averred, among other things, that owing to the fact that the wagon was overloaded and that there was no seat or footboard, and no place for the driver to sit upon the wagon, and to drive from the wagon required the driver to get upon the shingles, which were wet and slippery and had been thrown upon the wagon in that condition, and were loose, and that when plaintiff suggested to defendant's foreman that he drive the team from the ground, the foreman ordered plaintiff "to get upon the wagon for the purpose of driving said team;" that in obedience to the order plaintiff got on the wagon and attempted to drive and that when he had driven a short distance, owing to the nature of the ground, some of the shingles slipped off, which frightened the horses and they immediately started to run away, and that plaintiff, endeavoring to hold them, the horses vicious and hard-mouthed, and owing

to the fact that he was standing upon the wet, loose shingles, he was thrown and fell from the wagon and was run over by the wagon and badly injured. The negligence charged is "that the defendant, George Hillard, through his foreman, Charles Hillard, negligently ordered the plaintiff to get upon a wagon overloaded with loose, wet shingles on which his position was insecure and dangerous, as was known to defendant's foreman, and drive a team known to be vicious and liable to run away, when it was known to defendant's foreman that said team could have been safely driven from the ground."

The answer, after a general denial, averred contributory negligence and assumption of risk. To this there was a reply, and on trial before the court and a jury, a verdict in favor of plaintiff in the sum of \$8,350 was returned, judgment following, from which defendant has duly appealed.

[1] The aspect which the case would assume on a proper petition and as indicated, by our court when the case was before us on the first appeal, was met by amendment and by the evidence and renders it unnecessary to make a very extensive discussion of it. As testified to by plaintiff, and of course he is entitled on an appeal and with a verdict, to every reasonable presumption in favor of his testimony, is, that after dumping out a load that he had had in the wagon, he picked up part of a lot of shingles and had loaded the lower bed and sideboards and was about to get in, when the foreman, Charles Hillard, came around and said, "We will put them all on," referring to the shingles that were lying there; that to do that they stuck shingles edgewise in the bed all around and piled shingles in the middle up high, about 18 inches above the side, with loose shingles above the bed. These shingles were wet all the way through. The last ones loaded were muddier than the first because they were taken out of the manure; it was not wet, it was moist. They had been lying out in the mud and manure together. The foreman, still present and assisting, and the shingles loaded, plaintiff unwrapped the lines and started to drive from the ground. The foreman said, "Get up on the shingles and hold them down;" to which plaintiff said, "If I do I think I will fall off;" to which the foreman said, "Get up;" and plaintiff said that he knew the foreman well enough to obey orders if he wanted to stay around there. Plaintiff started off, standing about the center of the load, the shingles thrown in loosely, the foreman standing up back of the end of the wagon. The foreman followed behind the wagon with a board. Going around the barnyard and toward his destination he came to a drain with water in it. When the team came to it they stopped—their feet in the edge of the water, and then

leaped forward. As they did that plaintiff tried to hold them, the load shifted forward and so did plaintiff and he went off on to the right-hand horse and held on to him and the horses started to run away with him in that position. There was water in this drain and the wagon wheels went down into it. Plaintiff held on a little to the horse but had to let loose and fell behind the right-hand horse and was run over and severely injured, there being testimony to the effect that he would never be as able to work as before the accident. He further said that he had stood upon the load because it would have been impossible to sit, and if he stood up and anything happened he would have a chance to jump.

The assignments of error by learned counsel for the appellant are to the failure of the court to sustain demurrers to the evidence interposed by defendant at the close of plaintiff's case and again at the close of the whole case.

[2] We do not think this assignment is tenable. While it is charged that the team—or at least one of them—was vicious, and that the team on some previous occasion had run away, it must be said that the evidence about this is rather slight as is the evidence that they were hard-mouthed. That point, however, is not of any particular importance, further than to say that there was sufficient evidence to allow that assignment of negligence to go to the jury.

[3] There was sufficient evidence to go to the jury as to the negligent order that the foreman of defendant gave to require the plaintiff to drive from the load—to get up on the load and drive from there. There is evidence to show that there was no seat or footboard to the wagon; that the shingles were wet; that they had been exposed to a rain a few days before and that the shingles which were on top of the load had been lying on a manure pile and were damp and wet. There was evidence to the effect that the usual way under such circumstances for the driver, if he was riding on the load at all, was to stand up. Plaintiff said that was the safest way. In doing so, therefore, plaintiff was doing no unusual thing, doing what might be expected by the foreman that he would do when ordered to get up on top of the load and drive from that position. In other words, it could hardly have been anticipated by the foreman, or by plaintiff, that he was to sit on this load in the condition in which the shingles were. The evidence tended to show that the usual and safest and natural position would be to stand, if riding on the load.

[4, 5] Learned counsel for appellant insists with great force that plaintiff assumed the risk and cite authorities from other states sustaining that view. But our courts

have long since repudiated the doctrine of assumption of risk, as that doctrine is here sought to be applied; but the facts relied upon may be taken into consideration when determining the question of contributory negligence. This is so well established in our state that it is hardly necessary to cite authorities in support of it. One of the latest, however, is that of *Williams v. Pryor et al.*, 272 Mo. 613, loc. cit. 621, 200 S. W. 53. Where both master and servant have equal knowledge of the danger incurred by a servant in obeying an order of the master, the jury may assume that the servant is free from negligence in doing it, because it cannot be said that the servant and master are on an equal footing, even when they have equal knowledge of the danger. *Jewell v. Kansas City Bolt & Nut Co.*, 231 Mo. 176, loc. cit. 202, 132 S. W. 703. We hold, therefore, that there was no error in submitting this case to the jury.

[6, 7] But those same learned counsel assign as their second and third errors, that the instructions asked and given at the instance of plaintiff were erroneous. When we examine the argument of those learned counsel as to these assignments, it appears that the point of objection is that the instructions directed the jury to find, among other things, "that owing to these facts it was dangerous for plaintiff to get upon the wagon and drive said team;" and that both of these instructions use the expression, after requiring the jury to find certain specific facts, and that notwithstanding such facts, the foreman of the defendant "negligently ordered the plaintiff to get upon said wagon," and that the plaintiff "was negligently ordered into this position" by the foreman, etc. It is argued that the instructions do not attempt to define the terms "dangerous" or "negligently." As to the last, counsel is in error. By an instruction given by the court the jury were told that negligence, as used in these instructions, "is the failure to use ordinary care, which is the care which reasonably prudent men would use under the same and similar circumstances." That is an entirely sufficient definition as to the word "negligence," and as well covers the word used, "negligently." The word "dangerous" is certainly a word of such common and well-understood meaning that it is difficult to imagine a definition of it that would not be more confusing than the use of the word itself.

The fourth assignment is to the overruling of defendant's motion for new trial. In the light of what we have said above, that action was proper.

The judgment of the circuit court is affirmed.

ALLEN and BECKER, JJ., concur.

STEWART v. CHICAGO, B. & Q. R. CO. (No. 13226.)

(Kansas City Court of Appeals. Missouri.
June 14, 1920.)

1. Carriers \S 223—Prompt notification of embargo defense for delay in shipment of hogs.

If an embargo on all live stock shipments on account of weather conditions was justified, it was a defense, in an action for damages for failure to promptly ship hogs, that the shipper was promptly notified thereof, even after the hogs were in the pens ready for shipment.

2. Trial \S 199—Legal question not permissible in instruction.

A legal question is never permissible in an instruction.

Appeal from Circuit Court, Livingston County; Arch B. Davis, Judge.

"Not to be officially published."

Action by Claude Stewart against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

H. J. Nelson, of St. Joseph, Frank Sheetz, of Chillicothe, J. C. Carr, of Cameron, and M. G. Roberts, of St. Joseph, for appellant.

Edwin C. Orr, of Chillicothe, for respondent.

TRIMBLE, J. This is an action for negligent delay in the commencement of a shipment of hogs and negligent delay in the transportation thereof after the journey was begun. The shipment in question was from Meadville, Mo., to Kansas City, Mo., and was at all times wholly intrastate.

Plaintiff contemplated shipping hogs on Monday evening, December 10, 1917. He brought in some of his hogs on Saturday evening and placed them in the stock pens. He had an arrangement with the station agent at Meadville for a car, and Monday morning the car was at the chute. The rest of his hogs were delivered in the pens that morning between 8:30 and 9 o'clock. According to plaintiff's evidence, after they were in the pens, the agent notified him that on account of extraordinary weather conditions an embargo had been placed upon all live stock shipments. (A blizzard and snowy condition prevailed.) Plaintiff was notified of the embargo about 10 o'clock Monday morning, as soon as possible, and about 10 hours before the shipment was to commence. According to defendant's evidence, the hogs had not all arrived at the pens when plaintiff was notified. The hogs remained in the pens Monday night, and on Tuesday morning the agent informed plaintiff the embargo was off, but about 12 or 1 o'clock Tuesday, long before the time of the train plaintiff was intending to use, the station agent informed him that the embargo was on

again, and plaintiff's hogs remained in the pens (fed and cared for by him) until Thursday evening, when, upon plaintiff signing a contract agreeing to ship subject to delay, the hogs were loaded into the car and the shipment to Kansas City began. They should have gotten to Kansas City about 6 o'clock Friday morning. A part of the evidence in plaintiff's behalf is to the effect that the shipment arrived in Kansas City Friday afternoon, too late for the market of that day, and was held over and sold on a lower market than that of Tuesday, on which market they would have been sold had the shipment been made Monday evening, as originally contemplated. The suit is for this loss, the shrinkage, and the extra feed required. Upon rebuttal, however, it was elicited from a witness for plaintiff, who had a shipment on the same train as plaintiff's hogs, and who accompanied his shipment, that the stock arrived in Kansas City about 6 o'clock Friday morning, but the hogs were not unloaded until in the afternoon, because the pens were full.

Although mention is made in the brief of general congested traffic conditions, on account of war conditions and government transportation of troops and war material, yet the only thing pleaded was a blockade of snow and weather conditions, whereby defendant was compelled to refuse to accept or carry shipments until plaintiff's was accepted, subject to delay on account of conditions, on Thursday, December 13, 1917. According to plaintiff's evidence, trains passed through Meadville going to Kansas City during the time of the claimed embargo, and carried other freight, but no live stock was moved. This and other evidence as to weather conditions made it a question for the jury as to whether an embargo was justified or not. Hence the claim that the demurrer to the evidence should have been sustained cannot be upheld.

Under the instructions given on both sides, the jury returned a verdict for plaintiff in the sum of \$114, and appellant complains of error in the instructions given in plaintiff's behalf. Plaintiff's instruction No. 1 told the jury, among other things, that if, "previous to the time that the plaintiff or his agent * * * were notified or had any knowledge of an embargo on shipments of live stock, plaintiff delivered to the defendant the remainder of the hogs intended for shipment, then it became and was the duty of the defendant to exercise ordinary and reasonable care to transport and deliver such hogs at the stockyards * * * within a reasonable time, and if the jury find * * * that de-

fendant failed to exercise reasonable and ordinary care to so transport and deliver said hogs after they were delivered to it, and that by reason of such failure," etc., plaintiff was compelled to feed said hogs, and they suffered a shrinkage, and plaintiff received on the market less for his hogs, then the verdict should be for plaintiff.

[1] If the embargo was justified, it was a defense if the shipper was promptly notified thereof, whether it was before or after the hogs were in the pens. 10 Corp. Juris, 290, 292; 5 Am. & Eng. Ency. of Law (2d Ed.) 256; *Dillender v. St. Louis, etc., R. Co.*, 149 Mo. App. 331, 337, 130 S. W. 107; *Weessen v. Missouri Pac. R. Co.*, 175 Mo. App. 874, 162 S. W. 304; *Dawson v. Chicago, etc., R. Co.*, 79 Mo. 296; *Shoptaugh v. St. Louis, etc., R. Co.*, 147 Mo. App. 8, 17, 126 S. W. 752; *Cronan v. St. Louis, etc., R. Co.*, 149 Mo. App. 384, 130 S. W. 437. Now, the above-quoted instruction did not submit the issue of the defense pleaded, but went upon the theory that, even if the embargo was lawful, yet if the hogs were in the pens at the time plaintiff was notified, the defendant would be liable if the hogs were not delivered within a reasonable time. Or, to state it another way, the jury were allowed to say the hogs were not delivered within a reasonable time by the exercise of ordinary care, even if conditions did justify an embargo, provided the hogs were in the pens at the time he was notified of the embargo.

[2] It is contended by plaintiff that the giving of defendant's instruction B cured all difficulty, if any there is, in plaintiff's instruction. We do not think so. It permitted and authorized the jury to find a verdict for plaintiff, without passing upon the existence of the conditions which would justify defendant in placing an embargo on shipments on account of weather conditions. If it can be said that their existence was in any way involved in said instruction No. 1, it could only be so in the shape of a legal question, which is never permissible in an instruction. The instruction also permitted a recovery for negligent delay occurring after the shipment started Thursday night; but in defendant's instruction A the jury were told there was no evidence of negligent delay after the transportation started. The two were in conflict. It is true plaintiff's instruction does not refer specifically to any delay in transit, but, under the instruction, the jury are permitted to allow for it.

Other complaints are made, but they need not be noticed. The judgment is reversed, and the cause is remanded for a new trial.

All concur.

SHORTRIDGE v. RAIFFEISEN.
(No. 13384.)(Kansas City Court of Appeals. Missouri.
June 14, 1920.)**1. Justices of the peace §91(4)—Statement of cause of action for commission held not defective.**

Statement of cause of action filed in justice court by real estate broker suing for commission held not so defective as to state no cause of action at all, having given the names of debtor and creditor, amount of debt claimed, rate of commission, and designation of the realty.

2. Justices of the peace §91(1)—Statement informing defendant of demand and barring recovery in another suit sufficient.

When the statement of the cause of action filed in justice court is sufficient to inform defendant of the nature of the action and to bar recovery in another suit, it will not be held to be so fatally defective as not to support judgment.

3. Justices of the peace §190—Statement of cause of action amendable on remand.

If the statement of the cause of action filed in justice court was defective, it could be amended on remand of the case.

4. Appeal and error §882(11)—By joinder in asking instructions defendant admitted there was evidence for jury.

Where no demurrer to plaintiff's evidence was interposed, and defendant joined with plaintiff in asking the court to instruct on the issues, he thereby admitted there was evidence upon which to go to the jury, and he cannot complain on appeal of the sufficiency of the evidence.

5. Brokers §49(1)—In absence of limit broker had reasonable time to effect sale.

Where no limit of time was placed on plaintiff broker to effect a sale of the realty, he had a reasonable time in which to do so.

6. Brokers §88(2)—Whether contract of employment limited or general a jury question.

In a realty broker's action for commission, whether plaintiff's contract of employment was limited or general held for the jury.

7. Brokers §86(4)—Evidence held to justify finding plaintiff procured sale.

In a realty broker's action for commission, evidence held to justify finding that plaintiff's efforts were the procuring cause of sale.

8. Evidence §472(11)—Question to purchaser whether plaintiff's efforts induced him to buy properly excluded.

In a realty broker's action for commission earned by selling a property, the question asked of the purchaser whether plaintiff's efforts had anything to do with his buying held properly excluded as being a conclusion upon a question for the jury; purchaser being allowed to detail all facts and to tell what was done.

9. Brokers §88(2)—Existence of conditions to right to commission for jury.

In a broker's action for a sale commission, whether either or both of two conditions that he must sell to some one other than the actual purchaser and that he must sell for \$9,500 were a part of the contract held for jury.

10. Trial §253(7)—Instructions directing verdict should not omit necessary issues.

Instructions which direct verdict should not omit any of the issues which are a necessary part of plaintiff's case.

Appeal from Circuit Court, Pettis County; Hopkins B. Shain, Judge.

Action by E. S. Shortridge against Chas. H. Raiffeisen in justice court. From judgment for plaintiff on a trial de novo on appeal to the circuit court, defendant appeals. Reversed, and cause remanded for new trial.

O. C. Kelly and Lamm, Bohling & Lamm, all of Sedalia, for appellant.

W. W. Blain and A. L. Shortridge, both of Sedalia, for respondent.

TRIMBLE, J. This action originated in a justice court, and is a suit by a real estate broker for his commission. The case was tried anew in the circuit court on appeal, and the jury returned a verdict for plaintiff. The defendant has appealed.

The statement filed with the justice, and upon which the case was tried, is, for the first time, attacked in this court as being insufficient. It reads as follows:

"Sedalia, Missouri, Jan. 4, 1919.

"Charles H. Raiffeisen to E. S. Shortridge, Dr. To commission of 2½ per cent. on real estate valued at \$9,500 located at No. 1009 West Third St., Sedalia, Mo., \$237.50."

[1-3] In view of the liberality of construction and requirement accorded pleadings in a justice court, we are unwilling to hold the above to be so defective as to state no cause of action at all. It gives the names of the debtor and the plaintiff or creditor, the amount of the debt claimed, the rate per cent. of the debt claimed as a commission, and designates the real estate on which the commission is claimed. Indeed, the words "sale of" after the word "on" and before the words "real estate" are all that is lacking to make the statement complete in every particular and free from the most technical criticism. We think the statement is sufficient to inform the defendant of the nature of the action and to bar recovery in another suit. When it meets these requirements, it will not be held to be fatally defective so as not to support the judgment. *Jarrett v. Mohan*, 142 Mo. App. 29, 33, 126 S. W. 212; *Smith v. Truitt*, 107 Mo. App. 1, 7, 80 S. W. 686. However, even if it be deemed de-

fective, it could on a remand be amended. *Rechnitzer v. Vogelsang*, 117 Mo. App. 148, 152, 93 S. W. 326. And since the judgment will have to be reversed and the cause remanded for a reason hereinafter stated, the plaintiff can amend it by inserting the omitted words showing it was for a sale of the real estate.

The facts of this case make it somewhat unusual and a little out of the ordinary line of cases of this character. This is not a case where the broker finds a purchaser or introduces him to the owner, but is one where the owner and the purchaser to be have been negotiating with each other over a purchase of the property but their negotiations have not been successful, and the broker comes into the affair and exerts his efforts to accomplish or bring about a sale, and after he has exerted his efforts and has repeatedly gone back and forth between them, and finally, on the day the sale was made, telephones the purchaser to come into town on that day, and the purchaser in response to the telephone comes, but instead of going to the broker meets with the owner and closes the deal without him.

[4] Defendant insists that this was a special contract; that plaintiff was employed to effect a sale at a certain price in cash, and that as the sale was not made at that price or on the terms specified the plaintiff did not perform his contract, and hence is not entitled to recover; also that there is no evidence in the case tending to show that plaintiff's efforts were the procuring cause of the sale. With reference to this, it may not be amiss to observe that no demurrer to the evidence was interposed, and defendant joined with plaintiff in asking the court to instruct upon the issues, thereby admitting that there was evidence upon which to go to the jury. *Kenefick Hammond Co. v. Norwich Ins. Society*, 205 Mo. 294, 312, 103 S. W. 957; *Hansen v. Boyd*, 161 U. S. 397, 402, 16 Sup. Ct. 571, 40 L. Ed. 746; *Hartford Ins. Co. v. Unsell*, 144 U. S. 439, 451, 12 Sup. Ct. 671, 36 L. Ed. 496.

We are not in a position to say that conclusively plaintiff had only a limited contract, and therefore cannot recover because he did not perform the terms thereof. The evidence is that when plaintiff first spoke to defendant about selling the house for him he (plaintiff) told defendant that Denny was the man he had in view as a prospective purchaser. Defendant said: "There is nothing to him. He won't buy a house. He has been talking about buying a house for a long while and you can't sell him the house. You can't sell him any house." Plaintiff asserted that he could sell him a house and that Denny could be induced to buy defendant's. Whereupon defendant said: "Well, go ahead and sell it to him. Go ahead and sell it to him. I will pay you a commis-

sion." And plaintiff said: "All right, I will try him."

The price defendant had been holding his house at and the price he named to plaintiff was \$10,000, but later the plaintiff informed him that Denny would buy the house if defendant could take a little less than that, and defendant promised to go over his bills to see what expense the house had been to him and he would then report. He did so and told plaintiff he would take \$9,500, but could not take any less than that and pay a commission. Plaintiff saw Denny repeatedly about the matter, and the latter came several times to plaintiff's office about it, but Denny said he was not yet ready to make an offer, as he had matters on the farm to shape up, but that he would in about three weeks. In the meantime, at Denny's suggestion, plaintiff investigated the cost of the house and reported to Denny what he had learned from the contractor who built it. After seeing Denny three or four times, Denny proposed to put in a lot he owned as part pay on the house at a valuation of \$2,000. This plaintiff communicated to defendant, who refused to take the lot. Plaintiff continued in his efforts to sell the house to Denny.

At some time during the transactions Denny made a deal whereby he thought he had purchased another house of one Cadle, but in some way this deal fell through. Defendant seems to think that the record conclusively shows that plaintiff did not come into the matter until after the Cadle deal fell through, but manifestly there is evidence from which it might be found that plaintiff was talking to Denny and trying to get him to make an offer on defendant's house before this. And plaintiff obtained a promise from Denny that if the Cadle deal did fall through he would make an offer on the defendant's house. Plaintiff kept track of the Cadle deal, and as soon as it was off he called Denny over the telephone and made an appointment with him to come in that day and make the deal for defendant's house. Denny did come in, but, although plaintiff waited for him at his office, Denny did not come to plaintiff but got with defendant and the two closed the deal; defendant taking the lot Denny had theretofore wanted to put in on a valuation of \$2,000 at a valuation of \$1,500 and paying \$7,500 in cash. Thus the price was reduced from \$9,500 to \$9,000 only by treating Denny's lot as having a valuation of \$1,500 instead of \$2,000, and there was evidence that defendant testified in the justice court that the consideration for the house in the deal made was \$9,500.

[5, 6] We cannot say as a matter of law that a special contract defeats plaintiff's cause of action. In the first place, according to the evidence in plaintiff's favor, there

was no such limitation on plaintiff's right to a commission when the contract was made and plaintiff's efforts began. In the next place, no limit of time was placed on plaintiff to effect a sale, and he had a reasonable time in which to do so; and while he was in the final act of accomplishing a sale the defendant, without notice to plaintiff, got together with the purchaser and closed the deal. *Holland v. Vinson*, 124 Mo. App. 417, 101 S. W. 1131. There is other evidence in the record from which the jury could find that, even if defendant did tell plaintiff he would not pay a commission unless he sold the property for \$9,500 cash, yet defendant allowed plaintiff to continue in his efforts to sell the property at less than those terms; and still other evidence that defendant listed the property with plaintiff under a general contract to pay a commission if he sold the property, though the defendant was under the impression that he would not legally be bound to pay any commission unless the property was sold for \$9,500. In other words, it is a question for the jury to say whether the contract plaintiff had was a limited or general contract.

[7] With reference to the claim that there was no evidence from which the jury could say plaintiff's efforts were the procuring cause of the sale, we are of the opinion that there was. The jury could reasonably find that had it not been for plaintiff's efforts the sale would not have been effected, and that plaintiff's exertions were the procuring cause of the sale.

[8] The question asked of Denny whether the efforts of the broker "had anything to do with you buying the property" was, we think, properly excluded. He was allowed to detail all the facts and to tell what was done. The question whether the broker's efforts "had anything to do" with the sale left not only it to the witness to decide whether such efforts were effective in bringing about a sale, the question the jury was to pass upon, but also allowed the witness to draw the conclusion that if he did not rely on the broker's judgment in making the purchase the broker's efforts did not result in effecting the sale. The question allowed the witness to draw a conclusion in reference to the very question the jury were called to pass upon under the instructions of the court. It is not like showing the state of a man's mind prior to plaintiff's efforts by declarations made by such man at the time the state of mind was desired to be shown. *Folks v. Burnett*, 47 Mo. App. 564, 566.

[9] We think, however, that error calling for a reversal and a remanding of the cause for a new trial was committed in the way plaintiff's case was submitted in his instructions. As heretofore stated, it must be borne in mind that this is not the usual controversy of a broker and landowner over

a commission for procuring or finding a purchaser. Here, the owner and purchaser to be had been "dickering" with one another for two years, and each knew the other's terms but would not agree thereon. In this situation plaintiff asked defendant to be allowed to take a hand. According to plaintiff's theory this was granted and he was given a general contract to sell the property, or, if it was limited as to price, it became unlimited thereafter and was so treated by them and that it was unlimited both as to price and as to purchaser. Defendant's evidence tends to show, however, that he refused to give plaintiff a contract to sell to Denny since he already had been on the string and could himself do better with him than any agent could; also that the contract he made with plaintiff was to pay a commission only in case plaintiff found a purchaser who would give \$9,500 cash for the property. With reference to this last, plaintiff himself, in one place in his testimony, says defendant said: "I will take \$9,500 for the house and pay a commission. I can't take any less than that and pay a commission." So that the evidence is clearly in such shape that plaintiff's right to recover was affected by two possible conditions; one that he must sell to some one other than Denny, and the other that he must sell for \$9,500 or he would not be entitled to a commission. Whether either one or both of these conditions were a part of the contract was a question for the jury. It was not conceded that defendant knew plaintiff was still trying to sell to Denny and knowingly interfered and took the matter out of his hands. Now the error in plaintiff's instructions is that they assume that the contract was a general one as to price, and tell the jury plaintiff is entitled to recover and the finding will be for him if the defendant "employed plaintiff to sell the property" and if his efforts were "the procuring cause that resulted in the deal being made," unless the contract was the plaintiff was to sell to some one other than Denny; and they thus assume that the deal made was in accordance with the terms of the contract plaintiff had.

[10] But instructions which direct a verdict should not omit any of the issues which are a necessary part of plaintiff's case; and what was the contract plaintiff had and whether he had fully performed it or not were certainly questions which contain the very heart of his case. *Westerman v. Peer Investment Co.*, 197 Mo. App. 278, 284, 195 S. W. 78; *Young v. Cooperage Works*, 259 Mo. 215, 168 S. W. 611; *Jennings & Son v. Overholt*, 186 Mo. App. 505, 511, 512, 172 S. W. 449. Plaintiff's instructions contained one of the conditions which had to be negatived before he could recover, but omitted all reference to the other, and that other had reference to the two vital and

essential things to his recovery, namely, the nature of the contract he had and whether he had performed it.

The judgment is reversed and the cause is remanded for a new trial.

All concur.

YATES v. UNITED RYS. CO. OF ST. LOUIS. (No. 46116.)

(St. Louis Court of Appeals. Missouri.
June 8, 1920.)

1. Carriers \S 321(21) — Charge of general negligence proper in res ipsa loquitur case.

In a res ipsa loquitur case against a street railway for injuries to a passenger when the street car collided with a team of horses, a charge of general negligence is proper.

2. Carriers \S 316(6) — Proof of collision and injury to passenger makes prima facie case in her favor.

Plaintiff having been a passenger on defendant street railway's car and free from negligence, proof of happening of collision between car and a team of horses and injury to plaintiff raises a presumption of negligence against the railway, and makes a prima facie case for plaintiff, casting burden on railway to show freedom from negligence.

3. Appeal and error \S 1064(1) — Instruction in action against street railway by passenger held not reversible error.

In action against street railway for injuries to passenger when her car collided with team of horses, instruction that, though the jury should find that want of care of driver of team directly contributed to collision, yet if railway's motorman, had he exercised a high degree of care, etc., would have averted collision, plaintiff can recover, *held* not reversible error in view of circumstances.

4. Evidence \S 18 — Judicial notice taken of decreased purchasing power of money.

In passing on question of excessiveness of verdict for personal injuries, Court of Appeals may take judicial notice of the fact that the purchasing power of money has greatly decreased in recent years.

5. Damages \S 131(4) — \$1,000 verdict in favor of female street car passenger not excessive.

\$1,000 verdict awarded against street railway in favor of injured female passenger of 35, in good health before the accident and weighing about 208 pounds, who lost weight until at trial she weighed about 170 pounds, her injury having consisted of a sprained back, resulting in nervousness and insomnia, necessitating confinement to bed, *held* not excessive.

Appeal from St. Louis Circuit Court; Kent K. Koerner, Judge.

"Not to be officially published."

Action by Mary Kate Yates against the United Railways Company of St. Louis.

From judgment for plaintiff, defendant appeals. Affirmed.

Charles W. Bates, T. E. Francis, and Chauncey H. Clarke, all of St. Louis, for appellant.

Rassieur, Kammerer & Rassieur, of St. Louis, for respondent.

BIGGS, C. While plaintiff was a passenger on defendant's north-bound Broadway car it collided with a team of horses and wagon at the intersection of Biddle street. It is alleged that the jar, jolt, and sudden stop of the car as the collision occurred caused plaintiff to be thrown against the back of one of the seats of the car and against the side thereof, resulting in personal injuries, which form the basis of this action, and for which plaintiff recovered a judgment below for \$1,000. The answer was a general denial.

[1,2] The charge is general negligence, which is proper; this being a res ipsa loquitur case. The plaintiff being a passenger and concededly free from negligence, proof of the happening of the collision and the injury raises a presumption of negligence against the carrier and made a prima facie case, casting the burden upon defendant of showing that it was free from any act of negligence which caused the injury to plaintiff.

The errors specified are excessive verdict and the giving of the following instruction on behalf of plaintiff:

"Although the jury should find from the evidence in this case that Louis Staake, the driver of the wagon with which defendant's car collided, did not exercise ordinary care in driving said wagon, and although the jury should find from the evidence that such want of care (if there was such want of care) directly contributed to cause the collision by which plaintiff was injured, if you find she was injured, yet, if the jury should find from the evidence that defendant's motorman in charge of the car in which plaintiff was a passenger, *if he had exercised a high degree of care such as would have been exercised by a prudent, careful, and skillful motorman, under the same or similar circumstances, would have averted said collision and injury, if any, then plaintiff is entitled to recover.*"

The objection to this instruction is that it is said to assume negligence on the part of the motorman by using the italicized words set forth in the instruction. The instruction is unhappily worded, and the criticism leveled against it is not unreasonable. However, it must be considered that the jury are reasonably intelligent men, and that they would not have returned this verdict against the defendant had they not believed that the motorman failed to exercise that high degree of care placed upon him by the law.

In the case of Olsen v. Citizens' Railway

Co., 152 Mo. 426, 54 S. W. 470, the Supreme Court approved an instruction in identically the same form as the instruction in the instant case. The facts in the Olsen Case cannot be distinguished from those in the case at bar. In that case plaintiff suffered injuries by reason of a collision between the street car and a fire department wagon. The instruction in the case at bar was evidently copied from the instruction in the Olsen Case. In passing upon a complaint made against the instruction in that case, Judge Gantt (loc. cit. 431 of 152 Mo., 54 S. W. 471) states that the instruction is in the form almost universally adopted.

[3] We do not deem the giving of this instruction, under the circumstances of the case, reversible error, and hence rule the point against the defendant.

[4] Is the size of this verdict, namely, \$1,000, shocking to the judicial conscience and so excessive as to indicate that the jury was biased and prejudiced in its consideration of the cause? In passing upon the question we may take judicial notice of the fact that the purchasing power of money has greatly decreased in recent years, as was done by the Supreme Court in the case of Hurst v. Railroad (Sup.) 219 S. W. 566 (not yet officially reported).

The case as made tended to prove that the plaintiff's injuries consisted of a sprained back, resulting in nervousness and insomnia; that she was injured on January 26, 1916, and was thereafter confined to her bed for 4 weeks. After that, and until April following, she was able to sit up, but was not able to get around or attend to her household duties. Subsequent to April and throughout the summer she was at various times compelled to remain in bed a part of each week. At the time, the plaintiff was a woman 35 years of age and in good health, weighing before the accident 208 pounds. Since the accident she gradually lost weight, until at the time of the trial she weighed about 170 pounds. She testified that since she was injured she has continual headaches and has not been able to attend to her usual household duties. The trial took place on June 14, 1917, being about 18 months after the accident.

[5] We think, under the evidence, the jury was fully justified in making the award of \$1,000. It is therefore recommended that the judgment be affirmed.

PER CURIAM. The foregoing opinion of BIGGS, C., is adopted as the opinion of the court.

The judgment of the circuit court is accordingly affirmed.

REYNOLDS, P. J., and ALLEN and BECKER, JJ., concur.

O'BANNON v. MOERSCHEL et al.
(No. 13560.)

(Kansas City Court of Appeals. Missouri.
May 10, 1920. Rehearing Denied
May 17, 1920.)

1. Corporations ~~§~~429—Officer cannot use corporate moneys to pay individual debts; check of company being notice.

An officer of a corporation cannot lawfully use its money to pay his individual debts, and if he gives a check of the corporation per himself it is notice to his creditor, who may be compelled to repay it to the corporation.

2. Corporations ~~§~~429—Checks drawn by president having authority to draw, ordinarily legal payments of debt to drawee.

The fact that president of a corporation was such, with authority to draw checks for it, would ordinarily make his checks when cashed legal payments to the drawee, though not when drawee knows that president is putting his hands into the treasury of the corporation and misappropriating its funds.

3. Corporations ~~§~~404(1)—Use of assets to pay president's debt not within rule permitting solvent corporation to use assets for benefit of another.

Where directors consented to payment of president's debt with company funds under impression debt was that of company, and would not have given consent had they known company was paying president's debt as mere gratuity, case did not fall within rule that solvent corporation may use assets for individual benefit of another with consent of stockholders and directors.

Appeal from Circuit Court, Cole County; John G. Slate, Judge.

Action by W. D. O'Bannon, trustee, against Jacob W. Moerschel and others. From judgment for plaintiff, defendants appeal. Affirmed.

Calfee & Westhues, of Jefferson City, for appellants.

Pope & Lohman, of Jefferson City, for respondent.

ELLISON, P. J. Plaintiff is trustee in bankruptcy of the estate of the corporation known as the Schultz Dry Goods, Carpet & Ready-to-Wear Company. Frank J. Linhof was president of that corporation, and owed Jacob F. Moerschel, in the latter's lifetime, a sum amounting to near \$50,000 in interest-bearing notes given for borrowed money. Linhof paid the interest regularly by checks of the corporation signed by him as president, and Moerschel cashed these checks. The corporation was declared a bankrupt on the petition of Jacob W. Moerschel as one of its creditors, the corporation, through Linhof, admitting its insolvency. The corporation being insolvent, the District Court of

the United States for the Western district of Missouri, sitting at Jefferson City, on proper request of creditors authorized plaintiff as trustee to recover back these interest payments. Moerschel having died, plaintiff instituted this action against his executors. A. M. Hough, Esq., of the Cole county bar, was appointed referee. Defendant objected that the case was not one for a referee, but, as this objection was not saved in the motion for new trial, we shall assume that he was properly appointed.

The referee heard the evidence, and made report to the trial court, wherein he allowed to plaintiff the various payments of interest aggregating \$5,623.63. Each party filed exceptions to the report. They were overruled, and judgment rendered for plaintiff in the amount found by the referee. Plaintiff did not appeal.

It is proper to say as a part of the history of the case that the present corporation was preceded by the corporation known as the Schultz Dry Goods & Carpet Company and Linhof paid to Moerschel a number of payments by checks out of the funds of that corporation. But the latter became dissolved, and finally absorbed by the present bankrupt, the Schultz Dry Goods, Carpet & Ready-to-Wear Company. The referee refused to allow to plaintiff any of the money Linhof used out of the funds of the former corporation, on the ground that plaintiff did not represent that corporation, and that the five-year statute of limitation (section 1889, Rev. St. 1909) had run against the action. We should also state that Moerschel presented the notes for allowance against the estate of the corporation bankrupt as if they were the debt of the corporation, but the federal court held they were the individual indebtedness of Linhof, and disallowed them. In re Schultz Dry Goods, Carpet & Ready-to-Wear Co. (D. C.) 236 Fed. 425, and same case on appeal, 246 Fed. 887, 159 C. C. A. 159.

We therefore have only to determine whether the referee and the trial court are upheld in the law in holding Moerschel's estate liable to the plaintiff trustee in bankruptcy.

[1] The law is that an officer of a corporation cannot lawfully use the money of the corporation to pay his individual debts; and if he gives a check of the corporation, per himself, it is notice to his creditor, and the latter may be compelled to pay it back. Charcoal Co. v. Lewis, 154 Mo. App. 548, 136 S. W. 716; Napoleon Hill Cotton Co. v. Stix, 217 S. W. 323; Charcoal Co. v. Moore, 178 Mo. App. 692, 162 S. W. 745; McCullam v. Buckingham Hotel Co., 198 Mo. App. 107, 199 S. W. 417.

In 1917 the Legislature passed an act legalizing such payment unless it is shown that the payee of the check had actual knowledge

that it was issued without the knowledge of the corporation. Laws 1917, p. 144. But that act does not affect this case, for the reason that it was passed since the facts herein transpired.

But defendant has cited us to an exhaustive opinion of the Supreme Court (Coleman v. Hagey, 252 Mo. 102, 136-143, 158 S. W. 829), wherein Judge Walker states the right of a solvent corporation to deal with its money or other assets as an individual would, and that generally only judgment creditors could attack a disposal of the debtor's property. To the same effect is *Jorndt v. Hub & Spoke Co.*, 112 Mo. App. 341, 87 S. W. 29, decided by the St. Louis Court of Appeals through Judge Goode. But these cases have no application. In the case before us we have an officer of a corporation taking its funds bodily and using them (with the creditor's knowledge) to pay his private debt. The creditor thus becomes a party to the misappropriation, and can be forced to disgorge.

[2] To avoid the consideration we have just stated, defendant is driven to insist that it was not Linhof who paid the money to Moerschel, but that it was the corporation acting through Linhof. The fact that Linhof was president of the corporation with authority to draw checks for it would ordinarily make his checks, when cashed, legal payments to the drawee, but, of course, this could not be when the drawee knew the officer by giving the check was putting his hands into the treasury of the corporation and misappropriating its funds. *Bank v. Edwards*, 243 Mo. 553, 564-569, 147 S. W. 978.

[3] We do not overlook the law stated by our Supreme Court in *Coleman v. Hagey*, supra, 252 Mo. 143, 158 S. W. 829, and the St. Louis Court of Appeals in *Jorndt v. Hub & Spoke Co.*, supra, 112 Mo. App. 341, 87 S. W. 29, that a solvent corporation may use its assets for the individual benefit of another with the consent of the stockholders and directors of the corporation. Defendant, doubtless to bring himself within the law thus stated, introduced evidence that the stockholders and directors of the Schultz Dry Goods, Carpet & Ready-to-Wear Company consented that Linhof might make the interest payments in suit out of the funds of the corporation. But we think there is good reason why that evidence cannot avail defendant. The directors each testified that they consented to this use of the corporation funds because it was the understanding had at the time they formed the corporation that the debt to Moerschel for the money used in buying the stock was to be paid by the corporation. The effect of their testimony was that they looked upon the debt as that of the corporation and not of Linhof; and in furtherance of that understanding Moerschel actually presented his notes to the trustee in bankruptcy, and

endeavored to have them allowed as the debt of the corporation. The consummation of that idea was only prevented by the federal courts in the case *In re Schultz Dry Goods, Carpet & Ready-to-Wear Co.* (D. C.) 236 Fed. 425, and 246 Fed. 887, 159 C. C. A. 159, to which we have already referred. It seems plain from the testimony that the directors did not consider that Moerschel had a debt against Linhof personally and that their consent would not have been given if they had known the corporation, though not liable, was yet paying an individual debt out of its assets as a mere gratuity.

We think the judgment should be affirmed. All concur.

UNDERWOOD et al. v. HINES, Director General of Railroads. (No. 13593.)

(Kansas City Court of Appeals. Missouri. June 14, 1920.)

1. Carriers ⇨207(2)—Oral contract for interstate shipment is not binding.

No verbal agreement for cattle cars for shipment in interstate commerce can be relied on under the Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa), which requires a written contract, nor can a preliminary oral agreement for a future interstate shipment.

2. Carriers ⇨32(2)—Unconditional contract to furnish cars, irrespective of government needs or public service, is discriminatory, and violative of Commerce Act.

A station agent of a railroad operating under federal control has no authority to make an absolute and unconditional contract to have cattle cars ready at a certain place or date, irrespective of the government's needs or of general service to the public; such a contract being special and discriminatory, and violative of the Commerce Act.

3. Railroads ⇨5½, New, vol. 6A Key-No. Series—Federal control held to excuse failure to furnish cars to shipper.

Since the federal control of railroads was primarily to supply transportation needed for the Great War, and only secondarily to supply such transportation for the public, the fact that cars were needed for shipments of the government is a defense to an action for breach of contract by the carrier's station agent to have cars ready for plaintiff at a stated time and place.

Appeal from Circuit Court, Callaway County; David H. Harris, Judge.

"Not to be officially published."

Action by J. D. Underwood and E. R. Underwood, comprising the firm of Underwood & Sons, copartners, and another, against Walter D. Hines, Director General of Railroads. Judgment for plaintiffs, and defendant appeals. Reversed.

Harris & Price, of Columbia, and J. W. Jamison, of St. Louis, for appellant.

TRIMBLE, J. This is an action for damages against the Director General of Railroads, based upon the violation of an oral contract made by the station agent of the Missouri, Kansas & Texas Railway Company (in the hands of Receiver Schaff) at Tebbetts, Mo., with plaintiff, whereby said agent agreed to have three empty cattle cars at said station on April 2, 1918, ready for plaintiffs' use in the shipment of cattle from said station in Missouri to the National Stockyards in Illinois. Plaintiffs say that, relying upon the contract made on the 30th of March, 1918, to have said cars ready on the 2d of April, they delivered said cattle at said station; but, said cars not being furnished, they were required to keep and feed said cattle until a week later, when the cars were furnished on April 9, 1918. Wherefore they sue for \$200, the bill for the extra feed and labor required to care for them during the week they were unable to ship. (It seems that, contrary to the usual events in such matters, the price of cattle rose, and was better on the day the cattle did get to market than it was on the day they would have gotten there, had the cars been furnished on the 2d of April. Consequently, no other loss was claimed, except the additional feed and labor during the week the cattle could not be shipped.) At the close of plaintiffs' case, and again at the close of the entire case, the defendant asked a demurrer to the evidence which the court refused to give. The jury returned a verdict of \$150, upon which judgment was rendered, and the defendant has appealed.

[1] The shipment in contemplation, and for which the cars were to be used, was an interstate shipment; and no verbal agreement for shipment in interstate commerce can be relied upon under the Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa), which requires a written contract. *Thee v. Wabash R. Co.*, 217 S. W. 566. However, if it can be said that the contract in question was separate from and merely preliminary to a contract for an interstate shipment which, when entered into, would be in writing, and that the breach relied on is not a breach of that contract, there is this further to be said:

[2] The sole purpose of the contract was, and is alleged to be, to enable a shipment in interstate commerce to be made. Again, a contract, absolute and unconditional, to have cars ready for plaintiffs' use at a certain place and date, irrespective of the government's needs or of the general service to the public, is one the station agent had no authority to make, and his lack of such authority was known to plaintiffs. Such a contract is special, and, if upheld, would give the

shipper to whom it is made an unusual service different from that accorded to others. When such is the case, it is discriminatory, and violates the provisions of the Commerce Act (24 Stat. 379). *Chicago & Alton R. Co. v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501; *State ex rel. v. Atlantic Coast Line R. Co.*, 52 Fla. 646, 41 South. 705, 12 L. R. A. (N. S.) 506.

[3] The railroad was in the hands of the United States government, primarily for the supply of its need in the Great War in which it was engaged, and secondarily for the transportation of commerce for the public. The reason that no cars were obtainable until the date they were obtained was because of governmental war needs and the imperative duty to give precedence to shipments of the government, and therefore it was impossible to have cars on hand for plaintiffs' use on date specified. These facts appearing in the case without controversy, the demurrer to the evidence should have been sustained. *Edwards v. American Express Co.*, 216 S. W. 781.

The judgment is reversed.

All concur.

FANNING v. HINES, Director General of Railroads. (No. 2579.)

(Springfield Court of Appeals. Missouri.
June 5, 1920.)

1. Master and servant §286(2)—Negligence in directing inexperienced servant to operate drill held question for jury.

In an action by an inexperienced workman, injured while using a drill operated by compressed air, negligence in directing him to use it held, under the evidence, a question for the jury.

2. Trial §194(19)—Instruction held equivalent to declaration that master is negligent as matter of law.

In an action by railroad employé injured by using a drill operated by compressed air, an instruction that if the employé was directed to use the machine, that he was known to be inexperienced, and was unaware of the danger, that he was informed by the foreman that he could operate the drill with safety, and that while exercising reasonable care for his own safety the servant was injured, verdict should be for him, was tantamount to a charge that the master was negligent as a matter of law.

3. Negligence §136(9)—When case for jury.

It is only where the facts are such that all reasonable men must draw the same conclusion that the question of negligence is for the court.

Appeal from Circuit Court, Greene County; Orin Patterson, Judge.

Action by John E. Fanning against Walker D. Hines, Director General of Railroads.

From a judgment for plaintiff, defendant appeals. Reversed and remanded.

W. F. Evans, of St. Louis, and Mann, Todd & Mann, of Springfield, for appellant.

Alfred Page, of Springfield, for respondent.

FARRINGTON, J. [1] The plaintiff instituted suit and recovered a judgment against defendant for the sum of \$150, on account of personal injuries sustained by him while working as an employé of the defendant in the yards known as the "New Shops," in the city of Springfield, Mo. He was injured while operating a drill used for the purpose of boring holes in steel beams, and the power operating the machine known as the drill was compressed air. Plaintiff was the only witness used in the case. Briefly, the facts show that he was a man 37 years of age, and that he had worked some around the yards for defendant; had observed several times these drills while being operated by other employés of the company. He was then put on as a helper with a drillman, and assisted him in drilling holes for part of two days. At no time, however, prior to the time of his injury, was he ever given the management or operation of the drill; that is, the man under whom he was working turned on and off the power and actually operated the machine, the plaintiff gaining only such information as he could by helping and observing. The power is turned on in operating this machine by turning a handle, described in the record as similar to the handle on a motorcycle. If turned one way the power goes on, and if turned the other it goes off. It appears that in running this machine at times the drill will get caught, and when that takes place, unless the power is properly handled, the machine will begin to jump and is likely to get away from the operator and injure him. On the day plaintiff started out by himself with this machine, he was told to go and drill some holes under a car. He protested to the man under whom he had been working and also the foreman, stating that he did not understand how to operate the machine and did not want to do it; but was told by one of his superiors having charge of the work that he would never learn how to operate it any younger than he was, and to go ahead. That he could make it all right. He drilled one hole and was drilling on his second hole when something got wrong with the drill. It hung, and he did something in turning on or off the power that made it jump, knocking him down and injuring him.

When the plaintiff's evidence was in the defendant demurred and stood on the demurrer. We think that there was a sufficient case to go to a jury on the question of defendant's negligence. The evidence clearly

showed that plaintiff was an employé of the defendant; that he was directed to use this air motor; that the operation of such an instrument was dangerous in the hands of an inexperienced workman; that the defendant's foreman knew of this danger and that plaintiff was inexperienced; that plaintiff was aware that the machine was dangerous, but he was not practiced, experienced, or skilled in handling it when in its operation it became hung and began to jump. The evidence further shows that he was assured by his foreman that he could operate it safely, and that he was injured while operating it. There was sufficient evidence from which it could be inferred that it was the lack of his knowledge and experience in handling the machine that caused it to injure him. In our opinion it, therefore, becomes a question of fact for a jury to say whether, under all these facts and circumstances, a reasonable and prudent master would have put this machine in the hands of this man to operate under these conditions.

In the briefs of counsel they both speak of the handling of an automobile, illustrating their arguments as to plaintiff's experience and knowledge and notice of danger. We believe it would at least be a debatable question of due care in the owner of an automobile taking out for several days one who had never operated such a vehicle, and permitting him to observe how the machine was handled, controlled, and run, then, without the owner of the machine ever having had such person take hold of the wheel and handled the brake, the clutch, spark, and the gas under his observation, suggestion, and control, to place the machine in his hands without any of this experience, and tell him that he could safely run it by himself. It would seem that due care would require that he give the prospective operator some opportunity to personally run the car under his observation, so that in the ordinary running of the same, when there was something to be done to start or stop the car, he could be there to advise the prospective operator what to do. So with the drilling machine by which the plaintiff was hurt. He had observed how some one else operated it, but he had never had the personal experience of knowing how much air to turn off, or what to do when the drill hung and the machine became unmanageable and dangerous.

We think that it was clearly a case for the jury to say whether this defendant acted within reasonable care in placing this machine which did become dangerous if the drill hung, in the hands of this man, who had never had the actual experience of operating and controlling it, with no one there to suggest and direct, and by the very presence give some confidence to the operator in his

new undertaking. The court correctly overruled the demurrer to the evidence.

[2, 3] Objection is made to plaintiff's principal instruction, which was given by the court, which instruction is as follows:

"You are further instructed that if you find and believe from the evidence in this case that at and prior to the 26th day of September, 1918, plaintiff was employed as a workman by the agents and employes of the said William G. McAdoo, in charge of and operating the plant of the St. Louis-San Francisco Railway Company known as the New Shops, and that plaintiff was by direction of his employer working on freight cars in the process of construction and repair, and shall further find that on said 26th day of September, 1918, he was directed by the foreman of his employer to use a machine known as an air motor, and if you further find that said machine was dangerous when used and operated by an inexperienced workman, and that this was known to plaintiff's foreman who directed him to operate said machine, and shall further find that plaintiff was inexperienced in the operation of said machine, and that this inexperience was known to his foreman, and if you further find that plaintiff was unaware of the danger attending the operation of said machine, and shall further find that plaintiff was informed by his foreman that he, the plaintiff, could operate said machine with safety, and shall further find that while plaintiff was operating said machine, and while exercising reasonable care for his own safety on account of his inexperience in the operation of said machine, he lost control thereof, and shall further find that, on account of the great force of the compressed air by which said machine was operated, said machine was caused to be thrown with great force and violence against and upon plaintiff, and that plaintiff was thereby injured, then you will find the issues in favor of the plaintiff."

Appellant raises the point, and we think it is well taken, that this instruction does not leave it for the jury to say whether the defendant's conduct with reference to this plaintiff was that of a reasonably prudent and careful master. The instruction tells the jury that if they find the facts therein detailed and about which there was no dispute in evidence, then they will find for the plaintiff. This is as much as saying to the jury, if you find these undisputed facts, then you will find the defendant is guilty of negligence and the plaintiff must recover. There are some cases where the acts of a master are so negligent that a court can and should declare his conduct as negligence per se, but ordinarily some inference of negligence is to be drawn by the trier of the fact. This statement of law is so well established that we will not burden this opinion with authorities declaring it.

We do not believe that we can say, as a matter of law, the defendant was guilty of negligence in this case under the conceded facts or under the facts which the jury evidently found to be true. The necessary

element, however, which must be found before the plaintiff can recover in this suit against the defendant, is that the conduct, or the doing of the things which they found defendant did, was not the conduct of a reasonable and prudent master. It is only where the facts are such that all reasonable men must draw the same conclusion that the question of negligence is for the court. *Combs v. Kirksville*, 134 Mo. App. 645, 114 S. W. 1153; *Schwychart v. Barrett*, 145 Mo. App. 332, 130 S. W. 388. *Darks v. Grocer Co.*, 146 Mo. App. 246, 130 S. W. 430. *Oborn v. Nelson*, 141 Mo. App. 428, 126 S. W. 178.

On a retrial the instruction should also require a finding that it was the negligence, if they find such conduct of defendant was negligent, that caused plaintiff's injury.

The judgment is reversed and the cause remanded.

STURGIS, P. J., and BRADLEY, J., concur.

TAYLOR v. DOLLINS (KITTRIDGE, Garnishee). (No. 2725.)

(Springfield Court of Appeals. Missouri.
June 5, 1920.)

1. Garnishment \Leftrightarrow 158—Denial of garnishee's answer should state cause of action, and a reply should be served.

The denial of garnishee's answer being in law the first pleading, should state facts constituting judgment creditor's cause of action, and a mere statement that garnishee owes execution defendant, or did when process was served, is too general, and a reply which corresponds to the answer in ordinary cases should have been filed (Rev. St. 1909, § 2431).

2. Garnishment \Leftrightarrow 132—Interplea statute directory only, and garnishee may defend that fund belongs to the third party.

Rev. St. 1909, § 2439, providing that garnishee may cause an interplea for his own protection where the fund is claimed by more than one party, is directory and not mandatory, and he may take on himself the defense that the fund rightly belongs to the third party.

3. Appeal and error \Leftrightarrow 171(3)—Appellant not permitted to change theory of cause as shown by pleadings.

While garnishee's reply should have stated facts relative to defendant's order assigning fund to one other than execution creditor, yet where neither party observed the rules of good pleading, and the garnishee was allowed to prove that the fund in his hands was not the property of execution defendant by showing without objection that it had been previously assigned, it is too late to question such evidence and thus change the theory of the case on appeal.

4. Garnishment \Leftrightarrow 51—Where garnishment debtor could not countermand assignment, assignee's rights were superior to execution debtor's.

Where an execution debtor delivered to a bank an order on a county which was served on the county's overseer, under whom debtor was working, and who did not formally accept in writing, but kept the order, intending paying the bank, the order was valid and enforceable against the defendant, who could not countermand; and, since the garnishment plaintiff has no better right than the execution defendant, the bank's rights are superior to plaintiff's.

5. Assignments \Leftrightarrow 58—Garnishment \Leftrightarrow 51—Creditor cannot assign part of fund without debtor's consent but plaintiff in garnishment cannot raise objection.

A creditor cannot assign a part of fund due him without the debtor's consent, although he can assign the whole, but such question can be raised only by the debtor or holder of the fund, and not by plaintiff in action against garnishee.

6. Assignments \Leftrightarrow 49—Order treated as assignment need not be accepted in writing.

An order upon the county given by execution creditor to a bank, served upon the county's agent, held an assignment of funds in drawee's hands and not a bill of exchange, under Rev. St. 1909, §§ 10096, 10099, so that the drawee was not required to accept in writing; the order having lost its character as a negotiable instrument on being declared and treated as assignment.

Appeal from Circuit Court, Butler County; Almon Ing, Judge.

Action by F. G. Taylor against John Dollins. Judgment for plaintiff, and on execution W. H. Kittridge was made garnishee. Judgment for garnishee, and plaintiff appeals. Affirmed.

F. G. Taylor and E. R. Lentz, of Poplar Bluff, for appellant.

David W. Hill and Abington & Abington, all of Poplar Bluff, for respondent.

STURGIS, P. J. [1] Garnishment on execution. Plaintiff's judgment, obtained in the circuit court of Butler county, is for \$452.02. In endeavoring to collect this, the sheriff having the execution summoned W. H. Kittridge as garnishee. In the garnishee's answer to the interrogatories he denied that he was indebted to the execution defendant in any sum, or that he had in his possession or control any property or effects of such defendant. The denial of the garnishee's answer, which in law is the first pleading and should state the facts constituting plaintiff's cause of action (*Kiernan v. Robertson*, 116 Mo. App. 56, 60, 92 S. W. 138), is no more than a denial of the garnishee's answer and an assertion "that the garnishee is indebted to the defendant herein, or was so indebted at the time when the said garnishee process was served

upon him." No reply seems to have been filed, though the reply corresponds to the answer in ordinary pleadings. Section 2431, R. S. 1909; Dodge v. Knapp, 112 Mo. App. 513, 87 S. W. 47; Brown & Hamm v. Gummersell, 30 Mo. App. 341, 345. No objection, however, was made by either party to the pleadings, and the case went to trial, resulting in a judgment for the garnishee. The plaintiff appeals.

[2] There is little or no dispute as to the facts, and the questions raised are matter of law. The garnishee was overseer of certain drainage ditches in Butler county, employing persons, including defendant, to do work thereon in keeping same open and serviceable. The county paid to the garnishee the amount due for such work, and he thus had in his hands the sum of \$187.50 due or belonging to defendant for work and labor performed on such drainage ditches. It is conceded that defendant was also indebted to the Bank of Neelyville in the sum of \$200, and a few days prior to the service of the garnishment herein that bank obtained and presented to this garnishee the following order, the genuineness of which was not contested:

"Neelyville, Mo., August 8, 1919.

"Mr. W. H. Kittridge, Poplar Bluff, Mo.—Dear Sir: This is an order for you to pay to the State Bank of Neelyville, of Neelyville, Mo., \$200 from money due me from Butler county, Mo., for cleaning ditch in district No. 7. This money is to be allowed by the county court at their September meeting. John Dollins.

"Sworn and subscribed to before me this 8th day of August, 1919.

"My commission expires June 25, 1922.

"[L. S.] Arthur Moore, Notary Public."

The garnishee made no formal acceptance of this order, but retained the same, "accepted it in his own mind," and was not only willing but considered himself obligated to pay same to the extent of funds coming to his hands belonging to defendant, Dollins. The case was tried by the court and no declarations of law were asked or given. All the evidence offered by either party was admitted without objection.

The defense which the garnishee relied on is that the order in question acted as an assignment by the defendant of the funds in his hands to the Bank of Neelyville, and, since same came to his hands and he assented to the assignment prior to the service of garnishment, he had no funds in his hands at such time subject to garnishment as belonging to or due to the defendant Dollins.

The point is made by plaintiff that the garnishee should have stood neutral as to this fund and, after disclosing his information as to the claimed assignment of same to the Bank of Neelyville, have caused such claimant to appear and join issue with this plaintiff in an interplea. While a third party claiming property or funds seized by garnishment on execution has no right of his own

motion to interplead for such funds (Schwacker v. Dempsey, 83 Mo. App. 342, 352; Straus v. Rothan, 41 Mo. App. 602, 610), yet section 2439, R. S. 1909, provides that the garnishee may cause such an interplea for his own protection. This statutory provision however is directory only, is for the protection of the garnishee, and is not mandatory. The garnishee may take on himself the defense that the funds in his hands alleged to belong to or be owned by defendant rightly belong to some third party and not to defendant. Thus in Shelton v. Cooksey, 138 Mo. App. 389, 390, 391, 122 S. W. 331, 332:

"The garnishee answered that the fund did not belong to the defendant Vincent Cooksey, but that it was the property of George Cooksey. The cause was tried on the issues raised by the answer of the garnishee, the alleged claimant George Cooksey not having been made a party to the cause."

And at page 395 of 138 Mo. App., at page 334 of 122 S. W., speaking of the right of the court to adjudicate the ownership of the garnished fund as between the execution defendant and a third party, without following the method provided by this statute for bringing such claimant into court, the court said:

"This statute is held to be directory only, and the court had the right under the pleadings to pronounce upon them, in the absence of the claimant, as neither party had demanded that he should be brought before the court." McKittick v. Clemens, 52 Mo. loc. cit. 163; Swartz v. Riner, 66 Mo. App. 476; and Lindsay v. Brooks, 82 Mo. App. 301."

In Lindsay v. Brooks, 82 Mo. App. 301, 304, this is said:

"It was conceded at the hearing that none of the alleged principals of Brooks had prior to the garnishment or since made any claim or demand for the money in question. Counsel for Lindsay argues that, in the absence of such demand or notification, it was not permissible for the bank to interpose the rights of the alleged owners of the fund in defense of the garnishment. Whatever may be the rule elsewhere, and whatever may be our individual opinions on the subject, the question has been otherwise determined both by the Supreme Court (McKittrick v. Clemens, 52 Mo. 163), and by this court (Brown v. Gummersell, 30 Mo. App. 341)."

[3] It is also true, as claimed by plaintiff, that under the rules of good pleading the garnishee should by his reply have stated the facts relative to the order by defendant assigning this fund to the Bank of Neelyville. Neither party, as we have seen, have observed the rules of good pleading in garnishment cases, nor did plaintiff in any manner raise this point in the trial court, except perhaps in an indefinite way in the motion for new trial. No objection was made to the introduction in evidence of the order given by defendant on the garnishee directing him to

pay this fund to the Bank of Neelyville, nor to any of the evidence tending to show a valid assignment of this fund to the Bank of Neelyville prior to the service of the garnishment. The parties evidently regarded the garnishee's answer to the interrogatories as part of the pleadings, and such answer avers that this fund was not the property of the execution defendant at the time such answer was filed. The garnishee was allowed to prove this by showing without objection that such fund had been previously assigned to the Bank of Neelyville by the written order in question. It is too late to raise this question after plaintiff tried his case on the theory that this was the one issue to be settled. Plaintiff could not be allowed to join battle on issues known to be vital to the case, and after losing be allowed to obtain a new trial on more or less technical grounds not considered of importance till after the battle was lost. See *Hamra Bros. v. Herrell*, 200 S. W. 776, 780; *Brown v. Gummersell*, 30 Mo. App. 341, 345.

[4, 5] The merits of this case depend on the solution of the question whether the garnishment proceedings in favor of the judgment creditor should prevail over the prior order given by the judgment debtor on the garnishee in favor of another creditor, the Bank of Neelyville. The plaintiff says the garnishment should prevail because the order in question was not accepted by the garnishee, and that acceptance of the order is essential to its validity. The evidence shows that the garnishee did not accept this order in favor of the bank, either verbally or in writing, in a legal sense, so as to make the same a binding obligation on him. 4 Elliott, Contracts, § 3411. The garnishee did, however, have full notice of the same, since it was delivered to and retained by him and, as he says, he "accepted it in his own mind," that is, assented to the terms, waived all objections as to form and that its effect might be a partial assignment of the money coming to his hands belonging to the drawer of the order. The garnishee says he considered the order binding on him and an assignment to the bank of the funds coming to his hands. The acceptance of an order like the acceptance of a bill of exchange creates an obligation, and an action may be based on such acceptance. 4 Elliott on Contracts, § 3418; *Kimball v. Donald*, 20 Mo. 577, 581, 64 Am. Dec. 209. That, however, is not the question here presented. An assignment creates no new obligation, but merely transfers from one person to another an existing debt or chose in action. In *Kimball v. Donald*, supra, the court stated the law thus:

"It is true that anything amounting to a present transfer of a specific fund for value is a valid assignment in equity which changes the property as against the assignor, and cuts off subsequent attaching creditors. No form is required; it is sufficient that the transaction is,

in the contemplation of the parties, a present sale of the subject-matter assigned, vesting a present interest in the assignee, and not resting merely in agreement to be executed thereafter. In a word, anything that shows an intention on the one side to make a present irrevocable transfer of the fund, and from which an assent to receive it may be inferred from the other, will operate in equity as an assignment, if supported by a sufficient consideration. Upon this principle, courts allow an order payable out of a particular fund belonging to the drawer, and which has been delivered to the payee for value, to take effect as a present transfer of the debt; and Lord Chancellor Truro, in a recent case, 1852 (*Rodeck v. Gandell*, 15 Eng. Law and Eq. 30), stated it as the result of all the cases that 'an agreement between a debtor and a creditor that the debt owing should be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor, upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid, equitable charge upon such fund; in other words will operate as an equitable assignment of the debt or fund to which the order refers.'"

To the same effect is *Bank of Commerce v. Bogy*, 44 Mo. 13, 18 (100 Am. Dec. 247), where it is said:

"It has always been held that an order founded upon a good consideration, given for a specific debt or fund owing by or in the hands of a third person, operates as, or rather is evidence of, an equitable assignment of the demand to the holder, so that he may sue and recover the debt or the fund whether the order be accepted or not."

The law is that a creditor cannot assign a part of a fund due him from a third party without the consent of the debtor. To be valid in such case the assignment must be of the whole fund or debt. *Rice v. Dudley*, 34 Mo. App. 383; *Fourth Nat. Bank v. Noonan*, 88 Mo. 372; *Burnett v. Crandall*, 63 Mo. 410. This, however, is a question which can be raised only by the debtor, and if the debtor or holder of the fund assents to the partial assignment of the fund and is willing, as the garnishee here is, to recognize the partial assignment and pay same, then it stands on the same footing as an assignment of the whole fund. No acceptance is necessary. *Boyer v. Hamilton*, 21 Mo. App. 520, 524; *Bank v. Noonan*, 88 Mo. 372. In a case similar to this (*Whiteside v. Tall*, 88 Mo. App. 168, 171), the court said:

"Nor does it matter, on this issue between the garnishee and attaching plaintiff, that the assignment for the benefit of Mrs. Llewellyn was of only a portion of Lyons' indebtedness; no one but Lyons can raise that objection. *Johnson County v. Bryson*, 27 Mo. App. 341."

Hendrickson v. Bank, 81 Mo. App. 332, was a garnishment on execution in which a prior

order had been given by the execution defendant on the garnishee to pay to a certain bank an amount greater than the fund held by such garnishee. Such garnishee had not accepted such order. The similarity of facts is apparent. Since the garnishee made no objection that the order was for more than he held, the court held that it acted as an assignment of such fund and would prevail over the subsequent garnishment.

It is said in all such cases that the garnishment plaintiff secures no better right than the execution defendant has—that he merely steps into his shoes—and where the assignment is valid as between the parties thereto, the garnishee and execution defendant, it is valid as to the garnishing plaintiff. *Hendrickson v. Bank*, 31 Mo. App. 332, 336; *Smith v. Sterritt*, 24 Mo. 260, 263. It cannot be doubted that the order in question, after being signed by defendant and delivered to the bank in payment of or to secure a valid indebtedness, was valid and enforceable as against defendant. He could not have countermanded the same or used the fund in violation of the terms of the order and the bank's rights thereunder.

[6] Plaintiff argues that the order here in question is in the nature of a bill of exchange, and does not of itself operate as an assignment of the funds in the drawee's hands (sections 10096, 10099); that the drawee of such instrument is not liable unless and until he has accepted the same, and such acceptance must be in writing (sections 10097 and 10102, R. S. 1909). This, however, is not a suit by the payee of the order, the Bank of Neelyville, against the drawee, this garnishee. The liability of such drawee is not in question, for the drawee is not resisting such liability. The cases of *Nelson v. Nelson Bennett Co.*, 31 Wash. 116, 71 Pac. 749, and *Ewing v. National Bank*, 162 Ky. 551, 172 S. W. 955, are not in point, for they are cases based on the liability of the drawee of a bill of exchange arising from his contract of acceptance of same. A suit based on an assignment of a cause of action and one based on the new contract arising from accepting the order, check, or bill of exchange are radically different. That an order, or even a bill of exchange, may be shown to be and have the effect of an assignment is the settled law (*Boyer v. Hamilton*, 21 Mo. App. 520; *Kimball v. Donald*, 20 Mo. 577, 64 Am. Dec. 209), and when such instrument is declared on and treated as an assignment, then it loses its distinctive features as a negotiable instrument, and the rights of the parties thereunder are not influenced by the negotiable instruments law.

The judgment rendered is for the right party, and is affirmed.

FARRINGTON and BRADLEY, JJ., concur.

STATE ex rel. CROW v. CAROTHERS. (No. 13505.)

(Kansas City Court of Appeals. Missouri.
May 10, 1920.)

1. Statutes §226—Adoption of statute of other state adopts its construction.

✓ A state, in adopting a statute of another state, adopts the construction given it by the courts of the other state. /

2. Municipal corporations §159(1)—Meaning of "voters' register" within the recall statute stated.

✓ A "voters' register," within Laws 1913, p. 528, § 19, requiring petitioners for recall to be qualified voters as shown by the "voters' register," in so far as applicable to cities of the third class, means the record of voters at the last city election for mayor required to be kept by Const. art. 8, § 8; there being no provision for registration in city elections for such cities. /

3. Mandamus §76—Writ not issued to compel city clerk to certify recall petition unless refusal fraudulent or arbitrary.

✓ Writ of mandamus will not be issued to compel city clerk to certify a petition for recall under Laws 1913, p. 528, § 19, in absence of showing that his refusal to do so is fraudulent or arbitrary; his duties with reference to such a petition being quasi judicial. /

4. Mandamus §187(4)—Objections to form of denials cannot be raised for first time on appeal.

Relator, having treated the issue of fact as made up, and having accepted respondent's return to alternative writ as putting the facts at issue in the trial court, and having tried the case without objecting to the evidence, cannot object for first time on appeal to the form of the denials in respondent's return.

5. Mandamus §187(4)—Failure to state facts to sustain application can be raised for first time on appeal.

Relator's failure to state facts to sustain application for writ is not waived by failure of respondent to raise objection in lower court; the defect being available on appeal.

Appeal from Circuit Court, Adair County; James A. Cooley, Judge.

Mandamus by the State, on the relation of W. I. Crow, against J. C. Carothers. Peremptory writ issued, and respondent appeals. Reversed.

See, also, 214 S. W. 857.

A. Doneghy, of Kirksville, for appellant.
W. F. Frank, of Kirksville, for respondent.

ELLISON, P. J. This is a proceeding in mandamus, wherein relator seeks to compel respondent, who is city clerk, to certify to the common council of the city of Kirksville a certain petition for an election to elect a successor to one O. M. Hutchinson as one of

the councilmen for said city. After a hearing, a peremptory writ was ordered by the trial court.

Kirksville is a city of the third class, and this proceeding is founded upon section 19, Laws 1913, p. 528, known as the "recall" statute, which reads as follows:

"The procedure to effect the removal of an incumbent of an elective office shall be as follows: A petition signed by electors entitled to vote for a successor to the incumbent sought to be removed, equal in number to at least twenty-five per centum of the entire vote for all candidates for the office of mayor at the last preceding general municipal election, demanding an election of a successor of the person sought to be removed shall be filed with the city clerk, which petition shall contain a general statement of the grounds for which the removal is sought. * * * One of the signers of each such paper shall make oath before an officer competent to administer oaths that the statements therein made are true as he believes and that each signature to the paper appended is the genuine signature of the person whose name it purports to be. Within ten days from the date of filing such petition the city clerk shall examine and from the voters' register ascertain whether or not said petition is signed by the requisite number of qualified electors, and if necessary, the council shall allow him extra help for that purpose; and he shall attach to said petition his certificate, showing the result of said examination. If by the clerk's certificate the petition is shown to be insufficient, it may be amended within ten days from the date of said certificate. The clerk shall, within ten days after such amendment, make like examination of the amended petition, and if his certificate shall show the same to be insufficient, it shall be returned to the person filing the same, without prejudice, however, to the filing of a new petition to the same effect."

The respondent clerk claims that the application and alternative writ fail to state a case or ground of complaint against him under this statute. It will be noticed that the statute requires the city clerk, within 10 days from the date of the filing of the petition, to "examine and from the voters' register ascertain whether or not said petition is signed by the requisite number of qualified electors," and he shall attach to the petition his certificate, showing the result of his examination. Neither the application nor the alternative writ contains an averment that the persons signing the petition for "recall" as qualified voters were shown to be such by the "voters' register," which the statute requires as a necessary requisite to make them qualified petitioners for recall.

[1] Our law is a copy of the statute of Oklahoma, and in adopting it we adopted the construction given to it by the courts of that state. *State ex rel. v. Miles*, 210 Mo. 127, 109 S. W. 595; *Knight v. Rawlings*, 205 Mo. 412, 433, 104 S. W. 38, 13 L. R. A. (N. S.) 212, 12 Ann. Cas. 325. The Supreme Court of that state construed the statute as mean-

ing that the alleged qualified voter, signing as a petitioner, must appear on the registration books. The court's language is that—

"The registration books will disclose to him [the clerk] whether the names appearing upon the petition are qualified electors as shown thereby. His rule for determining the qualifications of the electors to sign the petition is limited by the act to the names appearing on the registration books. The election returns disclose to him the number of electors participating in the last preceding vote cast for the candidates, and enable him to ascertain whether the number signing the petition was equal in amount to 25 per cent. thereof. * * * The ordinance under which the clerk is required to act was drawn with the purpose in view of making his duties as simple as they could be made. The evidence given by the registration books established a certain and ready foundation as a basis, and was doubtless deemed to be the best and the simplest which could be secured. To permit all to sign such a petition, without reference to previous registration in the city, might result in the petition being signed wholly or to a great extent by parties who never before participated in any election, and of whose qualification there would be no reliable and easily available evidence, and of whom the clerk might be unable to determine whether they were or were not qualified electors. Under these circumstances, as we view it, the trial court was in error in holding as qualified petitioners those who had signed the petitions and whose names were not upon the registration rolls." *Chesney v. Jones*, 31 Okl. 363, 366, 126 Pac. 715, 716.

This case is approved in *Dunham, City Clerk, v. Ardery*, 43 Okl. 619, 630, 143 Pac. 331, 335 (L. R. A. 1915B, 233, Ann. Cas. 1916A, 1148) where it was said that "it was, no doubt, intended that the names signed to the petition should not be considered, unless they should be upon the voters' register," and where, at page 632 of 43 Okl., at page 335 of 143 Pac. (L. R. A. 1915B, 233 Ann. Cas. 1916A, 1148), *Chesney v. Jones* is quoted from at length.

[2] Our statute uses the term "voters' register" as the place where the city clerk looks to ascertain whether the petitioners possess that requisite to a right to petition. We have no book by that name in our election laws pertaining to elections in cities of the third class. Nor have we any provision for registration in city elections for such cities. The statute ought not to fail for the lack of a record known by that specific name. The expression, the entire section considered, undoubtedly means a record of the voters at the last municipal election for mayor. In point of fact, section 3 of article 8 of our Constitution requires a voters' register to be kept in all elections. It reads that:

"All elections by the people shall be by ballot; every ballot voted shall be numbered in the order in which it shall be received, and the number recorded by the election officers on the

list of voters, opposite the name of the voter who presents the ballot."

A previous registration is not required for municipal elections in cities of the third class, but a list of the voters is set down and kept, commonly called "poll books." We are confident that the Legislature meant such a list of voters, thus required to be kept, when it used the expression "voters' register." The same question was presented in the two cases we have cited above from the Supreme Court of Oklahoma, and the views herein expressed are in harmony with what was there decided.

[3] Another reason why the judgment awarding this writ cannot stand is that the duties devolved upon the respondent clerk with reference to a petition for recall of an incumbent are quasi judicial, and, being so, mandamus will not lie to coerce his judgment, unless he has acted fraudulently or arbitrarily. *State ex rel. v. State Board*, 103 Mo. 22, 28, 15 S. W. 322; *State ex rel. v. Cramer*, 96 Mo. 75, 84, 8 S. W. 788; *Dunham v. Ardery*, 43 Okl. 619, 632, 143 Pac. 331, L. R. A. 1915B, 233, Ann. Cas. 1916A, 1148; 2 *Spelling on Extraordinary Remedies*, §§ 1434-1437. We have examined the evidence preserved by the abstract of appellant and the additional abstract furnished by the relator, but in neither do we find any evidence of fraud or arbitrariness. The appellant appears to have endeavored to perform his duty under the law in all respects. Relator makes no effort to show fraud, and neither fraud nor arbitrary conduct appears in any finding of the court or in the judgment rendered. The only reason given in the finding and judgment is that the "said respondent hath not shown any just cause why a peremptory writ of mandamus should not issue."

[4] Relator has made the point in this court that respondent's return to the alternative writ does not specifically and separately deny each of the allegations in such writ, but contented himself with a general denial. Relator's reply contains the same fault. But we think that, after treating the issues of fact as made up, and accepting the pleading as putting the facts at issue in the trial court and trying the case without objection to evidence, it is too late to make an objection to the form of denial for the first time in this court.

[5] This rule does not apply to respondent's point as to failure to state facts to sustain the application for the writ, or, as it may be said, to sustain a cause of action; for that is a defect not waived, and an objection on that head may be brought forward for the first time in the appellate court.

There were many other points made

against the judgment, which, in view of our conclusion, it will not be necessary to notice.

Reversed.

All concur.

ONCKEN v. EHRLER. (No. 16003.)

(St. Louis Court of Appeals. Missouri.
June 8, 1920.)

1. Corporations ⇨175—Whether stockholder received notice of assessments held for jury.

Whether holder of stock of California corporation, which was sold for holder's failure to pay assessments on stock, was given notice of the assessments, *held* for jury.

2. New trial ⇨97—That evidence on retrial differed from that of first trial, to the surprise of a party, cannot be urged for first time in motion for new trial.

Where evidence was introduced during retrial different from that testified to on first trial, adverse party, after having neither filed any affidavit, nor asked for any postponement to secure a copy of the testimony on the first trial, nor called court's attention to fact that he was surprised thereby, cannot complain for the first time on appeal.

3. New trial ⇨98—Refusal to grant new trial for surprise by evidence differing from that on first trial held no abuse of discretion.

Where defendant did not complain of being surprised by plaintiff's testimony, differing from that given on first trial, and did not ask for postponement to secure copy of testimony given at first trial, and where three juries had given verdicts for plaintiff, refusal to grant new trial therefor *held* no abuse of discretion.

4. Corporations ⇨120—Agreement by seller of stock to repurchase held based on a good consideration.

Where seller of stock agreed to give buyer his money back within a year, if buyer wanted it, a new contract, entered into at the end of the year, whereby seller agreed to repurchase stock within specified period of time after demand after four years, *held* based on a good consideration; buyer's forbearance to enforce old contract being sufficient.

Appeal from St. Louis Circuit Court; Benj. J. Klene, Judge.

"Not to be officially published."

Action by Frank C. Oncken against E. H. Ehrler. Judgment for plaintiff, and defendant appeals. Affirmed.

Conway Elder, of St. Louis, for appellant.
John J. O'Connor, of St. Louis, for respondent.

NIPPER, C. This action originated before a justice of the peace, and is based upon a contract or agreement in writing, whereby

appellant agreed to purchase 500 shares of mining stock from respondent. A copy of the contract, which was attached to the petition, and which we here set out, is as follows:

"Contract.

"St. Louis, Mo., June 16, 1910.

"In consideration of the purchase from me of five hundred shares of the capital stock of the Reiner Mining Company by Frank H. Oncken, I hereby agree to purchase the said stock from Frank H. Oncken within 60 days after demand at any time after four (4) years, and before the expiration of fifty-two (52) months, for the sum of five hundred (\$500.00) dollars, with interest at the rate of 6 per cent. per annum from this date, less any dividends paid upon said stock.

"In witness whereof, I hereunto set my hand and seal at the city of St. Louis, Missouri, this 16th day of June, A. D. 1910.

"E. H. Ehrler. [Seal.]

"Issued in duplicate."

Plaintiff recovered in the justice court. Defendant appealed to the circuit court, where plaintiff again recovered. The trial court sustained defendant's motion for new trial, on the ground that the verdict was against the weight of the evidence. On the second trial in the circuit court, plaintiff again recovered. The trial court overruled defendant's motion for new trial, and he brings the case here by appeal.

Both appellant and respondent are residents of the city of St. Louis. At the time of the execution of the original contract, plaintiff was introduced to defendant by a Mr. Schwankhaus. Plaintiff testified that Mr. Schwankhaus was a salesman for a woodenware company, that he introduced him to Ehrler, at which time he was shown nuggets and gold dust, and was told that they came from a good mine out in California. Plaintiff stated that Ehrler insisted on him taking some of this stock at \$1 a share, and wrote out this contract or agreement; that he (Ehrler) was drawing \$10,000 a year, and had plenty of money to stand back of that; that plaintiff paid defendant \$500 for this stock, and defendant promised to give him his money back inside of a year if he wanted it; that at the expiration of the year he went back and asked for his money; that Ehrler told him everything was going fine, and in six months the stock ought to be worth \$5 a share, and renewed the contract for another year; that at the end of the second year he went back again, and had his stock with him, and met with the same results; that when the last time was up he went back, and had this stock in his pocket, or had the stock in his hand. We here quote from his testimony:

"Q. What did you say to him? A. I told him I would like to have my money, that I had the stock here; and he said he didn't have the money, and he was willing to give me stock in the other company.

"Q. Did he at that time say he would take back the stock and pay you? A. He said he didn't have any money that time.

"Q. Did you then and there offer to deliver him the stocks, if he would pay you? A. Yes, sir; I had the stock right there."

Defendant testified that plaintiff was always willing to renew the contract on each occasion a new contract was given for an old one; that he kept plaintiff informed continually of the condition of the company; that there was an assessment of 5 cents per share levied on said stock in October, 1913; that he mailed plaintiff copy of the notice. Plaintiff, however, denied ever having received any notice of this assessment under which this stock was sold. Without detailing all this evidence, it seems that the life of the Reiner Mining Company was short. Plaintiff's stock was sold upon his failure to pay the assessment levied, of which he claims to have had no notice. It was bought by the president of the company for 5 cents per share, plus about 2 cents cost.

Schwankhaus, testifying for defendant, said that he had discussed the affairs of the mining company with plaintiff, and that they had talked about this assessment; that he himself owned some stock in this company, and that, in discussing this assessment with plaintiff, he told plaintiff he was going to pay his assessment, and that plaintiff stated he felt the same way about it, but that his wife would not let him; that this conversation took place in 1913, after he had received his notice of assessment.

Plaintiff, in rebuttal, denied ever having had any conversation with Schwankhaus about any assessment.

At the close of respondent's case, various sections of the Civil Code of California relative to the levying of assessments on the capital stock of corporations, and the giving of notice thereof, as well as notice of sale of delinquent stock, and the manner of conducting same, were introduced in evidence.

Appellant insists: (1) That the evidence of the levying of the assessment and the giving of notice to the respondent was not rebutted, and the jury should have found for him; (2) that the court erred in not granting defendant a new trial; (3) that there was nothing given of value as a consideration for the renewal contract.

[1] As to the first proposition urged here, appellant testified that he mailed the proper notice to plaintiff and paid the postage thereon, and that such notice would have been returned if respondent had not received it. Respondent states positively that he did not receive such notice. The jury heard this evidence, and had an opportunity to observe the conduct and demeanor of the witnesses while testifying, and we cannot say, from this record, that the jury did not have some facts and circumstances before it from which it may

not reasonably infer that no notice was given. Appellant says that he mailed this notice. Respondent says he did not receive it; and whether appellant would have been relieved of his obligation, if respondent had received such notice, it is not necessary to decide, but the jury could have inferred from this record that no notice was given.

[2, 3] We now come to the second point urged by appellant, namely, that the court erred in not granting him a new trial on account of surprise in plaintiff's testimony, where it was shown by the stenographer's affidavit, who took the testimony of plaintiff at the first trial in the circuit court, that plaintiff at that trial admitted having received notice of assessments. Respondent, at the second trial in the circuit court, denied having received any notice of assessments, when it is shown by the affidavit of the stenographer, who took the testimony at the first trial in the circuit court, that he admitted having received such notice. When respondent at the second trial denied receiving such notice, appellant may have been surprised; but he neither filed any affidavit nor asked for any postponement of the trial in order to secure a copy of the testimony given at the first trial, but proceeded to offer his evidence in rebuttal, without calling the trial court's attention to the fact that he was surprised, and took chances rather on securing a favorable verdict from the jury with the evidence he had. Under such circumstances it is too late to complain for the first time in his motion for a new trial. Three juries have given a verdict for plaintiff, and we do not think the trial court erred or abused its discretion in overruling appellant's motion for a new trial on this ground. *Plumbing Company v. Hugonin*, 156 Mo. App. 68, 135 S. W. 967; *Miller v. Rankin*, 155 Mo. App. 394, 137 S. W. 15; *Thiele v. Railway Co.*, 140 Mo. 319, 41 S. W. 800; *Bragg v. City of Moberly*, 17 Mo. App. 221; *Byrd v. Vanderburgh*, 168 Mo. App. 112, 151 S. W. 184.

[4] As to the next reason urged in granting a new trial, or reversing the case, because there was no consideration for the agreement sued on, this court has heretofore passed upon this proposition in the case of *Grassmuck v. Ehrler*, 207 S. W. 287, loc. cit. 290, wherein it is stated:

"Mrs. Grassmuck thereby canceled the original agreements and accepted in lieu thereof new ones under which her right to demand the repurchase of her stock by defendant was deferred for a definite period of time. Such a contract to forbear is a sufficient consideration for the new promise of the defendant to repurchase. *Gate City Nat. Bank v. Elliott* (Sup.) 181 S. W. 25; *Glasscock v. Glasscock*, 66 Mo. loc. cit. 630."

The instructions given in this case are as favorable to appellant as he could possibly

ask or expect, and the jury found against him.

Finding no reversible error in the record, the Commissioner recommends that the judgment be affirmed.

PER CURIAM. The foregoing opinion of NIPPER, C., is adopted as the opinion of the court.

The judgment of the circuit court is accordingly affirmed.

REYNOLDS, P. J., and ALLEN and BECKER, JJ., concur.

SCOTT v. AMERICAN INS. CO. (No. 13606.)

(Kansas City Court of Appeals. Missouri.
June 14, 1920.)

1. Insurance \S 558(1)—Fire insurer held to have waived signing of proofs of loss by insured.

Fire insurer, insured living in California, while the property was situated in Missouri, by its course of dealing with insured's father and attorney in Missouri held to have waived a requirement of the policy that insured herself sign proofs of loss.

2. Insurance \S 645(3)—Waiver of policy requirements need not be pleaded.

It is not necessary to plead waiver of policy requirements in order to show and rely thereon in insurance cases.

3. Evidence \S 581—Transcript of testimony on former trial of absent witness properly admitted.

Where the evidence shows a witness at time of second trial is beyond the jurisdiction of the court, and that the party desiring to use him has made unavailing efforts to locate him, a correct transcript of his testimony on former trial is properly admitted.

4. Insurance \S 500—Valued fire policy on stored goods limited recovery.

A valued policy of fire insurance on goods in storage, and not subject to fluctuation in value, limited recovery by insured after loss.

5. Insurance \S 665(1)—Evidence held to sustain finding of vexatious refusal to pay by fire insurer.

In action on fire policy, evidence held sufficient to sustain finding against defendant insurer of its vexatious refusal to pay.

Appeal from Circuit Court, Jackson County; Thos. B. Buckner, Judge.

"Not to be officially published."

Action by Emma E. Scott against the American Insurance Company. From judgment for plaintiff, defendant appeals. Affirmed.

M. A. Fyke, of Kansas City, E. L. Snider, of Chicago, Ill., and Fenton Hume, of Kansas City, for appellant.

Noyes & Heath, of Kansas City, for respondent.

TRIMBLE, J. This is an action on a policy of fire insurance consisting of \$500 on goods consisting of hardware, jewelry, and furniture, \$100 on store furniture, and \$200 on household furniture, all while contained in a certain building in Kansas City. There were two trials, in each of which there was a verdict for plaintiff, but for some reason not disclosed by the record a new trial was granted after the first verdict. It is stated in one of the briefs that it was because of informality in the verdict returned. However, we are concerned only with the second verdict, since it is from the judgment rendered thereon that defendant has appealed. The verdict was for plaintiff for the full amount of the policy with 10 per cent. damages and \$80 attorney's fees for vexatious refusal to pay.

The first contention is that plaintiff is not entitled to recover because her proofs of loss were signed and sworn to by her agent, and not by herself personally.

The goods were kept in Kansas City. The plaintiff lived in California. At her request her father in Kansas City applied for the policy. It was issued and sent by defendant to plaintiff where she lived. When the fire occurred, she, upon hearing of it, had an attorney out West to notify the company. It paid no attention to the notice. She then requested her father to employ an attorney to take the necessary steps to collect the insurance. The father made 25 or 30 calls on the adjuster to get an adjustment and made 8 or 10 appointments with him to go out and look over the loss. Finally the adjuster came out and hastily looked over the scene of the loss. The father was compelled to go north, and left only the attorney to look after the matter of collecting the insurance. The adjuster informed the attorney that no formal proof would be required, that the company would either offer a settlement or deny liability. Nothing being done, the attorney, having waited as long as he thought he should, made out a proof of loss, signing and swearing to it himself, upon a blank obtained from the adjuster. Objections were made to the signing of the proofs by an agent, and not by plaintiff herself. Whereupon the attorney went to the adjuster and asked for the proofs of loss, so that he might send them to the plaintiff for her signature and affidavit. The adjuster refus-

ed to let him have it. He, the attorney, then asked for a blank on which to make out a new proof and offered to furnish the kind of proof desired, but the adjuster refused saying they were going to deny liability on the policy and were not going to pay anything. It seems, however, that each side selected an appraiser, and they selected a third, and the three met, but only two of them agreed upon the amount due, but the company did not pay that. So suit was brought.

[1, 2] Under the above and foregoing circumstances, the company cannot defeat the insurance on the ground that the plaintiff herself did not sign the proofs of loss. *Hicks v. Empire Ins. Co.*, 6 Mo. App. 254; *German Fire Ins. Co. v. Grunert*, 112 Ill. 68, 1 N. E. 113; *Lumbermen's Mutual Ins. Co. v. Bell, Extrix.*, 106 Ill. 400, 4 N. E. 130, 57 Am. St. Rep. 140. There was a waiver of proofs of loss. *Keeton v. National Union*, 178 Mo. App. 301, 308, 165 S. W. 1107; *Wiccarver v. Mercantile Town Mut. Ins. Co.*, 137 Mo. App. 247, 258, 260, 117 S. W. 698. And it is not necessary to plead waiver in order to show and rely thereon in insurance cases. *Andrus v. Fidelity Mut. Life Ins. Co.*, 168 Mo. 151, 67 S. W. 582.

[3] There was no error in reading the testimony of Stanley Lyons as contained in the transcript of his testimony given at the former trial. It was conceded to be a correct transcript, and the evidence shows he was, at the time of the trial, beyond the jurisdiction of the court, and the plaintiff had made unavailing efforts to locate him. *Miller v. Geeser*, 193 Mo. App. 1, 180 S. W. 3; *Showen v. Metropolitan St. Ry.*, 164 Mo. App. 41, 148 S. W. 135; *Augusta Wine Co. v. Weipert*, 14 Mo. App. 483; *Davis v. Kline*, 96 Mo. 401, 407, 9 S. W. 724, 2 L. R. A. 78.

[4] There was evidence tending to show the property was worth at the time of the fire more than twice the amount of the insurance, and that the fire caused practically a total loss. The goods were not subject to fluctuation or change, as they were not being sold or used in trade, but were stored, and there was no evidence of any depreciation. The policy fixed the value of the property at the time of the insurance. *Hilburn v. Phoenix Ins. Co.*, 140 Mo. App. 355, 124 S. W. 63.

[5] There was evidence from which the jury could find a vexatious refusal to pay, and we would not be warranted in setting aside their verdict in that regard.

The point that error was committed in plaintiff's instruction 1 is answered by what has been said regarding the proof of loss.

The judgment is affirmed.

All concur.

STATE ex rel. CHORN, Superintendent, et al. v. HUDSON. (No. 13394.)

(Kansas City Court of Appeals. Missouri.
June 14, 1920.)

1. Trial \S 150—Failure to read exhibits to jury not ground for demurrer to the evidence.

Where record showed that exhibits were regularly introduced in evidence, and many of the facts shown in the exhibits were admitted in the trial, and witnesses were examined with reference to the matters contained in them, *held*, that there was no sufficient reason for sustaining a demurrer to the evidence on the ground that they were not formally read to the jury.

2. Insurance \S 141(1)—Policy recognized by insurer and insured not void, although not properly countersigned.

Where a policy of insurance was recognized by the insurer and the insured as a valid obligation, neither could rely on any claim that it was void because not countersigned by the local agent.

3. Bills and notes \S 443(3)—Defendant could not complain that note was held as collateral by one of plaintiffs.

In an action on a note, defendant cannot complain that the note is held as collateral, where both the payee and the one alleged to be holding it collaterally are parties plaintiff and are agreeing as to their respective interests.

4. Insurance \S 197(2) — Contract providing that note covering premiums for six years should become due on failure to pay an assessment valid.

Agreement that the entire amount of a premium note covering six years should become due on failure to pay assessments levied after notice was valid, and insured, having failed to pay an assessment within the time provided, could not escape payment of the entire amount, where he had not canceled his insurance, merely because the insurance was suspended in accordance with the contract, or the company afterwards became insolvent.

5. Insurance \S 226—Cancellation only on consent, except on strict compliance with conditions provided for cancellation.

A contract of insurance having become effective, neither the insurer nor the insured could cancel or terminate it without the other's consent, except on strict compliance with the conditions provided in the policy for cancellation.

6. Insurance \S 197(5)—Whether notice of assessment was mailed held for jury.

In an action on a premium note, which became due on failure to pay an assessment on notice, where defendant did not admit that notice of assessment was mailed, or that he received it, *held* for the jury to say whether plaintiff's oral evidence that notice of the assessment was mailed to defendant was true or not.

7. Insurance \S 197(5)—Whether insured requested cancellation of policy held for jury.

In an action on a premium note given to cover six years' premiums, the entire note becoming due on failure to pay an assessment after notice, whether insured requested a cancellation, as he had a right to do under the policy, *held* for the jury.

8. Evidence \S 441(13)—Right of cancellation to be determined from terms of contract, and not from oral promises.

The right of an insured to cancel a fire policy should be determined from the terms of the contract, and not from any oral promises made by any officers of the company at the time the contract was entered into.

Appeal from Circuit Court, Boone County; David H. Harris, Judge.

"Not to be officially published."

Action by the State, on the relation of Walter K. Chorn, Superintendent, and others, against C. E. Hudson. Judgment for defendant, and plaintiffs appeal. Reversed and remanded for new trial.

Russell E. Holloway, of Columbia, for appellants.

Harris & Price, of Columbia, for respondent.

TRIMBLE, J. This is an action upon an insurance premium note dated October 2, 1915, given by the defendant to the Farmers' Town Mutual Fire Insurance Company of Mexico, Mo., for \$216, in payment of the premium for a period of six years on an insurance policy, issued concurrently with the execution of the note, and covering defendant's mercantile stock, with insurance to an amount not exceeding \$1,200. At the close of all the evidence defendant's demurrer thereto was sustained, and a verdict for defendant was directed. The verdict being returned, judgment was entered thereon, and plaintiffs have appealed.

The suit is by the receiver of the insurance company, and also the North Missouri Trust Company, a banking corporation, the latter having a special property interest in the note by reason of the fact that the insurance company had turned over the note in question to it, along with a number of other notes, as collateral security for a loan to the insurance company. The execution and delivery of the note as an insurance premium note is admitted by the answer. The defenses relied upon therein will be stated as they are respectively passed upon herein.

The note provided that the \$216 should be paid "in such portions and at such times as the directors of said company shall demand for payment of losses and expenses, as required and provided for by charter, by-laws, and rules of said company." It further pro-

vided that the note, "or such part thereof as shall remain unpaid at the expiration or termination of said policy, shall be returned to the maker, provided all assessments on this note and all liabilities of the maker to said company have been paid"; that, "if default is made in payment of this note as above provided, then the whole of this note shall become immediately due and payable." The by-laws provided that 15 per cent. of the note should be paid in cash at the time of its execution and the issuance of the policy, and that the remainder of said note should be payable at any time and in part or in whole upon an assessment made whenever deemed necessary to pay losses, expenses, or other liabilities of the company. This initial payment of \$32.40 was paid at the time of the note's execution and delivery, and was credited on said note. By the terms of the policy, the insured, upon acceptance thereof, becomes a member of the mutual insurance company, and is governed by its articles of association and by-laws which become a part of the contract.

Under section 4, article 3, of the by-laws, the amounts assessed upon each note shall be due and payable within 30 days after notice to the maker has been deposited in the post office, postage prepaid, or delivered to him in person. Section 5, article 3, of the by-laws provides that, if the maker of any note neglects or refuses to pay the sum so assessed upon him for 30 days after the mailing or delivery of said notice, the directors of said company may sue for and recover the whole amount of his premium note held by the company with costs of suit. It further provided that the party so in default should lose all benefits and advantages of his insurance during the term of such default and nonpayment, and notwithstanding shall be liable and obliged to pay all assessments that may be made during the continuance of his policy of insurance, provided the full amount has not been recovered by suit. But no person should be liable for a greater amount than the face of his note. Section 4 of article 4 of the by-laws provided that the—

"insurance may be terminated by request of insured or by the company, on given notice to that effect, but such cancellation shall not impair the right of this company to recover any existing claims on the note."

The policy provided that it should—

"be canceled at any time at the request of the insured, or by the company by giving five days notice of such cancellation. If this policy shall be canceled as hereinbefore provided, * * * the premium having been actually paid, the unearned portion shall be returned on surrender of this policy * * * this company retaining the customary short rate."

As heretofore stated, the note was dated, and the policy was issued and accepted by

insured, and 15 per cent. or \$32.40 of the amount of the note was paid and credited thereon, on October 2, 1915. On July 15, 1916, the directors of said company made an assessment of 25 per cent. on said note, amounting to \$45.90, and the plaintiff introduced evidence tending to show that notice of such assessment was duly mailed. On September 5, 1916, the insurance company wrote defendant, calling his attention to the assessment of \$45.90 levied on July 15, 1916, and saying they were calling his attention for the third time to the assessment past due and unpaid, and demanding its payment in five days; otherwise, they would be obliged to enforce collection of the assessment.

Upon a report made by the company to the superintendent of insurance on September 9, 1916, the latter, deeming that the company had become insolvent, applied to the circuit court of Audrain county for the appointment of a receiver, and one was appointed on September 16, 1916, and the company was enjoined from doing further business. On September 25, 1917, the court, upon a proper hearing and finding, ordered a levy of 100 cents on the dollar of all unpaid balances on assessment premium notes of the company, and directed the receiver to collect same. Thereafter defendant was notified that the balance on said note, \$183.60, was due, and payment thereof demanded. According to defendant's evidence, he wrote in answer to this demand, asking what they would take for the note.

It will be observed that under the terms of the note, and the contract made by the by-laws and policy, and the acceptance of the latter by defendant, the assessments were to become due in 30 days after notice thereof, and if default were made in the payment of said assessments the whole note should become due, and the note could be collected, with costs of suit. The 25 per cent. assessment was made by the directors on July 15, 1916, and the 30 days were up on August 15, 1916. So that it is plaintiffs' contention the whole note became due when the defendant failed to pay the assessment by August 15, 1916, and that when the court, in control of the receiver, made a levy of 100 cents on the dollar on the assessment notes, and authorized the receiver to sue therefor, the obligation of the defendant to pay the balance on said note, to wit, \$183.60, became complete.

The defendant, however, claims that on September 7, 1916, he sent to the insurance company a check for \$45.90 in payment of the 25 per cent. assessment levied on the notes by the directors July 15, 1916, and that he wrote the company a letter, saying he did not want the insurance longer, and asked the company to cancel the insurance. No such letter was introduced, nor do plaintiffs concede that such was written. The only evidence of the letter is the oral evidence of de-

fendant to that effect. Defendant admits he did not demand the return of his premium note, nor did he return the policy to the company. Defendant introduced in evidence his check for \$45.90, drawn on the Bank of Hartsburg, payable to the insurance company, and the evidence tends to show that it did not go through clearing house or banking circles from Mexico to Hartsburg, but was presented by some one at the bank and there cashed on September 19, 1916. This was four days after the insurance company had been placed in the hands of the receiver. It purported to bear the indorsement of the insurance company by Roy J. Maybee, but there was no indorsement of the receiver thereon.

[1] Defendant makes the point that the demurrer to the evidence can be sustained on the ground that the exhibits which the record shows were introduced in evidence, were not formally read to the jury. But this we regard as untenable. The execution of the note and the policy of insurance, and its acceptance by the defendant, were admitted in the answer, and many of the facts shown in the exhibits were also admitted in the trial, and witnesses were examined in reference to matters contained in them. The record shows they were regularly introduced in evidence. Each side made a statement to the jury of its side of the case, and the trial was conducted in such way as to render unjustifiable any such theory that the mere failure to read the exhibits (which to a large degree contained only legal matters for the court) was a sufficient reason for sustaining the demurrer.

[2] The defendant attempts to justify the giving of the demurrer upon the ground that the policy was void ab initio, and no consideration, in the way of insurance, ever existed, because it was not countersigned by the local agent at Claysville and was not otherwise properly signed; but the policy was recognized by both parties as an obligation, and neither could rely on any claim that it was void.

[3] Neither can the demurrer be sustained on the ground that the note was held as collateral by the North Missouri Trust Company. Both of these are parties plaintiff to the suit, and the petition states the capacity in which each is suing. If the trust company has a special interest in the note, that can make no difference to defendant as to whether he should be compelled to pay it in this suit, since both are parties plaintiff and are agreeing as to their respective interests therein.

[4, 5] Unless defendant paid the assessment of \$45.90 levied by the directors within the time provided by the terms of the note and contract, then the whole note became due and payable; and unless the defendant canceled his insurance, he cannot escape the

payment thereof merely because the insurance was suspended or the company afterwards became insolvent. Contracts of the character herein dealt with are valid, and the rights of the parties are to be determined according to the terms thereof. *Sherman v. Frasier*, 112 Iowa, 286, 83 N. W. 886; *Garlick v. Mississippi Valley Ins. Co.*, 44 Iowa, 553; *Continental Ins. Co. v. Phipps*, 190 S. W. 994; *Carlock v. Phoenix Ins. Co.*, 138 Ill. 210, 28 N. E. 53. The fact that the contract provides for a suspension of the insurance during the default does not release the defendant from the obligation to pay the note when the contract so provides. *Home Ins. Co. v. Hamilton*, 143 Mo. App. 237, 128 S. W. 273; *Continental Ins. Co. v. Phipps*, 190 S. W. 994; *American Ins. Co. v. Klink*, 85 Mo. 78; *Continental Ins. Co. v. Burks*, 207 S. W. 847; *Minnesota Farmers' etc., Ins. Ass'n. v. Olson*, 43 Minn. 21, 44 N. W. 672. The suspension of the policy, brought about by the failure of the party defending to perform some condition of the policy, cannot be relied upon, because to permit that would be to allow one to take advantage of his own wrong and default. *Huntley v. Perry*, 38 Barb. (N. Y.) 569; *American Ins. Co. v. Klink*, supra; *St. Paul, etc., Ins. Co. v. Neidecken*, 6 Dak. 494, 43 N. W. 696. The contract of insurance having become effective, neither could cancel or terminate it without the other's consent, except upon strict compliance with the conditions provided in the policy for cancellation. *Home Ins. Co. v. Hamilton*, 143 Mo. App. 237, 242, 128 S. W. 273.

[6] The defendant does not admit that notice of the 25 per cent. assessment levied by the directors on July 15, 1916, amounting to \$45.90, was mailed to him at the time of its levy, nor does he admit receiving said notice, and plaintiffs' proof that such notice was mailed consisted of oral testimony to that effect. Hence, even if the whole of the note did become due and payable, owing to the default in not paying said assessment by August 15, 1916, and even if on account thereof plaintiffs would be entitled to recover, still plaintiffs were not entitled to a directed verdict in their favor, since it would be a question for the jury to say whether plaintiffs' oral evidence that notice of the assessment was mailed to defendant was true or not.

[7] It will be observed, however, that, although the note says, if default is made in the payment of an assessment, the whole of the note shall become immediately due and payable, yet the insurance company did not elect to treat the note as being fully due, but, long after the default, wrote asking only for the payment of the assessment; and in this connection the by-laws say the directors "may" sue, and the petition alleges that the directors "might" sue, for the whole. Consequently, even if by the terms of the note

a failure to pay an assessment does render the whole note due, it may be a question whether the company, by failing to insist upon the whole note being due and asking only for the assessment, did not elect to treat the note as not being wholly due, thereby leaving insured with the right, upon paying all that was then demanded of him, to cancel the policy the same as if he had promptly paid the assessment. On the other hand, the company's waiver of the right to treat the whole note as becoming due could well be deemed to be made on the condition that the insured continued, instead of terminating, his policy. And if, as defendant claims, he did request a termination thereof, there is no evidence of any consent on the company's part to such termination after insured's default had occurred. Besides, there is an intimation in the record that other losses had occurred in the meantime which the company was unable to pay, and it may be a question whether the mere failure to insist upon the note being wholly due then would permit the defendant to pay the assessment that was then long past due and escape the payment of the whole note by requesting a termination of his insurance.

These matters, while perhaps suggested, are not dealt with in the briefs, and we do not pass upon them. For, even if the note was not treated as wholly due upon the default in the payment of the July assessment, yet, if defendant did not terminate his insurance, the levy of 100 cents on the dollar by the court in the receivership would entitle the plaintiffs to a recovery of whatever was yet due on the note. And whether defendant ever requested a termination thereof was a question of fact depending for its establishment on the oral testimony of defendant. The testimony on behalf of plaintiffs tends to show that no such request for cancellation

and that no check or communication of any kind was received from defendant. Hence the question of whether the defendant ever requested a cancellation (if a mere request be sufficient to effect a cancellation) was a matter for the jury to determine, and not for the trial court to decide on a demurrer to the evidence. A peremptory instruction, therefore, could not be given under the circumstances of this case. *Gannon v. Laclede Gaslight Co.*, 145 Mo. 502, 516, 517, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505; *Seehorn v. American National Bank*, 148 Mo. 256, 265, 49 S. W. 886; *Vincent v. Means*, 184 Mo. 327, 341, 82 S. W. 96; *Printz v. Miller*, 233 Mo. 47, 49, 135 S. W. 19; *Milliken v. Thyson Com. Co.*, 202 Mo. 637, 655, 100 S. W. 604; *Wolff, Adm'r v. Campbell*, 110 Mo. 114, 19 S. W. 622.

[8] In addition to this there is evidence in the case from which the jury could find that defendant himself regarded the note as being an existing obligation against him after he claims to have canceled the insurance. As to this right of cancellation, it should be observed that it should be determined from the terms of the contract, and not from any oral promises made by any officers of the company at the time the contract was entered into. Hence evidence of such oral promises should not have been admitted. And as to the \$45.90 which defendant claims to have paid, if it did get into the hands of the company before the receiver was appointed or if the receiver got the benefit of it, this would not defeat recovery, if there was no cancellation, but the \$45.90 would then be credited on the note, and judgment would go for the balance.

The judgment is reversed, and the cause is remanded for a new trial.

All concur.

F. W. WOOLWORTH CO. v. CONNORS.

(Supreme Court of Tennessee. May 17, 1920.)

1. Malicious prosecution §19 — "Probable cause" defined.

The existence of "probable cause," which is the existence of such facts and circumstances as would excite in a reasonable mind the belief that the person charged was guilty of crime, is a complete defense, though the person is innocent.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Probable Cause.]

2. Malicious prosecution §18(5) — Probable cause for prosecution for theft held to have existed.

Where braid was taken from a counter of defendant's store, and the manager was informed by two trusted employes that plaintiff, a stranger, who attempted to leave the store, took the braid, which was found at another counter, there was probable cause for institution of a prosecution against plaintiff for theft.

3. Malicious prosecution §71(2) — Probable cause a mixed question of law and fact.

The question of probable cause is a mixed question of law and fact, and whether the circumstances alleged to show it are true and existed is a matter of fact; but whether, supposing them to be true, they amount to a probable cause, is a question of law.

4. Appeal and error §301—Judgment reversed, without remand, though motion for new trial did not specify error in refusing peremptory instruction.

In an action for malicious prosecution, where defendant moved for peremptory instructions, the appellate court may reverse a judgment for plaintiff, without remand, where the facts established that there was probable cause, though the motion for new trial did not allege error in refusing the peremptory instructions, where it did assert that probable cause was established, and there was no evidence to support verdict.

5. New trial §164—Judgment may be rendered for defendant on motion for new trial, defense being established.

Where there was no evidence to support a verdict for plaintiff, and a defense was established by the uncontradicted facts, it is proper, on motion for new trial, for the court to render judgment for defendant.

6. Appeal and error §301—Refusal of peremptory instruction must be assigned in motion for new trial.

For the appellate court to review the refusal of a peremptory instruction, it should be assigned as error in motion for new trial, for the purpose of giving the lower court an opportunity to correct the error.

Certiorari to Court of Civil Appeals.

Action by Gustine Connors against the F. W. Woolworth Company. A judgment for

plaintiff was remanded by the Court of Civil Appeals, and defendant brings certiorari. Judgment of the Court of Civil Appeals reversed, and action dismissed.

M. S. Ross and Cherry & Steger, all of Nashville, for plaintiff in error.

C. H. Rutherford and John W. Hildrop, both of Nashville, for defendant in error.

McKINNEY, J. This is an action for malicious prosecution.

The defendant in error was prosecuted by the plaintiff in error in the city court of Nashville for the theft of some braid, but was acquitted. This suit immediately followed.

One of the defenses interposed to this action by the plaintiff in error was that of probable cause.

A very brief outline of the facts upon which the prosecution was predicated is as follows: As Mr. Hanchett, manager of the plaintiff in error's store in Nashville, was about to leave the building one afternoon, he was called by Miss Kimbro, one of the clerks in said store, and told that the defendant in error had taken some braid from counter No. 7 without paying for same, and had started to leave the store, when she apprehended her and took from under her arm a package, to which were attached two packages of braid, and she exhibited the said package, with the braid attached, to Mr. Hanchett. About the time that Mr. Hanchett came over to where Miss Kimbro and the defendant in error were standing, near the north door of said building, he heard another clerk, Miss Clardy, call to Miss Kimbro and state that the plaintiff in error had laid some of the packages of braid on the post card counter, and five packages of braid were observed lying upon said table. Mr. Hanchett, on this information, had the defendant in error arrested, and prosecuted her in the city court, as above stated.

After the defendant in error was acquitted in the city court, she was indicted in the criminal court of Davidson county for the theft of said braid, and on a trial of the case a verdict of not guilty was reported by the jury, and she was discharged. That case, however, is in no sense connected with the case we are now considering, as the indictment in that case was had subsequent to the time at which this suit was instituted.

[1] In considering the defense of probable cause the question of the guilt or innocence of the defendant in error is not necessarily involved. She may have been entirely innocent, and still the plaintiff in error could have relied upon this defense, if properly made out.

On this point the Court of Civil Appeals very properly says:

"As to the first point, the law as to reasonable or probable cause is defined to be such a state of facts in the mind of the prosecutor as would lead a person of ordinary caution and prudence to believe, or entertain an honest or strong suspicion, that the person is guilty. It does not depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution. In order to maintain an action for malicious prosecution, it is very clear that the plaintiff must aver and prove that the suit complained of was commenced and prosecuted without reasonable or probable cause, and that it was malicious. The warrantlessness of the suit may, in many instances, be so obvious as that malice may be inferred from it. The question of probable cause applies to the nature of the suit, and the point of inquiry is whether the defendant had probable cause to maintain the particular suit upon the existing facts known to him." *Newell on Malicious Prosecution*, 252.

In *Kelton v. Bevins*, Cooke, 90, 5 Am. Dec. 670, Judge Overton said:

"The public interest is concerned that offenses should not go unpunished. It is a test of the impropriety of such prosecutions that defendants are acquitted. The true and legal principle is, Had the prosecutor ground to think that a felony had been committed, with the information he possessed at the time of the commencement of the prosecution? If he had, he ought not to be subject to damages in this action. * * *

"To sustain an action for a malicious prosecution, there must not only be malice, but a want of probable cause. In the absence of either of these requisites, the action falls to the ground. Hence the want of probable cause for a prosecution is the test of this action. Though malice exists, if in the estimation of a rational and dispassionate mind there be probable cause for prosecution, the action cannot be sustained. With the information that Kelton possessed, he had reasonable ground to believe that a felony had been committed. He ought not, in justice and sound policy, to be mulct in damages and costs for endeavoring to detect and punish such offenses."

In the case of *Raulston v. Jackson*, 1 Sneed, 128, the court said:

"The law on this point is, and should have been so charged by the judge, that if the jury found from the proof that the defendant, at the time he instituted the prosecution, acted upon such a state of facts known to him, or derived from reliable information, as would induce a belief in the mind of a prudent, discreet man that the crime had been committed and by the person he was about to prosecute, he was not liable.

"The question is not whether the defendant is really guilty, but was there good and reasonable grounds for the prosecutor to believe he was. * * *

"Instead of requiring direct evidence of the fact of the crime, it may certainly often happen that no crime was in fact committed, and yet the prosecutor justifiable, because of the existence of probable or reasonable grounds

to believe the criminal act had been done, and by the accused. If men were not allowed to act upon such grounds, crimes would often go unpunished for want of prosecutors. This action is only intended to apply to cases where a criminal accusation is made against an innocent man through malice, and in the absence of even a fair and reasonable probability of its truth."

In the case of *Hall v. Hawkins*, 5 Humph. 357, the court said:

"Probable cause is the existence of such facts and circumstances as would excite in a reasonable mind the belief that the person charged was guilty of the crime for which he was prosecuted; that is, acting upon the facts within the knowledge of the prosecutor, if a reasonable man would believe the party guilty of the crime charged, there would exist probable cause for the prosecution."

The foregoing quotations from our authorities give, in the main, the definition as to what constitutes probable cause under the holding of this court, and, with this rule of interpretation, it is but necessary to apply same to the facts of this case in order to determine whether this defense has been properly made out.

[2, 3] The uncontroverted facts upon which the plaintiff in error relies in support of its defense of probable cause are as follows:

First. The taking of the braid.

Second. The information given by Miss Kimbro and Miss Clardy that the defendant in error was the person who took the braid.

Third. That these two ladies were trusted employes, in whom Mr. Hanchett had confidence, and whose statements he relied upon and believed.

Fourth. The exhibition of the two packages of braid attached to the package of tablets, and five packages of braid lying on the post card counter.

Fifth. The attempt of the defendant in error to get out of the store.

Sixth. The defendant in error was a stranger to Mr. Hanchett, Miss Kimbro, and Miss Clardy, neither of whom entertained towards her any ill will or unkind feeling.

The Court of Civil Appeals, in its opinion, states that the defendant in error introduced proof to disprove the evidence introduced by the plaintiff in error on the question of probable cause, but does not state what said proof consists of, and after a careful reading of the record we have been unable to find any contradictory evidence on these propositions.

Counsel for the defendant in error met this by saying that the witnesses for the plaintiff in error have contradicted themselves in their testimony, so as to destroy their evidence; but we are unable to find any contradictions on material matters.

As to the facts set forth above, constituting probable cause, as contended for by the plaintiff in error, the defendant in error in no sense undertakes to contradict them, but di-

rects her proof to the question of her innocence, which, as previously stated, is not necessarily involved in this inquiry.

In *Cooper v. Flemming*, 114 Tenn. 40, 84 S. W. 801, 68 L. R. A. 849, this court said:

"The question of probable cause is a mixed question of law and fact. Whether the circumstances alleged to show it are true and existed is a matter of fact, but whether, supposing them to be true, they amount to a probable cause, is a question of law."

As previously stated, the facts relied upon by the plaintiff in error to constitute probable cause are not in dispute, and it only remained for the court to apply the law to the uncontroverted facts, and say whether they constituted probable cause. We find nothing in the record to negative the idea that Mr. Hanchett was acting in good faith, based on substantial information.

We are of the opinion that they do make a case of probable cause. After reviewing our decisions on this question, we find several cases where this defense was sustained, where the facts were not as strong as they are in the present case. This being true, the trial judge should have sustained the motion of the plaintiff in error for a directed verdict.

[4-6] It is insisted that this court cannot dismiss the suit, but will have to remand it, for the reason that, in its motion for a new trial, the plaintiff in error did not assign as one of the grounds therefor that the court erred in not granting its motion for peremptory instructions.

It appears that the plaintiff in error, at the conclusion of all the evidence, moved for peremptory instructions on three grounds, as follows:

"(1) That there is no evidence on which to base a verdict.

"(2) That there was probable cause as a matter of law for the prosecution of Mrs. Connors, as alleged in this case.

"(3) That the defendant, F. W. Woolworth Company, or its agent, C. W. Hanchett, acted upon the advice of counsel in the prosecution of Mrs. Connors, particularly that there was probable cause, which is a matter for the court to determine."

This motion for peremptory instructions was denied by the court.

On motion for a new trial, among the many grounds assigned, were the two following:

(1) "There is no evidence to support the verdict."

(2) "The uncontroverted testimony, and all the testimony in the case taken together, shows that C. W. Hanchett, manager of the defendant,

F. W. Woolworth Company as a matter of law, had probable cause for causing the detention and arrest of the plaintiff, Gustine Connors."

It will thus be seen that the grounds for peremptory instructions and the motion for a new trial are substantially the same. It is true that it was not alleged in the motion for a new trial that the court was in error in not granting the motion for peremptory instructions; but it called the court's attention to the errors committed by him, which were the basis for the peremptory instructions asked for, and, if the court had corrected the errors on the motion for a new trial, it would have followed, under our practice, that he would have rendered a judgment for the plaintiff in error. *Barnes v. Noel*, 131 Tenn. 130, 174 S. W. 276.

The reason for the rule, requiring that a motion for peremptory instructions must be assigned as error in the motion for a new trial, is to give the trial court an opportunity to correct the error previously made, and to avoid burdening the higher courts with the work of correcting errors which the trial court could have corrected. The error committed by the trial court was in not holding that, as a matter of law, the defense of probable cause had been made out, and directing a verdict for the plaintiff in error.

On the motion for a new trial plaintiff in error again insisted that the court should have held, as a matter of law, that the defense of probable cause had been shown, and thus the court was given an opportunity to correct the error previously made.

We think this was, in effect, challenging the action of the court in not sustaining the motion for peremptory instructions, upon the ground that there was no evidence upon which to base a judgment in favor of the defendant in error and upon the further ground that the undisputed evidence made out a case of probable cause.

In *Southern Railway Co. v. Lewis & Adcock Co.*, 139 Tenn. 44, 201 S. W. 133, L. R. A. 1918C, 976, this court said:

"An assignment to the effect that the trial court erred in not peremptorily instructing the jury is equivalent to an assignment of error that there was no evidence to support the verdict, since under our practice there could be no peremptory instructions, unless there was no evidence to the contrary."

We think the converse of this would be true.

It results, therefore, that the judgment of the Court of Civil Appeals, remanding the case, will be reversed, and an order will be entered here dismissing the suit.

WALTON v. COMMISSIONERS OF LIGHT IMPROVEMENT DIST. NO. 1 OF CITY OF BENTON. (No. 12.)

(Supreme Court of Arkansas. May 24, 1920.
On Rehearing, June 28, 1920.)

1. Electricity $\Leftrightarrow 1\frac{1}{2}$ —On question whether petitioners for improvement district are majority in value, railroad property considered.

In determining whether the requisite majority in value has been obtained by those who petition for the establishment of an improvement district for the purchase of an electric lighting plant, under Kirby's Dig. § 5717, the value of railroad property must be taken into account in view of Acts 1911, p. 244, § 14, relating to the assessment of railroads for general taxation purposes.

On Rehearing.

2. Electricity $\Leftrightarrow 1\frac{1}{2}$ —Presumption that corporate officers had authority to sign petition for improvement district held overcome by evidence.

Where a petition for the establishment of an improvement district for the purchase of an electric lighting plant, under Kirby's Dig. § 5717, disclosed that certain corporations had signed the petition by their secretary and treasurer, the presumption that they were authorized to do so was overcome by undisputed testimony of such officers themselves that they had no authority to sign.

3. Electricity $\Leftrightarrow 1\frac{1}{2}$ —Presumption of ownership by signers of improvement petition from possession of lands or payment of taxes is prima facie only.

In determining whether a requisite majority in value has been obtained for petition for the establishment of an improvement district for the purchase of an electric lighting plant, under Kirby's Dig. § 5717, the presumption of ownership must be indulged in favor of persons in possession of or who paid taxes on lands to which they have no title of record; but such presumption is prima facie only, and may be overcome by evidence.

4. Electricity $\Leftrightarrow 1\frac{1}{2}$ —Evidence held to overcome prima facie presumption of ownership of signers of improvement petition who were in possession or paid taxes.

In determining whether a petition for the establishment of an improvement district to purchase an electric lighting plant, under Kirby's Dig. § 5717, contained a majority in value, evidence held sufficient to destroy the prima facie presumption of ownership of signers who were in possession of lands or who paid taxes thereon.

Appeal from Saline Chancery Court; J. P. Henderson, Chancellor.

Suit by J. W. Walton against the Commissioners of Light Improvement District No. 1 of city of Benton. Decree for defendants, and plaintiff appeals. Reversed and remanded, with directions.

Mehaffy, Donham & Mehaffy, of Little Rock, for appellant.

N. A. McDaniel, of Benton, for appellees.

SMITH, J. [1] This suit questions the validity of an improvement district in the city of Benton organized for the purpose of purchasing an electric light plant from a company which had allowed its franchise, obtained from that city, to forfeit. Several questions are raised which we find it unnecessary to decide, as, in our opinion, the petition of the property owners does not contain a majority in value as required by the Constitution.

The court below found otherwise and prepared an elaborate opinion discussing the various issues raised in the case. But in this opinion the court held that the value of the railroad property lying in the city should be excluded. But, in connection with this finding, the court also found that, if it was in error in excluding the railroad property, the petition did not have a majority in value; and there appears to be no doubt that such is the case.

The statute provides that—

"In ascertaining whether the petition for improvement of any land is signed by a majority of the owners in value of the real property in the district adjoining the property to be affected, the council shall take and be governed by the valuation placed upon the property as shown by the last county assessment on file in the county clerk's office. Women, married or single, may sign the petition; guardians may sign for their wards, and executors or administrators may sign for the estates represented by them." Section 5717, Kirby's Digest.

In regard to the assessment of railroads for general taxation purposes, the statute provides that—

"The buildings and side tracks of railroads shall be assessed as real estate, and each building or side track shall be assessed in the incorporated town or district where located. Main track shall also be assessed as real estate, and it shall be apportioned for assessment and taxation between the several towns and school districts through which the railroads run according to the actual mileage in each town and district" (section 14, Act 251, Acts 1911, p. 244), and that rolling stock, materials, and stores shall be assessed as personal property, and that assessment distributed in the same manner.

This assessment of railroad property is made by the state tax commission, and was properly made for the year in question, and the official certificate of the commission showing the railroad assessment in the city of Benton was furnished to and filed with the clerk of the county court. In extending this assessment on the tax books the clerk did not separate the real estate from the personal property, but extended the entire assessment

on the personal tax book. He stated, however, that the assessment roll sent him by the tax commission did show the length of the main track and the value thereof, the length of the side tracks and the value thereof, and the value of the buildings, in the city of Benton, and his explanation of his failure to extend these assessments properly was that he did not know what part of the assessment to extend as personal property nor what part as real estate, and he had therefore extended it all as personal property on the personal tax book. But, as appears from the statute quoted, the buildings, main track, and side tracks are assessed as real estate, and the clerk's lack of knowledge of this provision of the statute did not alter the character of the property. The case presented is not one where there has been a failure to assess the railroad property, for it was assessed, and properly so; and it will be observed that the statute does not require the determination of the question of the value of the property in the proposed district to be made from an inspection of the tax books, but the statute is that "the council shall take and be governed by the valuation placed upon the property as shown by the last county assessment on file in the county clerk's office."

The assessment of the railroad properties was on file in the clerk's office, and the railroad was no doubt required to pay the taxes levied on that assessment.

Had the railroad company desired this improvement and, by proper authorization, had signed the petition for it, we think, without question, it would have been proper for the value of its property, as shown by the last county assessment on file in the county clerk's office, to be taken into account, because, within the meaning of the statute, the assessment made by the tax commission is a part of the county assessment. And if this be true, it must also be true that the value of the railroad property should be taken into account in determining whether the requisite majority in value had been obtained by those who petitioned for the establishment of the improvement district.

It follows therefore that the necessary majority has not been obtained, and the decree of the court will therefore be reversed, and the cause remanded, with directions to enjoin the commissioners of the proposed district from further proceeding as prayed in the complaint.

On Rehearing.

Upon the petition for rehearing it is urged that the petition for the organization of the improvement district contained a majority in value of the property even though the railroad assessment is included. Such appears to be the case, if we include in the sum total of the assessed values of the petitioners the property of certain petitioners who had no

record title to the property assessed to them, and also the property of certain corporations. If either is excluded, the petition does not contain the necessary majority; if both are included, the petition does contain the necessary majority.

The general manager, who was also secretary and treasurer, of the Owosso Manufacturing Company, testified that he signed the name of that corporation to the petition, but that there had been no resolution or other action of the board of directors authorizing him to do so. The secretaries of two other corporations, who had signed the names of the corporation to the petition, gave substantially the same testimony.

[2] The names of these corporations were signed by the officers who would have signed the petition had authority in fact existed for that action. In such case it is proper to presume that authority for such signatures had been conferred, for, as we said in the case of *City of Malvern v. Nunn*, 127 Ark. 418, 192 S. W. 909, the board of directors possesses the authority to authorize the signing of the corporate name to such petitions, and the secretary is one of the executive officers who might perform that function. But that presumption is overcome here by the affirmative and undisputed testimony of these officers themselves that no authority to sign had been conferred upon them.

[3] A presumption of ownership is also to be indulged in favor of persons in possession of or who pay taxes on lands to which they have no title of record; and it is urged that this presumption should be treated as conclusive, inasmuch as they might be owners under a will or by descent cast, and this court has held in the case of *City of Malvern v. Nunn*, supra, that such owners have the right to petition for the creation of improvement districts.

[4] We think, however, that this presumption is only *prima facie*. And we are also of opinion that this *prima facie* presumption has been overcome by the testimony on the subject. Judge W. H. Evans testified that he had been a resident of Benton for many years, and had been judge of the circuit court for 12 years; that prior to that service he had been clerk of the circuit court and ex officio recorder for 6 years, and that he owned a set of abstract books, and had been engaged in the abstract business. He testified that he checked over the petition and spent from 2 to 3 hours per day for 8 or 10 days in a diligent search to ascertain the source of title of the petitioners now under consideration, and that the petitioners had no deeds of record to the lands assessed to them. Many landowners negligently fail to have their deeds recorded, and such, no doubt, is the case here, but in the case of *City of Malvern v. Nunn*, supra, we said:

"Deeds of record in the recorder's office in the county, at the time the council passes on the question, are the criterion in so far as the property represented by instruments subject to record is concerned."

Under the showing made, the names of these petitioners were properly excluded.

The petition for rehearing will be overruled, as, upon a reconsideration of the record in the case, it appears that a majority in value of the property owners have not petitioned for the improvement.

ELLIS v. STATE. (No. 62.)

(Supreme Court of Arkansas. June 21, 1920.)

1. Witnesses \S 388(5)—Cross-examination to impeach defendant not erroneous as introduction of confession without proof of voluntary character.

Where court did not permit any testimony in nature of a confession to go to jury, there was no error on any theory state was permitted on cross-examination to introduce confession, without first proving it was voluntary; purpose of defendant's cross-examination as to statements made by him on examining trial being merely to lay foundation for impeachment.

2. Criminal law \S 517(2)—Statements on examining trial in nature of confessions admissible.

Statements made by defendant, accused of receiving stolen goods, on the examining trial, in the nature of confessions of guilt, having been made in open court voluntarily, are admissible.

3. Criminal law \S 883—Verdict not specifying offense defined by instructions not defective.

Verdict, "We, the jury, find the defendant guilty and leave the punishment to the court," held not fatally defective on account of its form; the court having fully and correctly instructed as to the essentials of the crime charged, that of receiving stolen property.

4. Criminal law \S 798½—Charge as to form of verdict proper.

In a prosecution for receiving stolen property, a charge as to form of verdict held proper.

Appeal from Circuit Court, Pulaski County; John W. Wade, Judge.

Will Ellis was convicted of receiving stolen goods, and he appeals. Affirmed.

Troy W. Lewis, of Little Rock, for appellant.

Jno. D. Arbuckle, Atty. Gen., and Silas W. Rogers, Asst. Atty. Gen., for the State.

WOOD, J. Appellant was indicted, under section 1830 of Kirby's Digest, for the crime of receiving stolen goods, knowing them to

be stolen, with intent to deprive the true owner thereof. He was convicted, and appeals from a judgment sentencing him to 18 months' imprisonment in the state penitentiary.

There was testimony on behalf of the state tending to prove that in January, 1920, articles of clothing were stolen from several persons in Little Rock, Pulaski county, Ark., of the aggregate value of more than \$300. Two boys confessed to stealing the property, and they told the police officers where the articles could be found. They were under a dwelling house at 315 Gaines street, up near the front. Appellant, after he was arrested, also told the officers where they could find the stolen goods. On cross-examination, one of the officers was asked if he knew whether or not appellant was whipped at police headquarters. He answered that he did not know anything about it. After this, the question was repeated, and objected to by the state. The court, at this juncture, sustained the objection, reserving a final ruling until appellant showed that he was subjected to a whipping for the purpose of extorting statements from him. The boys who stole the property stated that they deposited the same at Nineteenth and Commerce. One of these stated that, at appellant's request, witness and one Davis "went out there, and got out the stuff, and carried it down to the house" where appellant resided; that appellant stated he would put it where it could not be found. The witness testified that the appellant knew that the articles were stolen. Witness stated that he so informed the appellant.

The testimony of the appellant was to the effect that he did not have any conversation with the parties who stole the goods. He was informed by one Davis, after the parties were arrested, that the goods were taken to appellant's house. Appellant looked for the things, and could not find them. The officers arrested appellant and took him to the city hall, where they asked him about the suit cases containing the articles. Appellant testified that the officers beat him up, so he did not know what he was talking about. They whipped him "on his naked meat," broke the skin, and brought blood from him. One of the officers put his foot on his head and was holding him down on the floor. This officer hit appellant over the head three times with a black-jack. After beating him, they gave him salve for his wounds. They injured his back, and he passed blood in his urine. They tried to make him confess that he stole the two grips. At this juncture the appellant was asked the following question:

"Q. Did you confess it?"

"A. No."

Among other instructions the court gave the following:

"If you find the defendant guilty, you will say, 'We, the jury, find the defendant guilty of receiving stolen property, as charged in the indictment, and fix his punishment at' a term of years in the penitentiary not less than one, or no more than five years. If you find the defendant guilty, and cannot agree upon the punishment, you will leave that to the court, and in that event the court will fix the punishment."

The appellant duly excepted to the ruling of the court in giving this instruction. The jury returned a verdict as follows:

"We, the jury, find the defendant guilty, and leave the punishment to the court."

There was no objection by the appellant, at the time the verdict was rendered, to the form of the verdict.

[1] The appellant contends that the court erred in permitting the state to introduce the confession of appellant, without first proving that the confession was free and voluntary. The record does not bear out counsel for appellant in his contention that the state, over the objection of appellant, introduced a confession by appellant in order to establish his guilt. Although appellant testified that he was severely beaten by the officers for the purpose of making him confess, nevertheless he denied that he made any confession. The proof introduced on behalf of the state did not tend to prove any confession on the part of appellant. True, the prosecuting attorney propounded certain questions in his cross-examination of appellant concerning alleged statements made by appellant when a witness on the examining trial before the municipal court. The appellant answered these questions by saying that he did not know, or by categorically denying that he made the statements attributed to him. It is manifest that the purpose of this examination was not to introduce any alleged statement of the appellant in order to show a confession, but for the purpose of laying the foundation for the impeachment of appellant as a witness.

[2] The record, as abstracted by appellant's counsel, does not show that the court permitted any testimony in the nature of a confession to go to the jury. Moreover, if any of the statements made by appellant on the examining trial were susceptible of being construed as in the nature of confessions of guilt, such statements were made in open court, and besides were entirely voluntary. See *Iverson v. State*, 99 Ark. 453, 138 S. W. 958. It was proved that the appellant was anxious to testify before the examining court. There was no prejudicial error in the rulings of the court in admitting or excluding testimony.

[3, 4] The appellant did not object to the

form of the verdict at the time same was rendered. Furthermore, the verdict was not fatally defective on account of its form. The court had fully and correctly instructed the jury as to the essentials of the crime of which appellant was accused. When the verdict is taken in connection with the instructions, there can be no doubt that the jury intended to find appellant guilty of receiving stolen property, knowing at the time he received it that same was stolen. The court had instructed the jury, that, before they could find the defendant guilty, they "must find that, at the time he received it, he did so receive it with the knowledge that it was stolen, and that he had the intent, in so receiving it, to deprive the true owner of the property." There was no error in the instruction as to the form of the verdict.

The indictment charged that appellant "did unlawfully and feloniously receive and have, with the felonious intent to deprive the true owners thereof, he then and there well knowing that the property had been so feloniously stolen," etc. When the jury found the appellant guilty as charged in the indictment, they necessarily found that he received the goods, knowing at the time that they were stolen.

There is no error. Affirmed.

AMERICAN RY. EXPRESS CO. v. COLLINS. (No. 63.)

(Supreme Court of Arkansas. June 21, 1920.)

1. Carriers ⇨ 134—Evidence held to show identity of shipment by express.

In action against express company for loss of plaintiff's son's effects, delivered to company by Navy Department for transmission to plaintiff, evidence held to warrant finding that the articles contained on the list of son's effects given plaintiff by Navy Department were those delivered by the department to express company.

2. Carriers ⇨ 136—Whether express company delivered same package received by it held for jury.

In an action against an express company for loss of the effects of plaintiff's son, delivered to it by the Navy Department for transmission to plaintiff, whether or not the department delivered to the express company the personal effects that belonged to plaintiff's son, and whether the company tendered to plaintiff the same package, held for the jury.

Appeal from Circuit Court, Yell County; A. B. Priddy, Judge.

Action by J. K. Collins against the American Railway Express Company. From judgment for plaintiff, defendant appeals. Affirmed.

Davis & Bohlinger, of Dardanelle, for appellant.

WOOD, J. Jerry Collins died on the United States hospital ship *Mercy*. The Navy Department furnished J. K. Collins, his father, hereafter called appellee, a list of his son's personal effects. Appellee instructed the Navy Department to forward by express his son's belongings to him at Ola, Ark. June 15, 1919, the agent of the American Railway Express Company, hereafter called appellant, attempted to deliver to appellee a bundle of clothing which it had received from Norfolk, Va. Upon examination of the package appellee became satisfied that it did not contain the property of his son. It did not contain all the items on the list of his son's property which had been sent the appellee by the Navy Department. Some of the items were marked "R. Collins." Appellee thought the package delivered weighed more than the weight given of the package containing his son's property. The Navy Department sent to the appellee a bill of lading November 1, 1918. He turned the bill of lading over to the telegraph operator at Ola and requested him to trace the goods, which the operator afterwards told him that he could not locate. Appellee made several inquiries of appellant's agent at Ola, and upon being unable to locate the goods appellee brought this action against the appellant August 12, 1919, to recover damages for the loss of the articles, which he valued at the sum of \$85. The bill of lading and the list of articles furnished appellee by the Navy Department were without objection introduced in evidence. Appellee testified to the items which were included in the list sent him by the Navy Department and which were not contained in the package tendered him by the appellant. On cross-examination appellee stated that he could not swear that the items claimed as missing had ever been delivered to appellant, and that he could not swear that the items claimed by him were the items listed under the heading of personal effects on the blank furnished by the Navy Department; but he further stated on redirect examination that the list of his son's personal effects offered in evidence had been forwarded to him by the Navy Department through the mail. He could not swear that the appellant issued the bill of lading which was sent him.

The court instructed the jury, among other things, that the burden was upon the appellee to make out his case by a preponderance of the evidence, and that unless the goods of appellee's son were delivered to the appellant it would not be liable; that if appellant tendered to appellee the goods that were delivered to it by the Navy Department for shipment to appellee the appellant would not be liable. The appellant asked the court to instruct the jury to return a verdict in its favor. The court refused to grant appellant's prayer. The jury returned a verdict in favor

of the appellee in the sum of \$55. From the judgment in that sum is this appeal.

Appellant contends that there is no testimony to show that the items listed by the Navy Department, which list was sent by the Navy Department through the mail to appellee, were ever delivered to the appellant; that there is no testimony to show that the package which appellant tendered to appellee was not the identical package which it received from the Navy Department for shipment to the appellee.

[1, 2] This contention of appellant is untenable. Although appellee was unable to identify the articles contained on the list sent by the Navy Department as the ones delivered by the Navy Department to appellant for shipment to the appellee, and although no other witness testified that they were the same articles delivered to appellant for shipment to the appellee, yet the jury were warranted in finding that such were the facts from the list sent by the Navy Department through the mail to the appellee and the direction given by the appellee to the Navy Department to ship the articles contained on the list to him, and the further fact that the Navy Department sent in its letter to appellee the bill of lading showing that the Navy Department had delivered to appellant a package to be transported to the appellee. This fact made it an issue for the jury to say whether or not the Navy Department delivered to appellant the personal effects that belonged to appellee's son, and whether appellant tendered to appellee this same package.

The court did not err in submitting this issue to the jury. Appellant does not complain that the issue was submitted under erroneous instructions. Appellant only contends that there was no substantial evidence to take that issue to the jury. We are convinced that there was such evidence.

The judgment is correct, and therefore affirmed.

COLE v. STATE. (No. 68.)

(Supreme Court of Arkansas. June 21, 1920.
Rehearing Denied July 12, 1920.)

1. Intoxicating liquors §20—Statute providing for summary seizure and destruction valid.

The statute providing for the summary seizure and destruction of intoxicating liquors kept in a prohibited district to be sold contrary to law is valid.

2. Jury §19(15)—Jury trial in proceeding to condemn intoxicating liquors not contemplated.

The statute providing for the summary seizure and destruction of intoxicating liquors kept in a prohibited district to be sold contrary to law does not contemplate jury trial in a proceeding for the condemnation of such liquors.

3. Intoxicating Liquors §250—Defendant complaining of condemnation of liquor must show he was not negligent in failing to attend hearing.

It is the duty of a litigant to keep himself informed of the progress of his case, and one charged with illegal sale of intoxicants, seeking relief against a collateral judgment for their condemnation on the ground of unavoidable casualty in not attending the hearing, must show that he himself was not guilty of negligence in failing to be present, a requirement not satisfied by testimony of himself and his attorney that they understood the case was set for a later hour than recited in the bill of exceptions.

Appeal from Circuit Court, Sebastian County; John Brizzolara, Judge.

W. H. Cole was prosecuted for the illegal sale of intoxicating liquors, and acquitted, and from a collateral judgment that the alcohol in possession of the sheriff and claimed by defendant be publicly destroyed, defendant appeals. Affirmed.

This appeal involves the validity of a judgment of the circuit court adjudging that ten gallons of alcohol in the possession of the sheriff of Sebastian county, Ark., and claimed by W. H. Cole, be publicly destroyed by the sheriff.

It appears from the transcript that the cause was specially set for hearing in the circuit court at 8:30 a. m. on November 17, 1919, and that the defendant was notified of the setting of the case for that time. When the case came on to be heard, the defendant and his counsel were separately called, but neither one made any appearance in the proceeding. The prosecuting attorney on behalf of the state introduced evidence tending to show that the ten gallons of alcohol had been taken by the sheriff from the possession of W. H. Cole, and that said Cole kept alcohol to be sold contrary to law. The alcohol was destroyed by the sheriff in compliance with the order of the circuit court.

Subsequently, at the same term of the court, the defendant filed a motion for a new trial, in which he set up that he had been charged with the illegal sale of intoxicating liquors, and had been acquitted of the charge, that the alcohol had been seized by the sheriff, and that the case, in so far as the seizure of the alcohol was concerned, had been continued several times at the instance of the prosecuting attorney, and at each time the case had been set for 1 o'clock p. m.; that the case had been finally set for November 17, 1919, and that both Cole and his attorney understood that it was set for 9 o'clock a. m.; that the attorney of Cole resided near the courthouse, and came there at 8:40 o'clock a. m. on the morning

in question for the purpose of appearing for Cole in the case; that when he arrived the case had been disposed of and the alcohol ordered destroyed; that the sheriff complied with the order of the circuit court as soon as it was made, and immediately publicly destroyed the alcohol; that both Cole and his attorney understood the proceeding to be set for trial in the circuit court at 9 o'clock a. m. on the day of November 17, 1919. The case is here on appeal.

J. E. London, of Van Buren, and T. S. Osborne, of Ft. Smith, for appellant.

Jno. D. Arbuckle, Atty. Gen., and Silas W. Rogers, Asst. Atty. Gen., for the State.

HART, J. (after stating the facts as above). [1, 2] It may be stated at the outset that the court has held valid our statute providing for the summary seizure and destruction of intoxicating liquors kept in a prohibited district to be sold contrary to law, and that the act does not contemplate a trial by jury in a proceeding to condemn and destroy such liquors. *Kirkland v. State*, 72 Ark. 171, 78 S. W. 770, 65 L. R. A. 76, 105 Am. St. Rep. 25, 2 Ann. Cas. 242.

It appears from the bill of exceptions that the case was specially set for 8:30 a. m. on November 17, 1919, and that it was heard and determined at that time. It is true that according to the affidavits of Cole and his attorney they understood that the case was set at a different hour on that day, but these affidavits were not sufficient to conclusively overcome the recital in the bill of exceptions that the case had been specially set for 8:30 a. m.

[3] The court overruled Cole's motion for a new trial because it did not state the facts, and it cannot be said that the finding of the court in this respect is without evidence to support it. The case was brought regularly on for trial and was regularly submitted for decision. It is the duty of a litigant to keep himself informed of the progress of his case, and the party seeking relief against a judgment on the ground of unavoidable casualty must show that he himself is not guilty of negligence. *Trumbull v. Harris*, 114 Ark. 493, 170 S. W. 222.

As above stated, the testimony of Cole and his attorney to the effect merely that they understood the case was set for a later hour does not conclusively overcome the recital in the bill of exceptions that the case was specially set for trial at 8:30 a. m.; and it cannot be said, therefore, that the judgment of the court in overruling Cole's motion for a new trial is not without evidence to support it.

Therefore the judgment will be affirmed.

HUMPHREYS, J., not participating.

SMITH v. J. M. TAYLOR & CO. (No. 74.)

(Supreme Court of Arkansas. June 21, 1920.
Rehearing Denied July 12, 1920.)

1. Payment §65(6)—One asserting payment of an obligation has burden of proof.

Where defendant asserted payment of a duebill given plaintiff, defendant had the burden of proof on that issue.

2. Payment §74(1)—Evidence held to show payment of duebill.

In suit for an accounting brought by a negro farmer against a merchant, evidence held to warrant finding in favor of the merchant that a duebill given the negro had been paid; it appearing the negro had executed a receipt.

3. Appeal and error §907(5)—Presumption that books of account not brought into record supported decree.

In a suit for an accounting, where the decree recited that on presentation of defendant's books in open court, it was adjudged that a certain amount was due, and the books were not brought into the record by bill of exceptions, or otherwise, it will be presumed by the appellate court that they sustained the findings and decree.

4. Frauds, statute of §23(3)—Recital of mortgages took transaction out of statute.

Where mortgages recited that they were given to secure advancements, and provided that defendant storekeeper should furnish supplies to plaintiff and his hands, the recitals constituted the undertakings original obligations without the statute, and so there might be a recovery, though the supplies, instead of being charged to plaintiff, were charged to his hands.

Appeal from Cross Chancery Court; A. L. Hutchins, Chancellor.

Suit by Walter Smith against J. M. Taylor & Co. which cross-complained. From a decree for defendant on its cross-complaint, plaintiff appeals. Affirmed.

R. R. Bond and Killough, Lines & Killough, all of Wynne, for appellant.

J. C. Brookfield, of Wynne, for appellee.

HUMPHREYS, J. Appellant, a negro farmer, instituted suit against appellee, a supply merchant, for an accounting growing out of transactions between them for the years 1916, 1917, and 1918, and for judgment in the sum of \$1,400. Appellee filed answer, denying any indebtedness on account of transactions between them, and, by way of cross-complaint, alleging that appellant was indebted to his supply store in the sum of \$590.60, with interest thereon from October 25, 1918, after giving appellant credit for all amounts paid in cash or cotton; that, to secure advances made to appellant and his hands in 1917 and 1918, appellant executed two notes, secured by mortgages upon certain chattels and crops being raised by ap-

pellant, the first note and mortgage being executed on June 30, 1917, and due November 15, 1917, and the second note and mortgage upon May 25, 1918, due and payable in six months thereafter, both notes bearing interest at the rate of 10 per cent. per annum from their respective dates. The cross-bill contained a prayer for foreclosure in the total sum of \$590.60, the alleged balance due on open account for advances made by appellee to appellant and his hands. Appellant pleaded the statute of frauds as a defense to appellee's claim for merchandise furnished his hands. The cause was submitted upon the pleadings, evidence, and exhibits thereto, from which the court found that appellant was indebted to appellee in the sum of \$590.60, and upon which finding a judgment and decree of foreclosure against the property were rendered. From the judgment and decree, an appeal has been duly prosecuted to this court.

Appellant contends that in stating the account the trial court erred: First, in disallowing him \$400 and interest on alleged loan; second, in allowing appellee a large sum in excess of \$127 for merchandise in 1917; third, in allowing appellee \$317.90 and interest on account of merchandise furnished R. H. Murray, and \$51.95 and interest for merchandise furnished A. C. Chapman.

[1, 2] 1. Appellant testified: That he loaned appellee \$400 on December 19, 1916, for a short time, and took the following duebill as evidence of the indebtedness:

"Parkin, Ark.

"In Account with J. M. Taylor Co.

"I have borrowed \$400 from Walter Smith for two weeks.

"J. M. Taylor. 12/19/16."

That he gave appellee a check on the Parkin Home Bank for the amount. That he deposited the duebill with the bank in order for appellee to pay it if he desired to do so, as well as for safe-keeping, where it remained, without being presented for payment, until February or March, 1919, at which time it was returned to him on request. That appellee never repaid, and still owes, the amount to him. On the 20th day of December, 1916, appellant's account with the bank was charged with \$400.

Appellee testified that he bought some cotton from appellant and owed him \$400; that, on account of the bank being closed, appellant did not want a check, and asked for a duebill, which he gave him; that he paid the duebill and took a receipt, as appellant did not have it with him at the time he paid it; that he wrote the receipt, and appellant signed it. The receipt is as follows:

"Received of J. M. Taylor for duebill dated 12/19/16 paid in full. 12/23/16. Walter Smith."

Appellant testified that he signed the receipt when he signed the first note and mortgage, without knowing its contents or that he was signing a receipt.

The point of difference as to whether the duebill evidenced money loaned or cotton sold is really immaterial further than to show who had the better memory. Both testified that it represented a bona fide indebtedness. The all-important question is whether it was paid. The burden, of course, was upon appellee to establish the payment. The receipt strongly corroborates the testimony of appellee on this point, unless obtained through deceit or fraud. There is nothing in the evidence to indicate fraud or deceit. Appellant could read, and was negligent unless he did so. The other papers signed by him did not bear the same date of the receipt. Neither he nor the bank, with whom the duebill was left, ever presented it for payment. We think appellee met the burden. The testimony preponderates in favor of payment.

[3] 2. Appellant testified positively that he only purchased merchandise to the amount of \$127 from appellee in 1917; that the items in excess of that amount were items purchased in 1916, for which he had settled.

Appellee testified to the correctness of the items from a statement made up from the books, and agreed to produce the books in open court for the inspection of the court and parties, including the book in which the running account for 1916 was entered, so that it might appear whether the items charged in 1916 and paid for were carried into the 1917 account. Appellee admitted that appellant had paid the running account of 1916 in full.

The contention of appellant on this point is that, had the book of 1916 been produced, it would have disclosed that items purchased in 1916, and paid for, had been carried forward and entered as purchases in 1917. This contention is met and fully answered by the recital in the decree that—

"Upon presentation of defendant's books in open court, it is found and adjudged that the amount due, secured by said mortgages and notes, is the sum of \$590.60."

The books not having been brought into the record by bill of exceptions or otherwise, and this evidence not being before us, we must presume that it sustained the finding and decree of the court.

[4] 3. The evidence disclosed that R. H. Murray and A. C. Chapman were appellant's hands; that, during the year 1917, R. H. Murray obtained merchandise of the value of \$317.90, and A. C. Chapman of the value of \$51.95, from appellee, which accounts were carried on the books as accounts against R. H. Murray and A. C. Chapman; that the

mortgages, which were given to secure advancements, contained the stipulation that appellee was to furnish supplies to appellant and his hands. These clauses in the mortgages constituted the undertakings original obligations, and therefore not within the statute of frauds.

No error appearing, the decree is affirmed.

HOME LIFE & ACCIDENT CO. v. COMPTON. (No. 75.)

(Supreme Court of Arkansas. June 21, 1920.)

Insurance §136(2)—Delivery of policy to insured's wife held compliance with "delivery" clause.

Delivery of life policy by insurer to wife of insured in keeping with his instructions held a delivery within meaning of delivery clause, test of delivery not being whether policy was deposited with insured, but whether it passed intentionally out of insurer's control into that of insured.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Delivery.]

Appeal from Circuit Court, Independence County; Dene H. Coleman, Judge.

Suit by Susie Compton against the Home Life & Accident Company. From judgment for plaintiff, defendant appeals. Affirmed.

T. D. Wynne, of Fordyce, for appellant.
S. M. Bone, of Batesville, for appellee.

HUMPHREYS, J. Appellee instituted suit against appellant in the Independence circuit court to recover \$2,000, as beneficiary of a policy of life insurance issued by appellant on the life of her husband, Thos. S. Compton, Jr.

Appellee filed answer, pleading nonliability on the alleged ground that the policy was not delivered to the insured during his lifetime and while in good health, and, for that reason, under the terms of the policy, was an incomplete contract.

The cause was heard upon the pleadings and evidence, at the conclusion of which each party requested a peremptory instruction in his favor. The court refused the request of appellant and granted the request of appellee. In response to the peremptory instruction in favor of appellee, the jury returned a verdict against appellant in the sum of \$2,000. The court thereupon assessed a penalty of 12 per cent. on the face of the judgment, \$250 attorney's fee, and rendered judgment against appellant for \$2,480, from which judgment an appeal has been duly prosecuted to this court.

The facts necessary to a determination of

the only question presented by this appeal are as follows: In the month of August, 1918, Thos. S. Compton, Jr., the then husband of appellee, applied for two life insurance policies of \$2,500 each in appellant's life insurance company. On account of having entered the military service during the war between the United States and Germany, appellant company issued a policy for only \$2,000 and mailed same, on the 4th day of October, 1918, to its agent, R. M. Carter, at Batesville, Ark., for delivery and collection of the first premium. The policy contained the following clause:

"This policy shall not take effect until the first premium shall have been actually paid and the policy actually delivered to the insured during the lifetime and good health of the insured."

In the interim between the application and the issuance of the policy the insured, Thos. S. Compton, Jr., directed the agent to deliver the policy, when it came, to his wife, the beneficiary therein, for him. When the policy arrived, the insured was at Camp Mayberry, Austin, Tex. The policy was received by the agent on the 5th day of October, 1918, and on the same day, delivered by him to Susie Compton, wife of the said Thos. S. Compton, Jr. At the time the agent delivered the policy, he collected the first year's premium and accounted to appellant company for the amount due it. The insured, Thos. S. Compton, Jr., was in good health at the time the policy was delivered, but on the 13th of the month died of influenza at said camp. His body was shipped back to Batesville and interred. Proof of his death was made to appellant company in accordance with the requirement of the policy, and payment was refused on the ground that the policy was not delivered in person to the insured in his lifetime.

Appellant contends that the contract was incomplete and not binding on it, because the policy was not actually delivered to the insured; in other words, the contention is made that the delivery of the policy to the wife of Thos. S. Compton, Jr., in keeping with his instruction so to do was not a delivery to him within the meaning of the delivery clause in the policy. The test of an actual delivery of an insurance policy by the insurer, or its agent, to the insured, is not whether it was deposited with the insured, but whether it passed intentionally out of the control or dominion of the insurer, or its agents, into the control or dominion of the insured. It is not an essential to actual delivery that there be a manual delivery to the insured. A delivery to a third person, designated by the insured, is to all intents and purposes a delivery to the insured. 14 R. C. L. 898; National Life Ass'n v. Speer, 111 Ark. 173, 163 S. W. 1188; Mo. State Life Ins. Co. v. Bur-

ton, 129 Ark. 137, 195 S. W. 371. In the two Arkansas cases supra the court held, under the facts of each, there had been no delivery of the policies. In those cases the companies and their agents had not parted with the control or dominion over the policies; but the doctrine was clearly announced in the case of National Life Ass'n v. Speer, and clearly inferable in Mo. State Life Ins. Co. v. Burton, Adm'r, that, if an insurance company had intentionally parted with the control of and dominion over the policies, such act would amount to a delivery of the policies within the meaning of clauses similar to the delivery clause in the policy involved in the instant case.

No error appearing, the judgment is affirmed.

PEARMAN v. PEARMAN et al. (No. 67.)

(Supreme Court of Arkansas. June 21, 1920.)

1. Quieting title \S 12(4)—Plaintiff must be in possession unless title be merely equitable.

The equity jurisdiction to quiet title independent of statute can only be invoked by a plaintiff in possession, unless his title be merely an equitable one, since where the title is legal and some one else in possession, the remedy at law is plain, adequate, and complete.

2. Taxation \S 793—Tax title cannot be confirmed where another is in adverse possession of premises.

Where plaintiff in a suit to confirm a tax title had previously given permission to his son to occupy the premises rent free, and it appeared that after the son's death his widow claimed that the land was a gift to the son, and was in actual adverse possession, it was error to confirm the tax title in view of Kirby's Dig. § 665, providing that there shall be no confirmation of the sale of any lands that are in actual possession of any person claiming title adverse to petitioner.

Appeal from Arkansas Chancery Court; John M. Elliott, Chancellor.

Suit by G. W. Pearman and others against Anna Pearman to confirm a tax title. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

G. W. Pearman brought this suit in equity under that part of chapter 25 of Kirby's Digest relating to the confirmation of tax titles.

Anna Pearman was allowed to file exceptions to the petition on the ground that she resided on the property and was in actual adverse possession of it. G. W. Pearman filed a response, in which he denied that Anna Pearman was in legal possession of the property, or had been for several years last past.

G. W. Pearman was a witness for himself. According to his testimony, he was the own-

er of three lots in the town of De Witt, Ark., and had owned them since December, 1898. The lots in controversy were sold at a tax sale in 1896 for the taxes of 1895. On June 14, 1898, the clerk executed a tax deed to J. A. Gibson, the purchaser at the tax sale. On June 25, 1898, J. A. Gibson, by a quit-claim deed conveyed the lots to L. C. Smith, and in December, 1898, L. C. Smith conveyed the lots to G. W. Pearman. G. W. Pearman has paid the taxes on the lots every year since he purchased them. He gave his son, Arthur Pearman, permission to build a house on the lots. He furnished to his son part of the lumber, and his son, who was a carpenter by trade, furnished the balance of the lumber and material, and himself erected the house. Pearman allowed his son to live on the place rent free, and intended that in case he died first that his son should have the lots as a part of his portion of the father's estate. The son became sick, and went West for his health. On his return he resided with his father, but was allowed to receive the rents from the property. The son rented out the property, and his tenant was in possession of it at the time he died. A few days before the son's death, G. W. Pearman told him that he intended to deed the property to the son's infant child as soon as he could quiet the title to the property.

Anna Pearman is the widow of Arthur Pearman, who was the son of G. W. Pearman. She and Arthur Pearman were married on the 2d day of October, 1915, and lived together as husband and wife until the husband died. A child was born unto them on November 4, 1916, and it died just three months after the death of its father. Arthur Pearman and Anna Pearman, his wife, moved into the house which had been built by him on the lots in controversy, as soon as they were married, and lived there until Arthur Pearman went West for his health. They then rented the property, and Arthur Pearman collected the rents as long as he lived. After Arthur Pearman died, Anna Pearman did not collect the rents for two months, but after their baby died she again began collecting the rents. Subsequently she moved into the house, and requested G. W. Pearman to make her a deed to the property, claiming that he had given the lots to his son before the latter erected the dwelling house on them. G. W. Pearman refused to make her a deed, and she continued to reside on the lots, claiming title to them and claiming to hold them adversely to G. W. Pearman. This all occurred before G. W. Pearman brought suit under the statute to confirm his title in the lots. During the pendency of the proceedings, G. W. Pearman died, and the proceedings were revived in the name of his two sons, who were his sole heirs at law.

The chancellor found the issues in their

favor, and the title to the lots was quieted in them against the claims of all persons whomsoever. Anna Pearman has appealed.

R. D. Rasco, of De Witt, for appellant.
Lee & Moore, of Clarendon, for appellees.

HART, J. (after stating the facts as above). [1] The equity jurisdiction to quiet title, independent of statute, can only be invoked by a plaintiff in possession, unless his title be merely an equitable one. The reason is that where the title is a purely legal one and some one else is in possession, the remedy at law is plain, adequate, and complete, and an action of ejectment cannot be maintained under the guise of a bill in chancery. In such case the adverse party has a constitutional right to a trial by a jury. *Mathews v. Marks*, 44 Ark. 436; *Ashley v. Little Rock*, 56 Ark. 391, 19 S. W. 1058; *Burke v. St. L., I. M. & S. Ry. Co.*, 72 Ark. 256, 50 S. W. 275, and *St. Louis Refrigerator & Wooden Gutter Co. v. Thornton*, 74 Ark. 383, 86 S. W. 852.

The action has been greatly extended by statute, and in many states is the ordinary mode of trying disputed titles. *Pomeroy's Equity Jurisprudence* (3d Ed.) vol. 4, § 1396. Such is not the case in this state, however.

Section 665 of Kirby's Digest, which is a part of the chapter relating to the method of procedure in confirming tax titles, provides that there shall be no confirmation of the sale of any lands that are in actual possession of any person claiming title adverse to the petitioner. At the time the proceedings in the case at bar were brought by G. W. Pearman, Anna Pearman was in the actual possession of the lots in controversy, claiming title thereto adverse to the petitioner. She claimed that G. W. Pearman had given the lots to his son, who was her husband, and that she and her husband had resided on the lots until they went West, and afterwards collected the rents on the same until his death. He left surviving him his widow and an infant child. The child died in about three months after the father and the widow went into possession of the lots after her child's death, and she claimed to hold adversely to G. W. Pearman at the time he brought the proceedings to confirm his tax title in the lots.

[2] Anna Pearman did not seek to quiet her own title to the lots, and thereby give the court jurisdiction of the entire controversy, as was the case in *Goodrum v. Ayers*, 56 Ark. 93, 19 S. W. 97. She was content to file exceptions to the right of G. W. Pearman to have his tax title confirmed, and did not seek affirmative relief on her own account. She was in adverse possession of the lots at the time G. W. Pearman filed his petition to confirm his tax title, and the court erred in granting the relief prayed for.

It follows that the decree must be reversed, and the cause will be remanded for further proceedings in accordance with the principles of equity and not inconsistent with this opinion.

HETTLE et al. v. STATE. (No. 76.)

(Supreme Court of Arkansas. June 21, 1920.)

1. Indictment and Information \S 114—Indictment held insufficient to sustain conviction of second offense of illegal cohabitation.

Since under Kirby's Dig. \S 1810, the offense of illegal cohabitation is a graded crime, and the fact of whether it is a first, second, or third offense is an element in the punishment thereof, an indictment for illegal cohabitation, failing to charge a second offense, was insufficient to sustain a conviction for a second offense.

2. Indictment and Information \S 81(1)—Indictment held not defective as not charging an offense by persons named in caption.

An indictment for illegal cohabitation was not defective in that no one was charged in the body of the indictment with having committed the offense, where the two accused persons were properly named in the caption of the indictment, and were charged in the indictment with having committed the offense, by reference to their names set out in the caption, and in the latter part of the indictment were specifically named as the parties against whom the indictment was preferred.

3. Criminal law \S 369(1), 1169(11)—Admitting evidence of illegal cohabitation prior to former conviction held prejudicial.

In prosecution for illegal cohabitation, the admission of evidence, over defendants' objection, that they dwelt together in like manner as husband and wife prior to a previous conviction for the same offense was error, and such error was prejudicial; the evidence being undisputed that after the former conviction defendants never slept in the same house.

4. Criminal law \S 369(1)—Evidence of like offenses before former conviction admissible only in corroboration.

In prosecution for illegal cohabitation, had the evidence tended to show that defendants committed such offense after their former conviction therefor, it would have been proper to admit evidence of like offenses occurring before their former conviction in corroboration, but for such purpose only.

Appeal from Circuit Court, Clay County;
R. E. L. Johnson, Judge.

Alford Hettle and another were convicted of illegal cohabitation, and appeal. Reversed, and remanded for new trial.

J. M. Burrow, of Mammoth Spring, for appellants.

Jno. D. Arbuckle, Atty. Gen., and Silas W. Rogers, Asst. Atty. Gen., for the State.

HUMPHREYS, J. Appellants were indicted in the Clay county circuit court, West-

ern district, for the crime of illegal cohabitation, in the following form:

"State of Arkansas v. Alford Hettle and Alpha Hall. No. 1223. Western District of Clay County, June Term, 1919.

"The grand jury in and for the district, county, and state aforesaid, in the name and by the authority of the state of Arkansas, accuse the persons named in the caption hereof as defendants of the crime of illegal cohabitation, committed as follows, to wit:

"On the 1st day of May, 1919, in the district, county and state aforesaid, the persons named in the caption hereof did unlawfully, knowingly, and willfully live and cohabit together as husband and wife, without being married to each other, he, the said Alf Hettle, being a male person, and she, said Alpha Hall, being a female person over the age of 16 years, against the peace and dignity of the state of Arkansas. T. W. Davis, Prosecuting Attorney for the Second Judicial District.

"Indictment No. 8."

The sufficiency of the indictment was attacked by demurrer upon the following grounds:

(1) That the said indictment does not state facts sufficient to constitute an offense.

(2) That said indictment does not charge any one in the body of the indictment of having committed an offense.

Over the objection and exception of appellants, the demurrer was overruled, and the cause was submitted to a jury upon the instructions of the court and evidence adduced. The jury returned the following verdicts:

"We, the jury, find the defendant Alpha Hall, guilty of first offense and fix her punishment at a fine of \$20.

"We, the jury, find the defendant Alford Hettle guilty of second offense and fix his punishment at a fine of \$100 and at imprisonment in the county jail for a period of six months."

Judgments were rendered in accordance with the verdicts, from which judgments, an appeal has been duly prosecuted to this court under proper proceedings.

[1] It is insisted that the court erred in overruling the demurrer to the indictment, because it failed to charge a second offense. Under section 1810 of Kirby's Digest, the punishment for illegal cohabitation is graded, according to first, second, and third offenses. For the first offense, offenders may be fined in a sum not less than \$20 nor more than \$100; for a second offense not less than \$100 and imprisonment in the county jail not exceeding twelve months; and for a third offense, or any subsequent offense, by imprisonment in the penitentiary for any time for not less than one nor more than three years. Appellants were tried for a second offense under the indictment, which did not specifically charge a second offense. The contention is made by the state's at-

torney that the essential elements of each offense are the same, and that therefore the allegations could be no different from a first, second, or third offense. We think the learned attorney in error in this contention. Under section 1810 of Kirby's Digest, the offense of illegal cohabitation is a graded crime, and the fact of whether it was a first, second, or third offense is an element in the punishment thereof. This court said in the case of *Kightlinger v. State*, 105 Ark. 172, 150 S. W. 690, that—

"Every indictment, for whatever offense, must set out all the facts which in law may influence the punishment for the commission thereof."

In support of that rule, citation was made to 1 Wharton, Crim. Law, § 1003; Bishop on Stat. Crimes, § 427; 2 Bishop's New Criminal Procedure, § 48, which last citation is as follows:

"If the punishment to be inflicted is greater or less, according to the value of the property, the value must be stated in the indictment, because every indictment, for whatever offense, must set out every fact which the law makes an element in the punishment thereof."

The rule is also supported by the following authorities: *Neece v. State*, 82 Tex. Cr. R. 378, 137 S. W. 919; *State v. Paisley*, 36 Mont. 237, 92 Pac. 566; *Shiffett v. Com.*, 114 Va. 880, 77 S. E. 608. The indictment, under the rules stated, was insufficient to sustain a conviction for a second offense.

[2] The contention is also made by appellants that the indictment is fatally defective because no one was charged in the body of the indictment with having committed the offense. Appellants are properly named in the caption of the indictment and are charged in the indictment with having committed the offense, by reference to their names set out in the caption, and in the latter part of the indictment are specifically named as the parties against whom the indictment is preferred. We think appellants are properly and sufficiently charged in the indictment with having committed a first offense.

[3] Appellants were convicted in a magistrate's court, on the 28th day of April, 1919, of the crime of illegal cohabitation. The indictment in the instant case was returned on June 12 following, charging them with having committed the same offense on May 1, 1919. Upon the trial, under the indictment, evidence was admitted, over the objection and exception of appellants, to the effect that they dwelt together in like manner as husband and wife prior and up to April 28, 1919. The evidence tended to show that, after the former conviction, appellant Alford Hettle engaged and occupied a room at night in a neighbor's home, a mile or more from his dwelling, and came back each

day to work on his farm. In fact, the undisputed evidence showed that, after the former conviction they never slept in the same house.

Over the objection and exception of appellants, the court instructed the jury as follows:

"Therefore, if you find from the evidence in this case beyond a reasonable doubt that the defendants, Alf Hettle and Alpha Hall, he being a male person and she being a female person over the age of 16 years, did on the 1st day of May, 1919, or at any time within 12 months next before the 12th day of June, 1919, unlawfully and willfully live and cohabit as husband and wife, without being married to each other, and in the Western district of Clay county, Ark., then it will be your duty to convict them."

[4] This was prejudicial error, so confessed by the Attorney General; for under it the jury was authorized to convict appellants for the crime of illegal cohabitation committed prior to their former conviction. Had the evidence tended to show that appellants committed the offense of illegal cohabitation after their former conviction, it would have been proper to admit evidence of like offenses occurring before their former conviction in corroboration, but for such purpose only. *Adams v. State*, 78 Ark. 16, 92 S. W. 1123.

For the error in giving the aforesaid instruction and in refusing to give the converse thereof, requested by appellants, the judgment is reversed, and the cause remanded for a new trial.

SOUTHERN MUT. LIFE INS. CO. v. PERRY. (No. 64.)

(Supreme Court of Arkansas. June 21, 1920.)

1. Insurance \S 646(1)—Burden on plaintiff to show right to recover.

The burden was on plaintiff to prove that she was entitled to recover under a policy of insurance.

2. Insurance \S 665(1)—Evidence held to show plaintiff paid premiums on policy of cousin.

In an action on a policy of insurance, evidence held to show that plaintiff paid the premiums on the policy in controversy, and that she was the cousin of insured.

3. Insurance \S 119—Policy on life of cousin on whom plaintiff not dependent void as wagering contract.

Plaintiff's policy on the life of her cousin, upon whom she was not dependent, while she was without reasonable grounds to expect that the cousin would support or aid her in any way, was void as a wagering contract.

Appeal from Circuit Court, Pulaski County; Guy Fulk, Judge.

Action by Ida Perry against the Southern Mutual Life Insurance Company. Judgment

for plaintiff, and defendant appeals. Reversed, and cause dismissed.

C. P. Harnwell, of Little Rock, for appellant.

S. A. Jones and Carmichael & Brooks, all of Little Rock, for appellee.

WOOD, J. This action was brought by the appellee against appellant on a policy of insurance issued by the appellant to one Sally Cox. The appellee was named as beneficiary in the policy.

Appellee testified that Sally Cox carried a policy with appellant. She identified the policy and same was introduced in evidence. Appellee testified on direct examination that Sally Cox died in November, 1915; that all of the dues had been paid promptly. On cross examination she testified that she (appellee) had receipts at the time Sally Cox died for all the premiums. Appellant would send appellee the receipts; would send her a notice a few days before the premiums were due; she (appellee) would send the money back to appellant and it would receipt her on a card. Sally Cox was her cousin.

At this juncture the witness was excused, and another witness was examined touching the proof of death, after which appellee was recalled for further direct examination. Her counsel asked, among others, the following questions:

"Q. They collected from her regularly, did they? A. They did collect from her regularly.

"Q. Did you know anything about the policy having been issued at the time it was issued? A. I knew nothing about it at the time it was issued.

"Q. Did you not secure it yourself? A. Did not, was not present."

On further cross-examination appellee testified that one day the agent came to her house and told her that the policy was made to her, and that Sally Cox had no change, and asked witness to pay that particular premium, and witness paid it. She could not remember the date.

Further testimony was developed, but from the conclusion we have reached on the above testimony it is unnecessary to set forth the other testimony.

Appellant prayed the court to direct the jury to return a verdict in its favor, which prayer the court refused. The trial resulted in a judgment in favor of the appellee, from which is this appeal.

[1] The court erred in refusing appellant's prayer for a directed verdict. The undisputed testimony of the appellee shows that the appellee and Sally Cox were cousins. The burden was upon the appellee to prove that she was entitled to recover under the contract of insurance.

The only conclusion that any reasonable mind could reach from the testimony of appellee is that she paid the premiums on the

policy issued by appellant to Sally Cox. If there had been no peremptory instruction, the only verdict that the jury could have returned under appellee's testimony would have been to the effect that the premiums were paid by the appellee; for that is the only possible way that the jury could have reconciled her testimony, which would have been its duty to do.

When appellee was first examined she swore positively that the appellant would send her the notice before the premiums were due, and that she would send the money back to appellant, and appellant would receipt her. The only possible way that this testimony can be reconciled with her subsequent statement that the appellant collected from Sally Cox regularly is to say that appellee furnished Sally Cox the money with which to pay the premiums. Any other view would be a stultification of the testimony of the witness, and on its face would put same beyond the pale of competent testimony. For a party who is also a witness will not be allowed to declare in one breath a certain state of facts and in the next, without explanation, declare the opposite. Under such conditions the two statements would neutralize and nullify each other, and, in legal effect, same would be tantamount to no testimony. The positions assumed by the party would be wholly inconsistent.

[2] We conclude, therefore, that the undisputed evidence shows that the appellee paid the premiums on the policy in controversy, and that she was the cousin of Sally Cox. There is no testimony tending to show that appellee was dependent upon Sally Cox, and no testimony to furnish appellee reasonable grounds to expect that Sally Cox would support or aid her in any way.

In *McRae v. Warmack*, 98 Ark. 56, 135 S. W. 809, 33 L. R. A. (N. S.) 949, we said:

"The principle upon which life insurance is based is that one who has a reasonable expectation of benefits and advantages growing out of the continuance of the life of the assured has such an interest in his life that he may insure the same. But where one is not thus interested in the life of the assured, but by insuring such life is rather interested in his early death, the contract of insurance is a mere wager, and against a sound public policy. Such contracts, it has been thought, would, if upheld, result in a mere traffic in human life, and would lend a great incentive to one thus disinterested in the life, but interested in the death of the assured to shorten that life. It is therefore well settled that the issue of a policy to one who has no insurable interest in the life of the insured, but who pays the premiums for the chance of collecting the policy, is invalid because it is a wagering contract and against a sound public policy."

[3] For the error in refusing to direct a verdict in favor of the appellant the judgment is reversed, and the cause is dismissed.

ROUNDTREE v. MEADORS et al.

(Court of Appeals of Kentucky. June 18, 1920.)

1. Judgment \Leftrightarrow 375—Fraud justifying vacation must be practiced prior to judgment.

The only fraud justifying vacation of a judgment after the term, under Civ. Code Prac. § 518, is that practiced by the successful party in the obtainment of the judgment, and fraud of the successful party in disposing of evidence necessary to the losing party on appeal is not such fraud.

2. Appeal and error \Leftrightarrow 1202—Affirmance on appeal conclusive on trial court.

Affirmance of a judgment on appeal is conclusive on a subsequent petition in the trial court to vacate the judgment and for a new trial, where the facts contained in the petition are the same as those stated in a petition on appeal for a rehearing which was denied.

Appeal from Circuit Court, Whitley County.

Action by Mary Roundtree against H. C. Meadors and others. Judgment for defendants, and plaintiff appeals. Affirmed.

See, also, 183 Ky. 47, 209 S. W. 505.

Stephens & Steely, of Williamsburg, for appellant.

Rose & Pope, of Williamsburg, for appellees.

QUIN, J. This appeal involves the sufficiency of a petition for a new trial filed in the court below by the appellant, and in which it was alleged that in November, 1914, plaintiff and her husband instituted an action against the defendants seeking a rescission of a contract executed in July, 1914, and upon a trial of said action judgment was entered in favor of defendants; from said judgment an appeal was taken to this court to perfect which a schedule was filed with the circuit clerk directing that he copy the entire record for transmission to the appellate court. The clerk copied the entire record, with the exception of four depositions taken in rebuttal by defendant, and which depositions were before the court at the time it directed that a judgment be prepared. For the purpose of drafting the judgment the papers were taken to the office of defendants' counsel, since which time it has been impossible to locate the depositions referred to. Defendants, as appellees on the former appeal, made a motion to dismiss said appeal because the record was incomplete. Appellant thereupon filed a motion to continue the case until such time as the depositions could be supplied, filing affidavits in support of the motion, and asked for an original process from this court directing that the depositions be supplied for reasons set forth in the petition, but which we deem unnecessary to state. At the same time a

notice was served of a motion to be made in the circuit court to reinstate the case upon the docket for the purpose of supplying said depositions. The circuit judge had been one of the attorneys for defendants, and, being thus disqualified from passing upon that motion, a request was made of the Governor for the appointment of a special judge to hear same and try other cases in which the presiding judge had been interested. Three terms of the court were held before a special judge was appointed. In the meantime this court affirmed the judgment in favor of defendants. Roundtree v. Meadors, 183 Ky. 47, 209 S. W. 505. It was further alleged that a petition for rehearing was filed, setting up the facts as stated in the petition for a new trial, but this was overruled; that defendant Meadors was present at the trial and had access to the papers, including the depositions aforesaid, and, whether the depositions were misplaced by fraud or design, defendants and their counsel were responsible for same being missing from the record, and the conduct of the defendants and their counsel was such as entitled plaintiff to an order setting aside the judgment and granting her a new trial. A demurrer was sustained to this petition; hence the present appeal.

[1, 2] We have been unable to find in the record on the former appeal wherein plaintiff made a motion to continue the case until such time as the depositions could be supplied, as alleged in the petition for a new trial. Plaintiff did make a motion "for all orders and processes necessary to supply certain rebuttal depositions which were lost or mislaid from the record"; but this was overruled, first because it asked no specific action by the court and was in reality not a motion, and, second, because the record could be supplied only in the circuit court. The omission from the record of a portion of the evidence necessitated an affirmance of the former appeal. Had plaintiff made the motion she evidently thought had been made, doubtless a different result would have followed. Additional time within which to supply the record would probably have been given had it been requested, but the court acted upon the only motion made. While not stated in either the petition or the brief that this action was filed pursuant to the provision of section 518 of the Civil Code, it is manifest that if the relief sought is grantable at all authority therefor must be found in section 518 and kindred sections. We are convinced plaintiff has not stated a case recognizable under the provisions of said sections. There is no allegation of fraud, except inferentially; however, the only fraud justifying a modification or vacation of a judgment after the term is that practiced by the successful party in the obtainment of the judgment. Here the acts complained of took place at a time subse-

quent to the rendition of the judgment, and therefore had the charge of fraud been direct the provision of the sections supra would not apply. The appeal does not involve the rights of any person under disability; no unavoidable casualty or misfortune is alleged. Appellant does not claim to come under the provision of said sections. The brief is but a reargument of the grounds set forth in the petition for rehearing on the former appeal. The petition alleges the facts therein contained are the same as stated in the petition for rehearing. Not only is the opinion on the former appeal conclusive of the relief sought, but appellant has shown no ground entitling her to a new trial.

The lower court did not err in sustaining the demurrer to the petition. The judgment is affirmed.

RAU et al. v. ROWE.

(Court of Appeals of Kentucky. June 15, 1920.)

Executors and administrators §514—Widow who mistakenly failed to claim exemption and expenditure entitled to allowance in later account.

A widow without children, who, through mistake and inadvertence of herself and attorney in presenting pleadings, did not assert, in her first settlement of her husband's estate, claim under Kentucky Sts. § 1403, for \$750 exemption as widow and \$282 expended for a monument, is entitled, nevertheless, to present a claim and have it allowed out of moneys which she has collected as rents.

Appeal from Circuit Court, Fayette County.

Petition for settlement of the estate of her deceased husband by Nellie B. Rowe against Sophie Rau and others. From judgment for plaintiff, defendants appeal. Affirmed.

G. C. Webb, of Lexington, for appellants.

R. L. Northcutt and R. J. Colbert, both of Lexington, for appellee.

SAMPSON, J. This litigation originated in March, 1914, when Mrs. Rowe filed her petition for a settlement of the estate of her deceased husband, making the appellants, Sophie Rau, etc., parties defendant. After judgment the case came to this court on appeal. See opinion in 168 Ky. 704, 182 S. W. 846. The judgment was reversed, with directions to enter a judgment giving Sophie Rau, etc., additional credits. This was done when the case went back to the lower court. A second opinion was decided on another branch of the case. Rau et al. v. Rowe, 184 Ky. 841, 213 S. W. 226.

After the death of Rowe and during this litigation his wife, the appellee, collected \$1,237.50 in rents from real estate which belong-

ed to his estate. As widow, there being no children, she was entitled to an exemption, under section 1403, Kentucky Statutes, of \$750. This she did not claim in her first settlement. She expended \$282 for a monument which she caused to be erected over the grave of her husband, but she had not made claim for this sum.

It is insisted that Mrs. Rowe is not entitled to assert her claim for \$750 exemption as widow and \$282 expended for a monument, because she did not include these items in her first settlement, nor until all moneys except the rents of the estate had been disbursed. In response to this she pleads that through mistake and inadvertence of herself and attorney in preparing the pleadings these two items were omitted. This being so, she is, as a matter of common justice and right, entitled to now present the claim and have it allowed and paid out of the \$1,237.50 which she collected as rents. This the circuit court did, and we find no error in the judgment.

Judgment affirmed.

PITTSBURGH, C., C. & ST. L. RY. CO. v. CARMODY.

(Court of Appeals of Kentucky. June 18, 1920.)

1. Master and servant §100(2) — Contract that railway employee's acceptance of benefits of relief department should bar action against railroad valid.

While Const. § 196, declaring that no common carrier shall be permitted to contract for relief from its common-law liability, will preclude a railroad company from contracting against liability to employees for future negligence, it does not preclude a railroad company from making settlement with an employee for injuries already sustained; consequently, an agreement between an employee and a voluntary relief department, providing for relief for injuries, etc., that acceptance of benefits will bar an action against the railroad company, is valid where the employee, after the accident, had an option to accept the benefits or reject the same and assert company's liability.

2. Master and servant §100(2)—Contract giving injured employee option to accept benefit in lieu of asserting employer's liability is not against public policy.

An agreement between a railway employee and a relief department that acceptance of benefits would preclude recovery for injuries resulting from the company's negligence is not contrary to public policy, for, as the employee was given an option to refuse the benefits, the contract amounted to no more than settlement.

3. Contracts §110—Freedom of contract will not be restricted because contract is not advantageous.

If the subject of the contract is lawful and the parties are sui juris, the right to contract

cannot be restricted because the contract is to the disadvantage of one of the parties making it.

4. Contracts 10(1)—Contract between employé and railway relief department for release on acceptance of benefits not bad for want of mutuality.

Where the contract between a voluntary relief department of a railway company and employés who made small monthly payments, which, after providing for varying benefits regardless of the company's liability, stipulated that the acceptance of benefits should release the company from liability for its negligence, it is not bad for want of mutuality where the company administered the funds and agreed to make good deficiencies.

5. Release 39—Election to accept benefits held to bar servant's action against master, though all benefits had not been received.

Where an agreement between railway employes and a relief department provided that the acceptance of benefits for injuries should release railway company from liability, etc., and an injured employé, having an election, accepted the benefits, such election is a defense to an action against the railway company, though benefits were still to be paid; this being particularly true where the employé asserted the benefits were to accrue during the remainder of his life.

Appeal from Circuit Court, Jefferson County.

Action by Thomas Carmody against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Trabue, Doolan & Crawford and Chas. W. Milner, all of Louisville, for appellant.

Elmer C. Underwood, J. L. Richardson, and S. L. Trusty, all of Louisville, for appellee.

HURT, J. The appellee, Thomas Carmody, was an employé of the appellant, Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, for the performance of the duties of a switchman in the yards of the appellant company in Louisville, and upon its moving trains from its yards in Louisville to other yards and tracts of appellant near Jeffersonville, Ind. The appellant was a common carrier. Carmody instituted this action against the railway company and one of its employés, alleging that on November 24, 1905, as the result of the negligence of the defendants, he was severely and permanently injured, and sought a recovery of damages as compensation for his injuries. The appellant company by the first paragraph of its answer denied the alleged negligence, and by a second paragraph of its answer, an amended answer, and answer to an amendment petition, pleaded as a bar to the prosecution of the action, in substance, that during a long time it in con-

junction with its employés had been maintaining, in connection with its organization and conduct of its business as a common carrier, a department which was known as the Voluntary Relief Department of the Pennsylvania Lines West of Pittsburgh; that the department was an organization for the purpose of providing indemnity for the employés of appellant in the event of injury, sickness, or death, and that the indemnity was due and payable to the employés when injured, whether the injury was the result of the negligence of the railway company or of the employé himself, or whether there was negligence on the part of any one; that the department was maintained by contributions of the employés who were members thereof at fixed rates and stated intervals, and by contributions of the appellant, it having agreed upon its part, and as a part of the contract of the organization of the department, that it would pay the expenses and costs of the operation and maintaining of the department and pay any deficit that might result from the sums paid in by the employé members being insufficient to pay the indemnities or benefits to which sick or injured employés were entitled, or pay death benefits under and in accordance with the rules and regulations of the department; that at the time and before the injuries suffered by the appellee he had, upon his application, become a member of the Voluntary Relief Department, and was a member thereof in good standing at the time of his injuries, and was entitled to the benefits of the organization in accordance with its rules and regulations, and entitled to receive the benefits allowed by the department from its relief fund for injury, sickness, or death; that in becoming a member of the department the appellee had agreed to and with the department and appellant that if he should accept benefits from the relief funds of the department for injuries suffered by him or death such acceptance would work a release of any claim for damages against the appellant arising from the injury or death; that when he received the injury complained of by him the appellee was at liberty either to accept the benefits provided by the Voluntary Relief Department or to assert a claim for compensation against the appellant by way of action for damages; that after he sustained the injury the appellee voluntarily elected to accept the benefits provided by the department from its relief funds, and that such benefits were paid to him thereafter until April 30, 1906, when he had received in benefits the sum of \$225, and at that time, under the terms and conditions of his membership, his right to receive further benefits ceased; that by his election to receive the benefits provided under the rules and regulations of the relief department and his acceptance of them he had thereby released any claim for

damages which he had against appellant growing out of his injury; and that he had thereafter instituted this action without having returned or offered to return the funds which he had received from the relief department, and which he would not have received but for his election to accept same and to waive any claim which he had against appellant. A copy of the appellee's application for membership in the department and a copy of the regulations of the Voluntary Relief Department were filed with the answer as a part thereof. The answer and amended answer contained the averment that the application of appellee to become a member of the Voluntary Relief Department which appellee had subscribed and agreed to contained the following stipulation:

"I agree that the acceptance of benefits from said relief fund for injury or death shall operate as a release from all claims for damages against said company (the appellant), arising from such injury or death, which could be made by or through me, and that I or my legal representatives will execute such further instrument as may be necessary formally to evidence such acquittance."

The regulations of the Voluntary Relief Department were alleged to contain the above-quoted stipulation and in addition thereto the following:

"Should a member or his legal representative bring suit against either of the companies now associated in administration of the relief department, or that may hereafter be so associated, for damages on account of injury or death of such member, payment of benefits from the relief fund on account of the same shall not be made until such suit is discontinued. If prosecuted to judgment or compromised, any payment of judgment or amount in compromise shall preclude any claim upon the relief fund for such injury or death."

To the above plea in bar of the action a demurrer was sustained, it being the opinion of the learned trial judge that the facts stated did not constitute an estoppel to or other valid defense to the action. A trial of the action resulted in a verdict and judgment for the appellee, and the railway company appeals, and relies solely for a reversal of the judgment upon its contention that the court was in error in sustaining the demurrer to the recited plea in bar and denying it a defense founded upon the facts therein alleged.

The appellee earnestly insists that the plea is insufficient in law for three principal reasons: First. The contract alleged by appellant to have existed between it and the appellee and the Voluntary Relief Department was prohibited by section 196 of the Constitution, and was void as against the public policy of the state. Second. The contract was not mutual, nor supported by any consideration coming from the appellant, and therefore was

not binding. Third. The regulations of the Voluntary Relief Department, together with the admissions of the answers as amended, show that the appellee was entitled to receive benefits from the relief fund of the department during his entire life, and that it ceased to pay the benefits after having paid \$225 on April 30, 1906, after which the action was instituted.

[1-3] (a) Section 196 of the Constitution renders void any contract which is prohibited by its provisions. The portion of section 196 which is relied upon as prohibitive of the contract alleged is as follows: "No common carrier shall be permitted to contract for relief from its common-law liability." The common-law liability of a railroad company to one of its employes for an injury sustained by the employe and resulting from the negligence of the railroad company was to compensate the employe for the damages sustained by him by reason of the injury. It may be conceded that a contract entered into between a railroad company and one of its employes, by the terms of which it is contracted that the company shall not be liable for damages because of an injury which may be thereafter suffered by the employe on account of the negligence of the company, is void as against public policy, as well as contravening the provisions of the Constitution, supra; but to deny to a railroad company and one of its employes the power to agree upon a binding settlement of the amount of the damages to which the employe is entitled for an injury suffered by him on account of the negligent act of the company, and to deny to the company the right to pay the employe the damages which the latter is willing to receive in settlement of his claim, and to the employe the power and right to contract for such settlement and to receive payment, would compel all such adjustment to be made at the end of litigation and by the judgment of a court, which is contrary to the public policy of this and every other state. It is evident that it is the liability for a future injury which the railroad company is prohibited from contracting against, and not a liability for an injury from negligence which has already occurred. Several states have constitutional provisions and statutes with provisions similar to section 196, supra, and in no one of them has the provision been so construed as to prevent an accord and satisfaction between the carrier and one of its employes for the claim of the employe for an injury which has already been suffered. In the contract which appellant relied upon, as embraced in its answers and in the regulations of the Voluntary Relief Department, which were presented as a part of the answer, there was no attempt by the appellant to contract for relief against its common-law liability, or any liability to which it was subject, or to limit such liability. The con-

tract provided a means of indemnity for the employé when disabled from sickness or injury, and so whether the injury arose from his own negligence or that of another, or from unavoidable accident, without fault of any one; but when the injury suffered was attributable to the negligence of appellant it did not affect any cause of action which the employé had against appellant for damages on account of the injury, until by his own voluntary action the employé elected to receive the benefits provided by the Voluntary Relief Department as compensation for the injury, and when he did so in consideration of the benefits to be received he contracted to release his claim against appellant. The contract in no way limited the liability of appellant, nor was it released from liability to an action for damages for an injury to the employé from negligence; but it was the acceptance of the benefits of the relief department as a satisfaction of the claim for damages against appellant which worked the release, and this had to occur, according to the contract, after the injury had been sustained. It is a contract to settle the past and not one providing for the future. A contract to be against public policy must be such a one as has a mischievous tendency and in some way militates against the public welfare and the rights of the public. It cannot be successfully asserted that the contract under consideration has any such effect. A contract which has the effect of enabling an employé to receive indemnity for injuries from sickness and accident, and does not take any right of action for negligent injury away from him, except by his own election and after the injury has occurred, when he is free to sue for his injury or to settle the claim by contract, does not appear to carry with it any tendency to mischief nor contravene any public right in any discernible way. The right to contract is a right vouchsafed to every citizen by the law of the land, if the subject of the contract is a lawful one and the person making same is *sul juris*, and the exercise of the right does no injury to the public. Because a man makes a contract which is bad, and not the best one which he might make under the circumstances, is no reason for taking away from him the right to contract about his own affairs, nor is such a reason sufficient to set aside a contract understandingly made with all the facts before him. Contracts similar to the one relied upon by appellant have been under consideration by the courts in various jurisdictions, in some of which were constitutional and statutory provisions similar to that embraced in section 196 of our Constitution, and where it was violative of the public policy to permit a common carrier to contract for relief against its common-law liability; and, while all of the courts have not agreed, the great weight of authority is to the effect that such

a contract does not contravene a sound public policy.

The trend of authority may be ascertained from the following decisions: *Johnson v. Railway Co.*, 58 S. C. 488, 36 S. E. 851; *Petty v. Brunswick & Western Ry. Co.*, 109 Ga. 666, 35 S. E. 82; *Eckman v. Railroad Co.*, 169 Ill. 312, 48 N. E. 496, 38 L. R. A. 750; *Johnson v. Railroad Co.*, 163 Pa. 127, 29 Atl. 854; *Ringle v. Railroad Co.*, 164 Pa. 529, 30 Atl. 492, 44 Am. St. Rep. 628; *Fuller v. B. & O. Employers' R. Ass'n*, 67 Md. 433, 10 Atl. 237; *Spitze v. Railroad Co.*, 75 Md. 162, 23 Atl. 307, 32 Am. St. Rep. 378; *Lease v. Pennsylvania Co.*, 10 Ind. App. 47, 37 N. E. 423; *Pittsburgh, etc., Ry. Co. v. Moore*, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638; *P., C., C. & St. L. Ry. Co. v. Cox*, 55 Ohio St. 497, 45 N. E. 641, 35 L. R. A. 507; *Maine v. Railway Co.*, 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315; *Chicago, B. & Q. R. Co. v. Bell*, 44 Neb. 44, 62 N. W. 314; *Donald v. Railway Co.*, 93 Iowa, 284, 61 N. W. 971, 33 L. R. A. 492; *Shaver v. Pennsylvania Co. (C. C.)* 71 Fed. 931; *Otis v. Penna. Co. (C. C.)* 71 Fed. 136; *State v. Railroad Co. (C. C.)* 36 Fed. 655; *Owens v. Railroad Co. (C. C.)* 35 Fed. 715, 1 L. R. A. 75; *Chicago, B. & Q. R. Co. v. Curtis*, 51 Neb. 442, 71 N. W. 42, 66 Am. St. Rep. 456; *Graft v. Railway Co. (Pa.)* 8 Atl. 206; *Martin v. B. & O. R. Co. (C. C.)* 41 Fed. 125; *B. & O. v. Bryant*, 9 Ohio Cir. Ct. R. 332; *Day v. Atlantic Coast Line*, 179 Fed. 28, 102 C. C. A. 654; *Judy v. Louderman*, 48 Ohio St. 562, 29 N. E. 181; *Atlantic Coast Line R. Co. v. Beazley*, 54 Fla. 311, 45 South. 761; *Hamilton v. R. R. Co. (C. C.)* 118 Fed. 92; *Johnson v. C. & S. R. Co.*, 55 S. C. 152, 32 S. E. 2, 33 S. E. 174, 44 L. R. A. 645; *King v. Railroad Co.*, 157 N. C. 44, 72 S. E. 801, 48 L. R. A. (N. S.) 450; *Harrison v. A. Midland R. Co.*, 144 Ala. 246, 40 South. 394, 6 Ann. Cas. 804; *Drobney v. Lukins, etc.*, 204 Fed. 11; *Pennsylvania Co. v. Reager's Adm'r*, 152 Ky. 824, 154 S. W. 412, 52 L. R. A. (N. S.) 841, Ann. Cas. 1915B, 312.

[4] (b) The contract is not unenforceable for want of mutuality and consideration. While the appellee and other employes of the various railroads which jointly administered the affairs of the Voluntary Relief Department each contributed to the funds of the department a small sum from his wages each month, yet they received the entire benefits of the fund. The amount of the benefits when paid to an employé was not controlled by the sum paid in by him nor the state of the treasury of the department. The appellant, together with the other railroads who were interested in administering the department, paid all the expenses of the administration of the department, supplied at its expense the necessary facilities for conducting its business, held the funds of the department and was responsible for their safe-keeping, and agreed to pay into its treasury the sums

necessary to cover any deficits which might arise therein from the contributions of the employes at any time not being sufficient to meet the demands of the treasury, in paying the benefits to which the members were entitled on account of disablement from sickness, accident, or injury of any kind, under the regulations of the department. The agreement made by the company and the employes was concurrent and obligatory upon both, and each agreed to pay in consideration of the promises and payments by the others. Discussing a contract not exactly like the one under consideration here, but containing the same essential features, it was said in *Petty v. Brunswick & Western Ry. Co.*, supra:

"That such a contract secured to an employe substantial benefits, and that the master contributed to the fund for the payment thereof, constituted a valuable consideration as to the employe; and this is true though he himself made a small monthly contribution to that fund. A contract of this kind is not wanting in mutuality."

In *Railway Co. v. Cox*, 55 Ohio St. 516, 45 N. E. 645, 35 L. R. A. 507, touching a similar contract, the court said:

"The promises are concurrent and obligatory upon both; both promise and both pay in consideration of promises and payments by the other; and the fact that third persons are interested does not impair the force of the obligation. If these stipulations do not supply consideration it would be difficult to frame such as would; and there being express assent to the terms of the contract by both parties, the element of mutuality is not wanting."

The same views as the above are expressed in *Judy v. Louderman*, 48 Ohio St. 562, 29 N. E. 181; *Lease v. Penna. Co.*, 10 Ind. App. 47, 37 N. E. 423, and *Otis v. Penna. Co.*, supra.

[5] (c) It is insisted for appellee that the pleadings admit that his injury was such that by reason of the rules and regulations of the relief department he was entitled to receive benefits for a greater length of time than same were paid to him, and that at the time of the institution of this action he was still entitled to receive benefits, although the relief department had then ceased to pay them to him. It is urged that the plea in bar is insufficient, in that it does not aver that the appellee had received all the benefits which under the contract he was entitled to receive; the allegation upon that subject being a conclusion and not an averment of facts which show a complete satisfaction, treating the acceptance of the relief department contract as an accord of the claim of appellee for damages for his injuries. This contention would be correct if the contract which constitutes the accord provided that the accord should be satisfied in full before it should be a binding settlement and obligatory upon the appellee. There can be no dispute of the com-

mon-law principle that where an accord is based upon a contract or agreement which provides for the performance of certain acts in satisfaction of the cause of action to be released the satisfaction and release is not effected until a full performance has occurred. Where, however, the accord consists of a promise or of the making of a contract to be performed in the future, and this promise or contract is accepted in satisfaction of the cause of action, the cause of action is released, and the party releasing the cause of action which he had and accepting the promise in satisfaction of it must thereafter look to the promise, and not his original cause of action. 1 R. C. L. 199, 200; *B. & W. Ry. Co. v. Clem*, 80 Ga. 539, 7 S. E. 84. It is evident in the instant case, and the averments of the answer and its amendments substantially alleged, that the appellee after receiving his injury accepted the benefits provided by the relief department and thereby elected to release the appellant from his cause of action, and as an accord and satisfaction of the claim which he had against appellant agreed to accept and to receive the benefits provided for him by the regulations and provisions of the relief department. It would appear that this is conclusively true if appellee's contention as to the construction of the relief department contract is correct, and that under same he was entitled to receive the benefits during his lifetime, since, if there was no release of his cause of action against appellant until the relief department had paid to him all the benefits to which he was entitled under it, there would be no settlement and release of the cause of action during the lifetime of the appellee. Such was evidently not the intention of the parties in making the relief department contract. As said in *Pennsylvania Co. v. Chapman*, 220 Ill. 428, 77 N. E. 248, although in that case the conclusion was different from the one here arrived at:

"The agreement on the part of the plaintiff that the acceptance of benefits from the relief fund should operate as a release of all claim for damages against the company is to be construed in connection with the by-laws, which amount to an agreement on the part of the relief department that it would pay him certain specified benefits."

The contract under which the relief department was created and conducted provided for certain benefits to which its members were entitled in case of disablement from sickness or accident and for injury from the negligence of the employer, if the injured employe agreed to accept them in lieu of his claim for damages against the employer, and it was agreed that if the employe elected to receive such benefits his action in so doing operated to release his claim against appellant for damages. He was to receive compensation for his injuries one time but not

twice. The beginning to accept of the benefits of the relief department by the injured employé was agreed upon between employer and employé as the act determinative of the fact that the agreement between them that the employé had accepted the benefits of the provisions of the relief department contract as an accord and satisfaction of his claim for damages had been entered into. Among the courts there has not been entire agreement as to the effect of the acceptance of benefits under a contract similar to the relief department contract here; certain of them holding that, to cause such acceptance to work a release of the employé's claim for damages against the employer, in addition to the acceptance of benefits it must also be shown that the relief department had performed its entire contract; while the holding of the others has been to the effect that the acceptance of benefits worked an acceptance of the relief department contract as an accord and satisfaction of the employé's right of action against the employer and a release of same, and thereafter each of the parties must look to the contract which had been entered into as an accord and satisfaction, and the employé must depend upon its enforcement for his compensation. The latter seems to be the more logical conclusion from the necessary results of the transaction. Discussing this phase of the results of such a contract, in *Johnson v. Railway Co.*, 58 S. C. 488, 36 S. E. 851, the court said:

"If the contract set up in the answer is a valid contract, and plaintiff has elected to accept and has accepted benefits thereunder, he could not escape the contract of release because a full tender of all payments due under the contract had not been made to him. By the contract and election to accept certain benefits and payments, he released the defendant from liability. The consideration for the release was the obligation or promise of the association to do certain things and the release was not conditioned on full performance by the association. For full performance of the contract by the association, the plaintiff, * * * has his remedy under the contract."

In *Petty v. Brunswick & Western Ry. Co.*, 109 Ga. 666, 35 S. E. 82, the court, considering a contract similar to the one here relied upon, said:

"The acceptance by an injured employé of any benefit under a contract of the kind * * * is an election on his part to look exclusively to that source for compensation on account of the injury, and amounts to a complete accord and satisfaction of his claim for damages against his master therefrom arising."

Hence it would appear that the appellee, by the acceptance of benefits under the relief department contract because of his injury, accepted that contract with its promised obligations as an accord and satisfaction of his

claim for damages against appellant and released the claim against appellant, and upon the failure of the relief department to perform its contract the appellee was relegated to his remedies upon and under that contract. *Penna. Co. v. Reager's Adm'r*, 152 Ky. 824, 154 S. W. 412, 52 L. R. A. (N. S.) 841, Ann. Cas. 1915B, 312. It was therefore not necessary for the appellant to aver a complete performance of the contract by the relief department, but it was sufficient to allege as a defense that the appellee had agreed to accept the benefits provided by the contract of the relief department as compensation for his injury as an accord and satisfaction of it, and that his claim against appellant was released in consideration of that contract. This the answer substantially alleged.

The trial court was therefore in error in sustaining a demurrer to the plea in bar, and the judgment is therefore reversed, and cause remanded for proceedings not inconsistent with this opinion.

SIMONS v. SCOTT et al.

(Court of Appeals of Kentucky. June 18, 1920.)

States ~~Co.~~ 53—State tax commission can remove revenue agents at will.

Under Laws 1918, c. 55, providing merely that the tax commission, a continuing body, shall appoint, direct, control, and supervise revenue agents, and saying nothing as to term, it may remove them without cause or hearing.

Appeal from Circuit Court, Franklin County.

Suit by A. H. Simons against J. A. Scott and others for injunction. From an adverse judgment, plaintiff appeals. Affirmed.

Gifford & Steinfield and L. S. Leopold, all of Louisville, for appellant.

Chas. I. Dawson, Atty. Gen., for appellees.

CARROLL, C. J. On January 3, 1920, the appellant, A. H. Simons, was appointed revenue agent for the state at large by the state tax commission, and on March 13, 1920, was summarily removed as such revenue agent by the state tax commission without notice or any cause being assigned for the removal. Soon after this Simons brought this suit in the Franklin circuit court, seeking to compel by injunction the state tax commission to rescind its order of removal and reinstate him as revenue agent, upon the grounds that his appointment run for a term of four years, or, if this was not so, he could only be removed (if at all) for a sufficient cause after notice and opportunity to be heard. The circuit court sustained a general demurrer to the petition, and, Simons declining to plead

further, his petition was dismissed, and he appeals.

The state tax commission contends that it had the power, in the exercise of the discretion vested in it, to remove Simons at any time without notice or cause or opportunity to be heard, and if it did have the power claimed the judgment must be affirmed.

In 1880 the Legislature enacted a statute (Laws 1880, c. 1312) giving authority to the auditor of state to appoint revenue agents "subject to removal at pleasure by the auditor." In 1902 (Laws 1902, c. 128, art. 15) the act of 1880 was so amended as to provide that the term of revenue agents for the state at large should be four years. In 1906 (Laws 1906, c. 22, art. 17) the statute relating to revenue agents was again amended so as to read that the auditor may appoint "not exceeding four revenue agents from the state at large, whose term of office shall be the same as that of the auditor and expire at the same time, unless they or any of them are removed by him."

In 1918 (Laws 1918, c. 55) the Legislature took from the auditor the appointment and control of revenue agents and placed "the appointment, supervision, control, and direction of revenue agents" in the state tax commission. This 1918 act, however, did not attempt to change in any manner the provisions of the old law regulating the powers and duties of revenue agents; it merely transferred their appointment and control from the auditor of state to the state tax commission, to which body the Legislature had confided the power to supervise the assessment of all property in the state.

In the consideration of this case, it is not pertinent to inquire into the powers and duties of revenue agents, as the sole question presented by the record is the power of the state tax commission to summarily remove Simons without cause or opportunity to be heard, and the solution of this question must be determined from a consideration of the terms of the act of 1918, because the appointment and control of revenue agents, without limitation or restriction, was placed by it in the hands of the state tax commission.

Under the act of 1906, it may be said that revenue agents did have a term coincident with that of the auditor, whose term was and is four years. But the state tax commission, which is composed of three members, cannot be said to have any definite term of office, such as the auditor; it is a continuing body, or, at any rate, a body the personnel of which does not necessarily change every four years, and therefore the provision of the act of 1906, relating to the term of these agents, can have little to do with the question before us. The act of 1918 does not fix any term; does not say when the term shall begin or end, or anything about removal. It merely provides that the tax commission shall appoint, direct, con-

trol, and supervise revenue agents, thereby plainly indicating a purpose to leave to the commission the power not only to appoint but to dismiss.

If the statute had provided that revenue agents could only be removed for cause and after notice and opportunity to be heard, or if they had been appointed for a term, the state tax commission could not, without cause and opportunity to be heard, make the removal. As said in *Commissioners of Sinking Fund v. Byars*, 167 Ky. 306, 180 S. W. 380:

"Whatever may be the rule with respect to municipal officers, it is the law of this state, and the generally accepted doctrine, that in the case of a state or other officer whose term is fixed by statute, the right of removal, even for cause, is not an incident of the power of appointment in the absence of a statute conferring such rights."

But, on the other hand, the court said in *Johnson v. Giun*, 105 Ky. 654, 49 S. W. 470, 20 Ky. Law Rep. 1475:

"Where the power of appointment is conferred in general terms and without restriction, the power of removal in the discretion and at the will of the appointing power, is implied, and always exists unless restrained, and limited by some provision of law."

In *Parsons v. Breed*, 126 Ky. 759, 104 S. W. 766, 31 Ky. Law Rep. 1136, the court had under consideration a statute providing that the board of public works "may appoint and, at pleasure, remove a chief of each department under its control." Under this statute, a board of public works removed, without notice, cause, or trial, *Parsons*, who was the chief of a department under its control, and appointed *Breed* in his place, and the court said:

"His [*Parsons*] term of office was not fixed, but, as expressed in the statute, was at the pleasure of the appointing board. He was liable to removal at any time, without notice, and without cause, other than the pleasure of the board. * * * 'Where the tenure of the office is not fixed by law, and no other provision is made for removal, either by Constitution or by statute, it is said to be a sound and necessary rule to consider the power of removal as incident to the power of appointment.'"

In 22 R. C. L. p. 562, the rule is laid down supported by many authorities that—

"Where the term or tenure of a public officer is not fixed by law, the power of summary removal is incident to the appointment."

Under these authorities, it seems clear that the tax commission had the power to discharge *Simons* in the manner that it did. He held his place merely at the pleasure of the Commission.

The judgment is affirmed.

STAMPER v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 18, 1920.)

1. Criminal law § 404(5)—Checks and identification card held admissible without notice in prosecution for forgery of check.

In prosecution for forgery of a check involving issue of defendant's identity as person who deposited forged check in bank and drew check thereon, the check, identification card signed by defendant, and other check by which he withdrew a portion of the amount so deposited, were admissible without notice to defendant under Civ. Code Prac. § 604, requiring that notice with opportunity for examination be given adverse party of writing to be introduced in evidence, such statute having application only to writings that are executed at a different time and place from the particular writing investigated, and that are introduced only for purposes of comparison with the writing in dispute.

2. Criminal law § 404(5)—Writings of defendant written previous to transaction involved in forgery prosecution incompetent to prove similarity of writing without notice to defendant.

In a prosecution for forgery of check involving issue of defendant's identity as the person who deposited the forged check in bank and subsequently drew on such deposits, a letter and a check executed by defendant some time previous to the bank transaction were not competent to prove forged check to be in defendant's handwriting without notice to defendant with opportunity to examine, under Civ. Code Prac. § 604.

3. Criminal law § 1169(5)—Admission of incompetent evidence held reversible error notwithstanding court's subsequent admonishment not to consider it.

In forgery prosecution, where evidence as to whether forged check was in defendant's handwriting was in sharp conflict, the admission of writings by defendant without notice to defendant with opportunity to examine writings as required by Civ. Code Prac. § 604, was reversible error, though court subsequently admonished jury not to consider such evidence.

Appeal from Circuit Court, Harlan County.

A. M. Stamper was convicted of forgery, and he appeals. Reversed, with directions for a new trial.

Hall & Jones and J. E. Sampson, all of Harlan, for appellant.

Chas. I. Dawson, Atty. Gen., for the Commonwealth.

CARROLL, C. J. The appellant, A. M. Stamper, under an indictment charging him with the forgery of a check for \$900, was found guilty and his punishment fixed at im-

prisonment in the state penitentiary for a term of two years. On this appeal his counsel insist that the judgment should be reversed: First, because the evidence was not sufficient to sustain a conviction; and, second, for prejudicial error committed by the trial court in the admission of evidence.

On August 12, 1919, a man who assumed to be Walter Cole presented to the Harlan State Bank a check for \$900, drawn on that date on the First National Bank of Whitesburg, and payable to the Harlan State Bank. The check was signed with the name of Walter Cole. When the check was presented to the Harlan State Bank, it was placed to the deposit of Walter Cole, who it appears had not before kept a deposit at the bank, and was unknown to the bank officers. At the same time the person assuming to be Walter Cole, at the request of the cashier, signed his name to a card and left it with the bank so that his signature might be available to the bank for comparison with the checks that might be drawn by him on his deposit.

In the usual course of business and within a few days, the check was sent to the Whitesburg bank on which it was drawn and paid. On August 28, 1919, the person who made the deposit in the Harlan bank on August 12th, and yet assuming to be Walter Cole, presented in person a check for \$700, at the Harlan bank, payable to himself, and, having on deposit at the time \$900, the bank paid him the \$700 in money.

A few days after this the Whitesburg Bank, with which the real Walter Cole did business, sent him a statement of his account with the bank, including the checks he had drawn, among them being the check for \$900. When Walter Cole received and examined his checks, he at once discovered that the \$900 check was a forgery, and so advised the Whitesburg bank. In this connection, it may be said that it is admitted by the Whitesburg bank that this \$900 check had not been drawn by Walter Cole and was a forgery. Soon after this the appellant, A. M. Stamper, was charged with the commission of the forgery and indicted, with the result stated.

On the trial of the case there was evidence tending to show that A. M. Stamper was the man who deposited with the Harlan bank the \$900 check and who later withdrew from the bank the \$700 in money. On the other hand, the weight of the evidence conduces to show that Stamper was in Whitesburg, some 50 miles distant from Harlan, on the morning and during the day of August 28th, when the \$700 was withdrawn from the bank, and that he remained in Whitesburg until late in the afternoon of August 30th; and, if this evidence is to be believed, it is, of course, manifest that the cashier of the Harlan bank was mistaken in his evidence that Stamper, who he identified as the man that made the depos-

it on August 12th, was in his bank on August 28th, and withdrew the \$700.

It is strongly contended by counsel for Stamper, and there is great force in the contention, that if Stamper was not the man who withdrew the \$700 on August 28th, neither was he the man who deposited the \$900 check on August 12th, because the cashier of the Harlan bank testified that the same man made the deposit on August 12th, and checked out the \$700 on August 28th.

As to whether Stamper was in the Harlan bank on August 12th is also a disputed issue. Stamper admits that he was in Harlan that day, but denies that he was in the bank or that he deposited or had anything to do with the drawing or depositing of the \$900 check; while the cashier of the bank says that he was in the bank on that day and did deposit the check.

The defense of Stamper was an alibi, and while so much of his defense as relates to the transaction on August 12th is supported only by his own evidence, so much of it as relates to the transaction on August 28th is strongly supported by a number of witnesses who testified positively that he was in Whitesburg between 9 and 10 o'clock of the morning of the 28th, and remained there until late in the afternoon of August 30th.

With the evidence in the condition stated, and in view of the fact that the judgment must be reversed, for other reasons we refrain from expressing an opinion as to the sufficiency of the evidence to sustain a conviction, preferring to leave this matter to another jury.

[1] On the trial of the case the commonwealth introduced the two checks for \$900 and \$700 each, the identification card signed by the man assuming to be Walter Cole when the \$900 deposit was made, a letter written and signed by the appellant, Stamper, and a check for \$20, the body of which was written by Stamper, but the signature by Walter Cole. The checks for \$900 and \$700 were, of course, competent, and no objection was made to their introduction as evidence upon the ground that notice had not been given to Stamper or his attorney that these writings would be introduced, as provided in section 604 of the Code. The identification card was admissible without notice, because it was a part of the transaction connected with the deposit of the \$900 check. It and the check were signed by the same person, and, independent of the Code provisions, it was competent for the purpose of showing that the same person signed the check and the identification card, and it was permissible to show by persons who had examined these writings that the same persons signed the name "Walter Cole" to each of them.

The Code provision only applies to writings that are executed at a different time and place from the particular writing under

investigation, and that are introduced only for purposes of comparison with the writing in dispute. *Major v. Garrett*, 157 Ky. 468, 163 S. W. 463.

[2] The letter and the \$20 check, both of which were executed some time before the bank transaction took place, came under the Code provisions and were not admissible unless the provisions of the Code in regard to notice and opportunity for inspection were first complied with.

It appears that, when the letter and the check were introduced, they were compared by witnesses with the \$900 and \$700 checks, and these witnesses testified that the same person wrote the letter, the body of the \$20 check, and the signature to the \$900 and \$700 check. It also appears that, when these writings were introduced and after the witnesses who had examined them testified as to the similarity of the handwriting, they were handed to the jury for their inspection and were examined by the jurors.

At the conclusion of the evidence, the court orally instructed the jury that they should not consider the letter or \$20 check, or the evidence of the witnesses who compared these papers with the other two checks and testified as to the similarity of the writing in determining the guilt or innocence of the accused. But it is insisted that the admonition of the court to the jury came too late, as the minds of the jurors had been particularly directed to the letter and the \$20 check, not only by the evidence of the witnesses, but their own examination, and therefore the prejudicial effect of this evidence, which was incompetent because no notice had been given of its introduction, could not be removed by the admonition of the court.

As the \$20 check and the letter were introduced for purposes of comparison with the \$900 and \$700 checks, it was necessary, under section 604 of the Code, that the commonwealth should have given reasonable notice to Stamper, or his attorney, of its intention to introduce these writings, together with reasonable opportunity to examine them before the commencement of the trial. But, in view of the fact that the court in every way that it could took from the jury the consideration of this incompetent evidence, its admission would not perhaps, under ordinary circumstances, be so prejudicial as to authorize a reversal of the case especially.

[3] The evidence, however, of the guilt of Stamper is so conflicting and unsatisfactory that we have concluded that under the circumstances of this particular case the court could not, by its admonition, correct or remove from the minds of the jury the prejudicial effect that must have been produced by the admission of this incompetent evidence. On another trial the court should not permit Walter Cole to testify as an expert unless

he shows himself to be better qualified than he did on the last trial.

For the error mentioned, the judgment must be reversed, with directions for a new trial in conformity with this opinion.

DIAMOND BLOCK COAL CO. v. UNITED MINE WORKERS OF AMERICA et al.

(Court of Appeals of Kentucky. June 18, 1920.)

1. Injunction ¶136(1) — Injunction against erecting houses to prepare for discharged employees held improper.

Where the allegations that defendants were interfering with their employees by threats and declarations were not sustained by proof, and the only acts of defendant shown were peaceful solicitation of employees to join the union and construction of buildings to house employees discharged or evicted from the mine houses because they had joined the union, there was no ground for a temporary injunction.

2. Trade unions ¶8 — Can peacefully solicit members among employees of those opposed to unions.

Workmen have a right to organize trade unions and solicit without fraud or intimidation, others to join such union, even though the latter are employed by those who are opposed to unions, and discharge all employed by them who join the union.

3. Injunction ¶101(1)—Injunction will not issue without proof of irreparable injury or threat to continue trespass.

Injunction against a trade union will not issue without proof of threatened irreparable injury, or for a single act of trespass without threat to continue trespass.

4. Injunction ¶192—Injunction will not issue against unions for threats by members.

Even if members of a trade union have threatened and intimidated employees of plaintiff, injunction cannot be issued against the union, but only against the guilty members if they are parties to the action.

5. Associations ¶20(2)—Trade unions ¶9 —Cannot be sued in association name.

Generally a voluntary association such as a trade union cannot sue or be sued in the association name except in special cases.

Suit for injunction by the Diamond Block Coal Company against the United Mine Workers of America and others. On motion to dissolve a temporary injunction granted by the judge of the circuit court. Motion granted, and injunction dissolved.

O. W. Napier and T. E. Moore, Jr., both of Hazard, for plaintiff.

Jesse Morgan, of Hazard, W. O. Davis, of Versailles, and Edward O'Rear, of Frankfort, for defendants.

SAMPSON, J. The Diamond Block Coal Company, a Virginia corporation doing a coal mining business in Perry county, Ky., filed its petition in the Perry circuit court on March 10, 1920, praying the clerk to grant it an immediate temporary restraining order and that the court make this perpetual, enjoining and restraining the defendants, United Mine Workers of America and 17 individuals named in the petition as defendants, and all persons working by, through, or under them, or in their employment, from proceeding to erect, construct, or build or attempting to erect, construct, or build, near the coal plant of the plaintiff, shacks, houses, or tents, or shelter of any kind, and from placing therein, or attempting to place therein, any person or persons for the purpose of inducing or persuading any of its employees, laborer or laborers, to break their contracts of employment with the plaintiff, and from doing divers other things set forth in the prayer of the petition; and, as the petition was properly verified and bond given, the clerk of the court on that day granted a temporary restraining order in accordance with the prayer of the petition, and a copy of this order was served upon each of the 18 defendants. At the time the judge of the Perry circuit court was absent from the county, and this was alleged in the petition. After alleging that the plaintiff is a corporation organized under the laws of Virginia for the purpose of mining and selling coal from its lease of 1,493½ acres of valuable coal land, located about 3 miles above the town of Hazard, in Perry county, upon which lease it has 78 houses for its employees, and a tiple, railroad switch, and other improvements necessary in mining and marketing coal, and that it has been running its mine regularly and finding a market for its product for about four years without experiencing any labor troubles, and that its employees, about 75 in number, were content and well satisfied with the labor conditions prevailing at the mines, it alleges:

That the defendants, naming them, "are each claiming to have some connection of some sort with their codefendant, United Mine Workers of America, and as such, with the exception of the defendants Jack Morris and Lee Marks, are and have been for some time holding meetings for the purpose, as the plaintiff is informed, of attempting to interfere in some way with what they term the miners employed and engaged in its mines, and all workers employed by it in and about its mine, but so far have failed to make any headway thereat, but the plaintiff

now says that the defendants, acting together and in concert with each other, and individually, are now threatening to come near to and in to the plant of the plaintiff and erect near by its plant, and within 200 yards thereof, houses, tents, shacks, buildings, and barns, and to drill wells and open up a regular camp for agitators for the purpose of intimidating, alarming, and disturbing its employes and its officers and managers in charge of its plant to such an extent that they will abandon their contracts of employment with it either through fear of violence or through the unlawful persuasion used by the defendants in their efforts to break the contracts of labor between it and its employes, and induce them to quit its employment and come into the camp which they are erecting near by, and at which camp they propose to take any employe who is not engaged and will not become engaged in the actual mining of coal, and keep him at their own expense, and house, clothe, and feed him and his family, provided he is not employed in the mining of coal, and will assist him in their unlawful way, and hinder it in the production of coal at its mines, and that the purpose and intention of the defendants and each of them in the location of the said camp and the construction of houses, shacks, and the erection of tents thereon is to either by intimidation or by persuasion entice each and all of its employes at said mines to abandon their contracts of employment and labor with it, and thereby force it to close out its mines, and that each of the defendants are working together and in conjunction with each other under and by an agreement with each other for this purpose, and this purpose alone."

It is further alleged that the defendants are attempting to establish a camp near the mines of the plaintiff company for the purpose of lodging therein agitators to bring about unrest and dissension among its employes and thereby cause a strike and to prejudice the minds of its employes against it. The petition also avers:

That certain of the defendants are nonresidents of the state, and are what are known as walking delegates or international organizers, imported for the purpose of fomenting unrest and disturbance in and about its camp, and that some of these persons are acting together in an attempt to do the plaintiff injury, and "are threatening to come into its camp and among its men in crowds and numbers and by demonstrations and by other acts and demonstrations cause dissension and strife among its employes to such an extent that it will bring about disorganization in its plant such as will prevent its operating same; that the defendants are threatening to build a number of shacks and to erect a number of tents near by plaintiff's mines for the purpose of housing men in furtherance of the plan and scheme on the part of the defendants to induce and persuade plaintiff's employes to break their contracts with it and to become idle, and thus bring about a complete shut-down of plaintiff's mines."

The answer traverses each of the material allegations of the petition, and affirmatively pleads that the United Mine Workers of

America is a voluntary association with more than a half a million members scattered over the United States, that there is no statutory provision of law in this state authorizing an action against voluntary association, and it pleads and relies upon this fact as a complete bar and abatement to plaintiff's action, and further that the United Mine Workers of America, a voluntary association of working people, is authorized by Act Cong. June 29, 1886, c. 567, 24 Stat. 86 (U. S. Comp. St. §§ 8908-8912), and is what is known as a national trade union organized—

"for the purpose of aiding its members to become more skillful and efficient workers, the promotion of their general intelligence, the elevation of their character, the regulation of their wages and their hours and conditions of labor; the protection of their individual rights in the prosecution of their trade or trades, the raising of funds for the benefit of sick, disabled, or unemployed members of the families of deceased members, or for such other object or objects or which working people may lawfully combine, having in view their mutual protection or benefit."

By reply the affirmative matter of the answer was traversed, and it was averred that, if the defendants and each of them were not enjoined from doing the things complained of in the petition, the plaintiff would suffer great loss and damage. To this reply defendants filed a rejoinder, the affirmative allegations of which were by agreement controverted of record.

On March 23d the defendants gave notice and entered a motion before Hon. John C. Eversole, judge of the Perry circuit court, "to dissolve, cancel, and set aside the restraining order" granted by the clerk, and this motion was heard partly upon affidavits and partly on oral evidence which was taken down in shorthand and transcribed and made a part of the record now under consideration. Plaintiff, the Diamond Block Coal Company, filed and read 10 affidavits, one of the affidavits containing the names of about 50 deponents, but only 6 of these affidavits relate facts which are pertinent to the issue; the others stating only that they had been approached by persons representing themselves to be members of the organization known as United Mine Workers of America, and solicited to join the union and offered its benefits, and that they refused so to do because they were perfectly content with the conditions surrounding their employment with the plaintiff. Of the 6 who gave relative evidence, if the persons mentioned had been defendants, one of them, W. A. Shumate, named Lon Hamilton, McKinley Fowler, and one Couch as threatening him if he did not join the union. Neither Hamilton, Fowler, nor Couch are defendants, and are not shown to be members of the United

Mine Workers. The next affiant, Joe Cornett, stated that while in the employ of the plaintiff Lon Hamilton and Harrison McIntyre, representing themselves as members of the union, approached him and urged him to join the union and told him that he "did not get any grub allowance as an employé of the Diamond Block Coal Company, but that, if he would join their union, they would see to it that he was given his grub and seventy-five cents a day; that the union was going to build houses in close proximity to the Diamond Block Coal Company and there take care of their men and keep them there and feed and house them and pay them money while they were not working." At another time he stated that Clay Lawson and Fultz Newberry, also representing themselves as members of the union, told him that it was useless to guard the tippie, "that the union men could blow it up if they wanted to, and that the damn thing ought to be blown up, anyway." And at another time Harrison McIntyre stated to affiant that he "did not see any use in the company fighting the union; that they would have to come to it." Neither of the persons named by affiant Joe Cornett are defendants, and, except for the intimation in the affidavit that they are members of the union, no proof is adduced on that subject. The other affidavits are much the same as the ones referred to, but no person named in the affidavits as having threatened violence or attempted to intimidate or coerce an employé of the plaintiff is a defendant in the proceeding before us. No witness for the plaintiff relates any fact which proves, or in any measure tends to prove, that the defendants, or either of them, have used unlawful means, or have threatened to use any unlawful means, to promote the interest of the union, or to injure the plaintiff in its property or its property rights. No witness for plaintiff testifies to any act or threat of either of the defendants, except that the organization and some of the other defendants named have been endeavoring peaceably to organize and institute local unions of laboring people in the Hazard district, and have solicited persons to become members of the organization, and have attempted to peaceably persuade working men of that district to join the union.

The plaintiff's general manager, R. F. Hoskins, was called as a witness and cross-examined by counsel for defendants. Among other things, he was asked:

"Q. What position do you occupy with that company? A. I am the general manager.

"Q. Do you know where the W. O. Davis tract of land is with reference to your coal tippie? A. Yes.

"Q. How far is it? A. Well, I have measured it; I would say it is about 300 or 400 yards, air line, from our commissary and the houses

on the north of the river, and about half a mile from our tippie and mine. * * *

"Q. How far are the houses [proposed to be built by defendants] away from your commissary and office? A. I said I would think about 300 or 400 yards. * * *

"Q. Can you see the houses from your office? A. No, sir. * * *

"Q. Have you noticed any one working on the Davis tract of land? A. I did not notice. I heard the carpenters working up there.

"Q. You just heard the sound of the hammering? A. I saw people working, but it was a little too far to distinguish who they were.

"Q. While they were working up there they did not interfere with you in any way did they? A. No.

"Q. You was not disturbed by reason of the fact that they were up there working? A. No.

"Q. Did any of the men working up there on these houses attempt to do you any injury? A. Not as I know of myself.

"Q. Did they go upon your premises and interfere with you any way? A. No.

"Q. Or with any of your employés? A. No. * * *

"Q. Do you know Wm. Larson [one of the defendants]? A. No, sir.

"Q. Has he trespassed upon your property to your knowledge? A. Not to my knowledge.

"Q. Do you know J. H. Brown [another defendant]? A. Yes, sir.

"Q. He has not trespassed on your property? A. Not to my knowledge.

"Q. Do you know Frank Hefferly [one of the defendants]? A. No.

"Q. He has not trespassed upon your property, has he? A. Not to my knowledge."

The witness was then asked concerning each of the 17 defendants named in the petition in like manner, and he answered he did not know of any trespass or wrong done by either of the defendants.

"Q. Tell the court whether or not the defendants have individually or collectively intimidated or coerced you, or any of your employés, or used any violence or force in any way to cause you to stop operating your mine or caused your employés to quit digging coal for you. A. Not as I know of.

"Q. Now you have never stopped the operation of your mine, have you? A. No. * * *

"Q. Now, Mr. Hoskins, neither of the defendants have done any act that has caused you any damage have they? A. No.

"Q. Now, you charge that some of the defendants are threatening to go upon your property. Do you know of any defendant that has ever threatened to go upon your property? A. No. * * *

"Q. Have either of the defendants done any act or anything to your knowledge that would bring about any trouble in your camp? A. No.

"Q. Or any dissension or strife in your camp? A. No. * * *

"Q. Did they give you the name of any person who was threatening to do you any injury? A. They gave the name. I would have to get that from the affidavit. Here is one—Clay Lawson and Fultz Newberry.

"Q. Now, then, Clay Lawson and Fultz New-

berry are not defendants here, are they? A. No more than I am led to believe that they belong to the United Mine Workers.

"Q. You do not know that they belong, do you? A. No.

"Q. Are they the only two men that you have ever received information that they was to do you injury? A. They are the only two I can recall. * * *

"Q. I notice you charge in your petition that the defendants are inducing and persuading your employes to break their contracts with you. None of the defendants have done that, have they? A. No; none of them mentioned in there.

"Q. What kind of contract have you with your employes? A. The contract whereby you can discharge them at your will and they quit at their will. I have no signed contract, of course, but it is understood it has always been our policy that they have a right to move away at a minute's notice, and we have that same privilege to discharge them for any cause. That has been our policy since the day we started.

"Q. Then it is your policy, a policy of your company, to discharge men at your will, and it is the corresponding right of them to quit when they desire at their will, either individually or collectively, just as they please? A. Certainly.

"Q. You claim the right to discharge all the employes you have got at any time? A. Yes.

"Q. You also grant them the right to quit collectively at any time? A. Yes.

"Q. Have any of your employes quit working for you at any time recently, quit of their own accord? A. Yes, sir.

"Q. Any of them been discharged by you recently? A. I think so; I cannot recall their names though. I know some have left and some have come and we have discharged some.

"Q. No act on the part of the defendants, so far as you know, has caused any one to quit you, has it? A. Well, the general impression—

"Q. Your knowledge, what do you know? A. No; personally I have not heard the conversation.

"Q. Has the defendant United Mine Workers of America ever injured you in any way to your knowledge? A. No more than having to discharge people for joining when it is our policy that we will not have union people, and cutting our production down.

"Q. Then do you tell the court that, if the miners who work for you join the United Mine Workers of America, it is your policy to discharge that miner? A. Yes.

"Q. For that reason and that alone? A. Yes. * * *

"Q. Do you refuse to employ miners who have joined the union if you know of that fact? A. Yes.

"Q. Do you know anything about the association known as the Hazard Coal Operators' Association? A. Yes. * * *

"Q. Is your company a member of that association? A. Yes. * * *

"Q. Ever had any agreement as to how you would treat the men who joined the union? A. No, sir; it has been our policy that we are not going to work union labor.

"Q. Then there is an understanding and agreement that your company and also that

your neighboring companies are not to work union labor? A. It is no agreement.

"Q. It is a general understanding? A. I do not know as you would call it an understanding. We are not working them. * * *

"Q. Have you given any other names of those who have joined the union? A. I have given some names of men who have joined the union. * * *

"Q. You also recognize the fact that they as a body of laboring men have the right to protect their interest in preparing shelter and places for those who are evicted by the coal company? A. Everybody has the right to try to protect themselves.

"Q. Then you tell the court that you have no objection for these men as far as you are concerned, in a legitimate way and in a legal way, of building camp houses? A. I have an objection or I would not be at this thing to-day.

"Q. I mean in a legal way, as far as they have a right under the law? A. Of course I object. I mean by that I don't want to see anybody in the rain."

In regard to the union, the witness was asked:

"Q. Some of your men did join? A. Yes.

"Q. And they were discharged by you? A. Yes.

"Q. You had some litigation in court about the houses in which they lived? A. Yes. * * *

"Q. And you stated that your only reason for discharging them was that they had joined this union? A. Yes. * * *

"Q. Now, Mr. Hoskins, the men you discharged never gave you any trouble, did they? You just found out they had joined the union and you discharged them and they went away? A. I don't know as they gave us any trouble at the time we discharged them. But it is our rule we will not work union labor. * * *

"Q. Everything has gone on quietly and peacefully? A. Yes.

"Q. Those who joined the union, do you know where they joined it, whether on your premises or somewhere else? A. I do not think they have joined on our premises."

From all the evidence, of which there is a great quantity, the following facts may be adduced:

Some months before this litigation started three or four local unions among mine workers were organized in the Hazard field, but neither one was located at Diablock. However, a few of the men employed at plaintiff's mines became members of one of these locals, and were discharged by the company for no other cause than that they had become members of the union. The union was trying to increase its membership and to organize other locals, while the operators and the different members of their association were attempting to suppress union labor and to expel it from that coal field. While this struggle was going on the men who were discharged for joining the union were evicted by the companies from their houses, and, as they could not obtain employment at other

camps in that vicinity, were often unable to find shelter, and to overcome this obstacle the Mine Workers leased three or four small pieces of ground at different places in the Hazard field, one of the tracts being the W. O. Davis tract mentioned in the evidence. It contains about five acres, lies upon a hillside near the Kentucky river, and about one-half to three-fourths of a mile from the place of business of the plaintiff, Diamond Block Coal Company. It was the intention of the Mine Workers to use these scraps of ground as building sites for shanties or cheap dwelling houses and tents to be occupied by such of their membership as were evicted by the companies from their tenant houses. A few days before this litigation started, the United Mine Workers entered into a written contract with defendants Marks and Morris, carpenters and builders of Hazard, to erect ten shanties of given dimensions upon the W. O. Davis tract, and these workmen, in pursuance of their contract, began the erection and had completed three of the houses at the time the injunction was sued out and served on them. The uncontradicted evidence shows that the Mine Workers had great difficulty in finding and locating land that they could lease for the purpose of erecting abiding places for their men, and that the Davis tract was not selected because it was near the Diamond Block-Coal Company, nor because it was especially desirable, but rather because it was the only tract obtainable in that vicinity. It further appears that, while defendants were anxious to organize the men working about the mines throughout the Hazard field, they were not especially interested in the organization of the men at plaintiff's place.

On this hearing the circuit judge, sitting as a chancellor, overruled the motion of defendants to dissolve the temporary restraining order, and entered an order continuing the injunction in force until the case was prepared upon its merits, or until defendants could apply to a judge of this court for a dissolution.

[1] As there is no evidence to support the allegations of the petition that defendants have used threats, intimidation, coercion, and fraud to accomplish their purposes, and as these allegations are specifically denied by defendants, thus putting the burden of proof upon the plaintiff, and as it is admitted by plaintiff and its officers that its mines continue uninterruptedly to run, and no employé has been induced by defendants, or either of them, to leave its employment, and that its employés have the right to quit its employment at any time, it follows that the plaintiff has wholly failed to make out its case, unless it be that the peaceable solicitation of miners to become members of the organization in that district was a violation of the rights of the plaintiff, or that the leasing of the ground by defendants from Davis and

others and the erection or attempted erection of the shacks or tenant houses was an invasion of the rights of plaintiff. In its last analysis, plaintiff's only complaint supported by evidence is that defendants have leased the ground and are proposing to erect shacks thereon, and are soliciting other employés to become members of the union.

While the United Mine Workers of America is a voluntary association, and not a corporation, it is recognized both by federal statutes and the statutes of Kentucky. The association, through its officers, had a right to enter into a lease contract with Davis and to erect the houses for the shelter of their membership. Of this there can be no doubt. That it was going to house and care for laboring men who had been discharged and evicted by employers in that vicinity because the men joined the unions does not militate against the manifest right of the association to otherwise make a lease and erect houses. So long as the union keeps within its legal rights, it may lease as much ground and erect as many houses as may satisfy its purpose, and it violates no right of the plaintiff, because the rights of two persons never conflict.

[2] Labor organizations have a status in this country the same as other associations. Courts without exception have recognized the right of laboring men to associate themselves together to better their conditions and to increase their wages by lawful means. They can organize new lodges and solicit membership at any time or place so long as they do not trespass upon the rights of another. In the case of *Saulsberry v. Coopers' International Union*, 147 Ky. 170, 143 S. W. 1018, 39 L. R. A. (N. S.) 1208, we said:

"A man's labor is his own. He has the right to dispose of it upon the best terms he can secure; if one to whom it is offered or by whom it is desired is unable or unwilling to pay the price demanded for it, we have presented simply a case where the parties to a proposed contract cannot agree as to terms. * * * The influences which actuate the employer in discharging the servant, or the servant in quitting the employ of the master, are not proper subjects of inquiry. If they possess the right to terminate the employment, they may exercise it, although the one so doing may know it works inconveniences, if not a positive injury, to the other. The exercise of a legal right by one in a proper manner will not be denied, although damage or loss may result to another as a necessary consequence thereof. * * * If the same principle applies to a union, which is but an organization of men for mutual benefit and protection, the plaintiff is remediless, even though his business is ruined. The right of laborers to organize for protection, in the way of securing better wages, shorter hours, and improved facilities whereby their condition is bettered, has been many times before the courts of this country, and such right has been uniformly upheld."

In the case of *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 28 C. C. A. 99, it was said:

"The courts have invariably upheld the right of individuals to form labor organizations for the protection of the interest of the laboring class, and have denied the power to enjoin the members of such associations from withdrawing peaceably from any service, either singly or in a body, even where such withdrawal involves a breach of contract."

[3] The general rule seems to be that organizers of labor unions may use any peaceable means, not partaking of fraud, to induce persons to become members, and equity will not enjoin such organizers, or their associates, from attempting by proper argument to persuade others to join the union so long as they do not resort to force or intimidation. If the union should induce employes of the plaintiff to become members of its organization, and the plaintiff, as it has done in the past, should discharge such employes because of their membership in the union, and the plaintiff should thereby lose the service of the employe, the proximate cause would not be the joining of the union by the employe, but the discharge of the employe by the plaintiff, and the plaintiff could have no legal redress of the defendant, even though all its employes should so join the union and should in consequence suffer discharge by the plaintiff, and its business should be closed. Neither will an injunction issue in a case of this character where there is no proof of irreparable injury or the evidence fails to show that the acts complained of are likely to be continued, nor will an injunction lie because of a single act of trespass in entering upon the premises of the complainant where there is no threatened repetition of the act.

[4] It may be urged that there is evidence in this record sufficient to warrant the conclusion that certain of the persons named in the affidavits as making threats or proposing injury to the plaintiff's employes or plant were at the time members of the United Mine Workers of America, and therefore acting for and on behalf of the union. Even if it be granted that these men or any one or more of them were members of the union, and that they made the statements with which they are charged, no injunction would lie against the organization on account of such threats. The only way to reach such persons, under the facts of this case, is to make them defendants, and, if it had been shown that either of the defendants named had threatened to and was about to invade the premises of the plaintiff, intimidate, coerce, or alarm its employes, injure its property or property rights, or otherwise infringe upon its lawful rights, the injunction would not be dissolved as to such person, if it were made to appear that the plaintiff would suffer irreparable injury, and that it had no ade-

quate remedy at law. But that is not the case we have here.

In this jurisdiction the rule is thoroughly established that a labor organization, through its officers and agents, may organize new branches and solicit membership among employes of concerns that are opposed to union labor so long as they use only peaceable means, such as persuasion and argument, and are not guilty of threats against the person or property, intimidation, coercion, or fraud. No sufficient facts were shown on which the extraordinary remedy of injunction should have been granted to complainant in this case, as injunctive relief can be had in no case except where it is made to appear that complainant has no adequate remedy at law and that great and irreparable injury will result.

Capital may lawfully organize for its advancement and protection. It does so every day. Labor may rightfully do the same thing. This is the American way—the best-known way. A business man decides he would like to go into the coal mining business. He knows if he does he will, to some extent, reduce the business chances and profits of those concerns already in the business of producing coal, but he has the right, if he can, to engage in the business and to peaceably organize capital to aid him in carrying out his plans, and in doing this he may approach other business men and persuade or induce them or any member to join him in his new enterprise. Such men join their fortunes to make themselves more powerful, their business chances greater, and their profits larger. For the same reason working men get together and organize. They want to increase their efficiency, power, influence, and business chances. We are born equal in civil rights, and so remain although our avocations and fortunes are widely different. What capital may lawfully do, labor may do with equal right. Neither has the lawful power to invade the rights of the other, nor would it be to the advantage of either. The two are inseparable companions. One cannot exist without the other.

Some common basis can and must be found on which to work out the difficulties which confound industrials to-day without stifling initiative, hope, and ambition—the spirit of our institutions. An hour's labor in a given community at a given calling should bring the toiler a given sum, with purchasing power, measured in the common necessities of life, sufficient to carry him, if judiciously employed, for a given time. This basis must bear a fixed relation to the cost of production of such articles as wheat, corn, meat, cotton, wool, and hides, as well as the value of the finished product of the hour's labor. When this plan is worked out and property administered both labor and capital will be benefited, and there will cease to be strikes

and other manifestations of industrial unrest.

[6] It is a general rule that voluntary associations, such as the United Mine Workers of America, have neither power to sue nor to be sued in the association name, except in special cases. 16 R. C. L. p. 465; 25 R. C. L. p. 72; Labatt's Master & Servant, vol. 7, p. 8491; note Curd, etc., v. Wallace, etc., 7 Dana, 192, 32 Am. Dec. 85; Nichols v. Bardwell Lodge No. 179, I. O. O. F., 105 Ky. 172, 48 S. W. 426.

But, as the injunction in this case must be and is dissolved on other grounds, it is not necessary here to further consider the question.

An order has been entered dissolving and setting aside the temporary injunction granted by the judge of the circuit court.

RILEY et al. v. WALLACE, Judge.

(Court of Appeals of Kentucky. June 18, 1920.)

1. Contempt ⚡30—Courts of record have inherent power to punish.

All courts of record of superior jurisdiction have inherent power to punish for contempt, a right recognized by statutes, as Ky. St. § 1291.

2. Jury ⚡21(4)—Statute gives right to trial by jury in contempt proceedings.

The rule of common law as to the conduct of contempt proceedings has been modified by Ky. St. § 1291, by giving the party charged right to a trial by jury when in opinion of judge indignity offered him requires a greater punishment than he is authorized to impose by statute.

3. Contempt ⚡13—False swearing by witness a direct contempt.

False swearing by a witness is such an obstruction of justice as to constitute a direct contempt of court.

4. Contempt ⚡2—Contempts either direct or constructive.

Contempts of court are either direct or constructive.

5. Contempt ⚡40—False witnesses could not be proceeded against unless chancellor knew falsity.

Unless the chancellor knew that testimony given by witnesses in a divorce suit was false, they could not be proceeded against for contempt by information and rule.

6. Evidence ⚡1—"Judicial knowledge" defined.

Judicial knowledge is not the personal knowledge of the judge, but the cognizance of certain facts which a judge under the rules of legal procedure or otherwise may properly take or act upon without proof because already known to him, or that knowledge which the

judge has or is assumed to have by virtue of his office.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judicial Notice.]

7. Evidence ⚡5(1)—Judicial notice taken of whatever should be known within jurisdiction.

Judicial notice will be taken of whatever ought to be generally known within the limits of the court's jurisdiction.

8. Evidence ⚡28, 49—Judicial notice of legislative acts, and official signatures enjoined by statute.

Judicial notice of legislative acts and resolutions and of the official signature of any officer of the state, of the United States, or of any state or territory in the United States is enjoined by Ky. St. §§ 1624, 1625.

9. Evidence ⚡43(1) — Chancellor could not know witnesses gave false testimony to justify proceedings.

The chancellor could not judicially know that certain witnesses in a divorce suit had given false testimony, and could not proceed against them for contempt by information and rule, but the matter should have received the consideration of the officers of the criminal court.

Petition by C. B. Riley and A. W. Bealmear against Arthur M. Wallace, Judge, etc., to restrain entry of order in contempt proceedings. Relief granted, and defendant enjoined and restrained from proceeding further.

Chas. P. Johnson and Clem Huggins, both of Louisville, for petitioners.

N. C. Cureton, Asst. Co. Atty., Grover G. Sales, and John L. Woodbury, all of Louisville, for defendant.

QUIN, J. W. H. Haney sued his wife for a divorce on the ground of five years' separation. On the proof of two witnesses, C. B. Riley and A. W. Bealmear, a judgment granting the prayer of the petition was entered November 25, 1919. December 2d defendant moved the court to set aside the judgment of divorce on the ground of accident and surprise, and because of fraud in obtention of the decree, setting up in an affidavit filed in support of the motion that her husband had admitted to her that he had no cause for divorce and had promised to drop the proceedings. For this reason an answer prepared by her counsel was not filed, and she took no further steps in the matter. The first she knew of the judgment was when she saw a notice in a newspaper to that effect on November 25, 1919.

When the motion was first called on the docket, W. H. Haney filed his affidavit stating that on November 26, 1919, the day following the entry of the judgment, he had married one Gladys Innes, and thus the sta-

tus of the parties had been changed. The motion was set for hearing on the 17th of December. In the meantime subpoenas were issued for various witnesses, including Riley and Bealmear, to appear on said date. Upon that hearing it was established that Haney and his wife had lived together as man and wife within two years prior to the filing of the petition for divorce. The testimony of Riley and Bealmear substantially showed that the evidence given by them in the divorce case was based upon information received from Haney. Thereafter, to wit, January 3, 1920, an information was filed by Hon. Arthur M. Wallace, judge of the chancery branch, First division, Jefferson circuit court, who had granted the decree, in which he set out in detail the facts as given, charging that the testimony given by the two witnesses aforesaid was false and untrue, and said statements were for the purpose of interfering with the lawful and true administration of justice in said case. A rule returnable January 6, 1920, was issued upon said information. In a response to this rule, filed by Riley and Bealmear, they denied they were guilty of contempt, or that the testimony given by them in the divorce suit was untrue. At the same time they filed a demurrer to the information as well as a motion to strike same from the record. These were overruled, and the court of its own motion struck out certain parts of the response, and before the rules were called up, to wit, on January 29, Riley and Bealmear petitioned a member of this court for an order restraining Judge Wallace from entering any order or proceeding in any wise to punish the petitioners for contempt of court.

By agreement of the parties the proceedings in the circuit court were held in abeyance until the matters should be disposed of by this court.

[1] As a general statement it may be said that all courts of record of superior jurisdiction have the inherent power to punish for contempt. *Arnold v. Commonwealth*, 80 Ky. 300, 44 Am. Rep. 480. This right is recognized by statute. For instance, in section 1291, Kentucky Statutes, it is provided that a court may for contempt impose upon the offender a fine not exceeding \$30 or imprisonment not exceeding 30 hours, without the intervention of a jury.

[2] In the *Arnold Case*, supra, it was held that it was not necessary to provide by statute a mode of trial in contempt cases. The manner of conducting such proceedings was established by a rule of the common law, and all the Legislature has said is that the tribunal to whom the contempt is offered shall not, by way of punishment, exceed a fine of \$30 or imprisonment exceeding 30 hours without the intervention of a jury. The rule of the common law has been modified by giving to the party charged the right to a trial by

jury, and the judge is required to have a jury impaneled when in his opinion the indignity offered requires a greater punishment than he is authorized to impose by the statute.

Of prime importance is an answer to the question whether the petitioners were guilty of contempt of court.

[3, 4] As said in 13 C. J. 25:

"Ordinarily false swearing by a witness is held to be such an obstruction of justice as to constitute a direct contempt of court."

This, we think, is a fair statement of the rule. Contempts of court are either direct or constructive. It is manifest the court treated the acts of the petitioners as a direct contempt, and we will deal with it as such.

[5, 6] Unless the chancellor knew the testimony given by the petitioners was false, the petitioners could not be proceeded against by information and rule; hence it becomes necessary to inquire as to whether the court had actual or judicial knowledge or cognizance of the alleged falsity of the statements given or made by the petitioners. Knowledge of notorious facts—i. e., common knowledge—the court may be assumed to share with other intelligent men. Judicial knowledge is not the personal knowledge of the judge; it may be defined as the cognizance of certain facts which a judge under the rules of legal procedure or otherwise may properly take or act upon without proof because already known to him, or that knowledge which the judge has or is assumed to have by virtue of his office—*virtute officii*. To announce and enforce the provision of certain laws, substantive or procedural, is one of the judicial powers of the court and a very important object in the creation of the tribunal. Knowledge of such is therefore an essential attribute of the office. Cognizance of these rules of law is not, like that of facts in general, something which comes to the judge without, i. e., de hors, the judicial office. *Chamberlayne on Evidence*, §§ 570-572.

As said by Prof. Thayer in his *Treatise on Evidence*, the two maxims, that what is known need not be proved, "*manifesta non indigent probatione*," and it matters not what is known to the judge if it is not known to him judicially, "*non refert quid notum sit iudici, si notum non sit in forma iudicii*," comprise the whole doctrine of judicial notice.

[7] Judicial notice will be taken of whatever ought to be generally known within the limits of the court's jurisdiction.

In *Wade on Notice*, § 1403, it is said:

"The classes of fact of which notice will be taken are judicial, legislative, political, historical, geographical, commercial, scientific, and artistic, in addition to a wide range of matters arising in the ordinary course of nature, or the general current of human affairs, which rest

entirely upon acknowledged notoriety for their claims to judicial recognition."

See, also, *Commonwealth v. Gabhart*, 160 Ky. 32, 169 S. W. 514.

[8] Judicial notice of legislative acts and resolutions and of the official signature of any officer of this state, of the United States, or of any state or territory in the United States is enjoined by Kentucky Statutes, §§ 1624 and 1625.

If the chancellor had had actual knowledge that Riley and Bealmear had made false statements, he would not have entered the decree of divorce, nor could he judicially have known of the alleged false testimony. It was not until after they were ordered to appear at the hearing under process of the court and in response to questions by attorneys appointed by the court to assist in the investigation that they gave information which led the chancellor to believe they had made false statements. Petitioners are here insisting that the statements made by them were not false, but we will not enter into a discussion of this question.

As said in *People v. Stone*, 181 Ill. App. 475:

"In a case of direct contempt, it [the court] may act upon that of which it may take judicial notice, but it cannot judicially know that evidence is false unless at the trial it is so made to appear by the witness' own admission or perhaps by unquestioned or incontrovertible evidence. Otherwise the court would act merely upon its belief or conclusions derived from evidence heard, and not upon matter of fact of which it had judicial cognizance, which is essential to summary proceeding for direct contempt."

And as further said in the foregoing opinion:

"If false swearing in the presence of the court constitutes direct contempt, then judicial knowledge of its falsity is, in our opinion, indispensable to the right of the court to exercise authority to commit therefor, and there is nothing in the record to disclose that the court knew or could know that the testimony was false."

Judge Wallace did not know, indeed could not know from the record, of the alleged falsity of the testimony given by Riley and Bealmear. At most, he was acting upon a presumption, not upon judicially known facts. With commendable promptness he sought, though by an improper method, to have the parties, if guilty, punished. We do not doubt he was convinced of their guilt. However, the facts were not disclosed until after a hearing of the motions to modify the judg-

ment, and this was had at a date subsequent to the filing of Haney's affidavit, and when it was known that the status of the parties was such that the judgment of divorce could not be annulled.

Gordon v. Commonwealth, 141 Ky. 461, 133 S. W. 206, was a proceeding similar to this, but it was disposed of on a plea of limitation. The court intimates that the punishment inflicted on appellant in that case was warranted because of his own admission of guilt when testifying in a pending damage suit, a situation not presented here. Petitioners are denying they gave false testimony; besides the alleged falsity was not ascertained until after an independent investigation in which petitioners were ordered to appear and testify. We cannot give our approval to this plan of procedure.

As said in *Melton v. Commonwealth*, 160 Ky. 642, 170 S. W. 37, L. R. A. 1915B, 689:

"In thus speaking we do not undervalue the importance of the protecting courts or keeping pure the administration of the law; nor do we think what we have said limits in any manner the power courts have always possessed to punish as for contempt persons who were guilty of contempt as it has always been defined. When a court has full power and authority to protect its dignity, enforce its processes, discipline its officers, and punish those who would impede or bring into disrepute the administration of justice in a pending case, it has all the authority that is needed to be exercised through contempt proceedings, and other offenses should be left to be disposed of in the ordinary way."

[9] If the petitioners were guilty as charged in the information, they should not go unpunished. The practice of attempting to secure court judgments upon false or fraudulent testimony should not and will not be tolerated, nor would we be understood as sanctioning such practice, or any semblance thereof, because it is deserving of the severest condemnation and censure. We only hold that the facts shown in the record before us do not present a case justifying the procedure adopted. The chancellor could not judicially know the petitioners were guilty as charged. If the petitioners are thought to be guilty, that is a matter that should receive the consideration of the officers of the criminal court, and due notice of the facts should be brought to their attention for such action as may be deemed advisable.

For the reasons given the relief sought must be granted, and defendant will be enjoined and restrained from proceeding further in the contempt proceedings.

SATTERLY v. THORNTON.

(Court of Appeals of Kentucky. June 18, 1920.)

1. Trial \S 133(6)—Improper remark cured by sustaining objection and admonishing jury.

Court, by promptly sustaining objection to counsel's improper remarks in argument to jury and admonishing jury not to consider such remarks, cured what might otherwise be reversible error.

2. False Imprisonment \S 8—Refusal to take prisoner before police judge held actionable.

Where defendant, who had arrested plaintiff on a warrant charging a breach of the peace, issued by a police judge, and substantially complying with Cr. Code Prac. \S 27, refused to take plaintiff before the police judge and afford him an opportunity of furnishing bail, but immediately placed him in jail, though he requested to be taken before such judge, and though on the way to the jail they passed within about eight feet of the judge's office, plaintiff had a good cause of action against defendant for false imprisonment, in view of section 28.

Appeal from Circuit Court, Spencer County.

Suit by Ezra Satterly against O. G. Thornton. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

S. K. Baird, of Shelbyville, for appellant.
L. W. Ross and Thad Cheatham, both of Taylorsville, for appellee.

QUIN, J. Appellant, as plaintiff below, instituted this suit to recover damages on two counts; one for assault and battery the other for false imprisonment. There was a directed verdict for defendant on the second count, and the jury found in his favor on the first. Plaintiff appeals.

Defendant is the town marshal of Taylorsville. February 5, 1918, county court day, he received information there would be an attempt to release from jail one who had been arrested for drunkenness. To prevent the escape of the prisoner he remained at the courthouse that night. The prisoner had created a disturbance following his arrest. About 10 o'clock p. m., plaintiff, his son, and a companion, while in a nearby restaurant, hearing cries in the direction of the jail, stepped out through a rear door of the restaurant to the jallyard to see what was the trouble. The prisoner requested them to get him a drink of water. Seeing these people near the jail, defendant, in company with his deputy, hastened toward them, and ordered them to move on. Some words passed between the parties. Their respective version of the affair is detailed by the opposing witnesses. Defendant in turn struck plaintiff, his son, and their

companion with a billiard cue, which he had in his hand. The evidence of the assault is contradictory. This issue was submitted to the jury under proper instructions, and the record contains nothing prejudicial to the rights of plaintiff in this regard.

Alleged improper remarks by counsel in his opening statement are urged as grounds for a reversal. The overstatement by an attorney of his case is usually fraught with more danger to his side of the controversy than to that of his adversary. We do not see wherein the remarks complained of could have influenced the jury or affected their verdict. However, they were not objected to, nor was any motion made to strike same from the record.

It is next urged that counsel overstepped the bounds of propriety in his closing argument. We have written oftentimes that in arguing a case to the jury counsel should confine themselves to the facts disclosed by the record, or to reasonable deductions therefrom, and when they exceed these bounds they do so at their peril. See *Pullman Co. v. Pulliam*, 187 Ky. 213, 218 S. W. 1005, and cases therein cited.

[1] The remarks pointed out were improper, and should not have been made, but when they were objected to the court very promptly sustained the objection, and admonished the jury that they were not to consider them, thus curing what might otherwise have been a reversible error.

Complaint is further made of two questions propounded the witness Greenwell, but here again the court promptly sustained the objection to the questions—they were not answered.

The court erroneously instructed the jury to find for defendant on the false imprisonment charge. A warrant issued against plaintiff by the police judge on May 20, 1918, was placed in defendant's hands for service. Said warrant commanded defendant to arrest plaintiff and bring him before the police court to answer a charge of a breach of the peace committed in Taylorsville on the 7th day of May. The form of the warrant substantially complied with that found in section 27 of the Criminal Code.

[2] Plaintiff was arrested on the morning of May 20. On the way to the jail he inquired of defendant where he could find the police judge, and was told the latter was at the courthouse. When they reached the courthouse he repeated the question about finding the county judge, and informed defendant that the friend who accompanied them was prepared to go on his bond, whereupon defendant said to come on, he did not have time to fool with him. They passed within about eight feet of the judge's office, but notwithstanding plaintiff's request to be taken before the police judge, and his ability to furnish satisfactory bail, defendant failed

and refused to comply with his request, placed him in jail, and locked the door. He did not remain long in jail; his companion immediately appeared before the judge, arranged the bond, and plaintiff was released. Under the circumstances it was defendant's duty to have taken plaintiff before the police judge and afford him the opportunity of furnishing bail, and not subject him to the humiliation of being placed in jail. He was so directed by the warrant, and requested by the plaintiff, who advised him he had a bondsman ready. Under the provisions of section 27 of the Criminal Code it is the duty of the arresting officer to bring the prisoner before some magistrate of the county in which the offense was committed; and in section 28, in misdemeanor cases, it is provided that the person arrested may immediately give bail, either before the magistrate who issued the warrant or the judge of the county court. The defendant did not comply with either of these Code provisions. Circumstances and conditions might arise under which it would be impossible for the officer to take his prisoner immediately before the proper official. For instance in *Pepper v. Mayes*, etc., 81 Ky. 673, *Pepper* was arrested under a warrant and brought before the justice at 11:30 p. m. He was crazed with a dangerous condition of mind, and the court by cursing him late to try the case, he been in condition of the perjury of the prisoner. See, also, 5 C. J. 429; *Pratt v. Hill*. The facts of the case, as can read the opinion, and the directions of the court to the plaintiff before the trial. The evidence showed that the defendant was at the time.

There was no evidence as to the occurrence of the arrest; this was ruled on the submission on this issue will direct the jury to find for the defendant, but, should defendant submit the evidence, the court should submit the case to the jury. Wherefore the further proceedings.

Frauds, statute of §131(1)—Agreement to surrender term having more than one year to run must be in writing.

An agreement for the surrender of a written lease for five years, which would have more than one year yet to run after the date of surrender is within the statute of frauds, and not enforceable if not in writing.

Error to Court of Civil Appeals of First Supreme Judicial District.

Suit by A. Franklin Sittig against Alf Gardner and others. Judgment for plaintiff was affirmed by the Court of Civil Appeals (188 S. W. 731), and defendants bring error. Affirmed.

Elliott Cage, of Houston, for plaintiffs in error.

Ross & Wood and W. J. Howard, all of Houston, for defendant in error.

SONFIELD, P. J. Suit by A. Franklin Sittig, plaintiff, against Alf Gardner and others, defendants, to recover installments of rent for certain premises in the city of Houston and a foreclosure of the landlord's lien. Plaintiff by amended petition alleged that defendants entered into possession of the premises under a lease from plaintiff—the lease being for a period of five years, beginning on the 16th day of August, 1911, and ending on August 16, 1916, and continued in such possession until the 1st day of July, 1914, when, over the protest of plaintiff, who was asserting a landlord's lien on the fixtures and stock of goods in the storehouse upon the premises, they abandoned the premises, which have since that time been unoccupied. This suit was instituted on the 8th day of April, 1914, and prior to the vacation of the premises, for installments of rent then due. By amendments, plaintiff alleged other installments of rent accruing from time to time, up to the date of the trial, and sought recovery thereof.

Defendants admitted the lease contract, but alleged that on or about the 16th day of January, 1914, the parties made and entered into an agreement, by the terms of which defendants were to be released from any liability for rent then due, and were to be permitted to remain in the building until the 1st day of July, 1914, rent free, plaintiff to pay them the sum of \$500 in consideration of their agreement to the cancellation and of their vacating the premises by the first day of July, 1914; that in compliance with this agreement the defendants vacated the premises before July 1, 1914, and have never used them since that date, but

they prayed judgment.

On the trial, defendants offered evidence to establish the parole agreement, and that they vacated the premises in compliance with and reliance upon such agreement, at considerable expense to themselves. This evidence was excluded by the court. The cause was tried to a jury, and upon the conclusion of the evidence the court instructed to return a verdict in favor of plaintiff for the amount of the rent, with a foreclosure of the lien. On appeal, the judgment of the district court was affirmed. 188 S. W. 731. Writ of error was granted by the Committee of Judges.

The determinative question in the case is whether the agreement for the surrender of the lease, the term remaining and to be surrendered being for more than one year, was within the statute of frauds. Upon consideration of this question, we concur in the conclusion of the Court of Civil Appeals that the agreement was within the statute. That court in its opinion so fully and clearly discusses the question that we deem further discussion unnecessary. We are of opinion that the judgment of the Court of Civil Appeals should be affirmed.

PHILLIPS, C. J. We approve the judgment recommended in this case.

ANDERSON v. STEDDUM. (No. 142-3072.)

(Commission of Appeals of Texas, Section B.
June 23, 1920.)

Guardian and ward §30(3)—Pension is "estate" expendable only on court order.

Pension money received by a guardian as "estate" of the ward within the meaning of the term "estate" as used in Vernon's Sayles' Ann. Civ. St. 1914, art. 4131, and the guardian is not entitled to credit for expenditure thereof for support and education where she did not first procure a court order as required by that article.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Estate.]

Error to Court of Civil Appeals of Sixth Supreme Judicial District.

Proceedings on the final account of Mary A. Anderson, as guardian of Charles T. Steddum, her minor son. A judgment of the district court disapproving the final account was affirmed by the Court of Civil Appeals (194 S. W. 1132), and the guardian brings error. Affirmed.

H. G. Evans, of Bonham, for plaintiff in error.

J. W. Gross and A. P. Bolding, both of Bonham, for defendant in error.

KITTRELL, J. This cause is reported in 194 S. W. 1132. The writ was granted by the Committee of Judges. It involves the question whether pension money received by a guardian and expended in her capacity as such is "estate" of the ward within the meaning of the term "estate" as used in article 4131, V. S. R. S. The Court of Civil Appeals held that it is, and that, the guardian having expended the money without having first procured such order as is by said article 4131 required to be obtained before the expenditure was made, the guardian was not entitled to credit for such expenditure in the settlement of her final account.

The Supreme Court has indicated to us that in its opinion the judgment of the Court of Civil Appeals was correct and should be affirmed. In view of that opinion, it is recommended that the judgment of the Court of Civil Appeals be affirmed.

PHILLIPS, C. J. We approve the judgment recommended in this case.

O'NEIL ENGINEERING CO. et al. v. FIRST NAT. BANK OF PARIS. (No. 104-2940.)

(Commission of Appeals of Texas, Section B. June 18, 1920.)

1. Principal and surety \Leftrightarrow 59—Surety on a contractor's bond is charged with knowledge of terms.

Surety on a contractor's bond is charged with knowledge of all the terms, stipulations, and legal consequences of the contract upon which it became a guarantor.

2. Assignments \Leftrightarrow 85—Assignee of contractor held entitled to priority over surety.

Where a construction contract authorized the board of road commissioners to retain 15 per cent. of the monthly estimates, and the surety on the contract was subrogated to and had had assigned to it the rights of the board, the contractor's assignment of the remaining 85 per cent. gave its assignee rights superior to the board and surety so long as the contractor was carrying on the work and not in default.

3. Assignments \Leftrightarrow 74—Assignee takes only title of the assignor.

When there is an assignment of a particular fund, the assignee takes the title of the assignor to that which is assigned, but he obtains no greater right in or title to the fund than exists in the assignor.

4. Assignments \Leftrightarrow 85—Breach having occurred before payment, rights of assignee were inferior to those of surety.

Where contract for the construction of a road authorized the board of road commissioners to retain 15 per cent. of the monthly estimates, and provided that the remainder

should be paid on or before the fourth Monday of the month following that in which the work was performed and the warrant for the work done on the previous month, although approved on the 4th day of the month, had not been delivered on the 8th day of the month, when the contractor defaulted and a bank which had an assignment of warrants to become due demanded payment, *held*, that the board was warranted in retaining the amount because of default, so rights of the surety to which had been assigned all sums retained, etc., were superior to those of the bank.

Error to Court of Civil Appeals of Sixth Supreme Judicial District.

Action by the First National Bank of Paris, Texas, against the O'Neil Engineering Company and others. Judgment adverse to plaintiff was modified and affirmed by the Court of Civil Appeals (176 S. W. 74), and defendants bring error. Judgment of the Court of Civil Appeals reversed, and that of district court affirmed.

James J. Collins and M. W. Townsend, both of Dallas, and Chas. L. Black, of Austin, for plaintiffs in error.

A. P. Park, of Paris, and Brooks, Hart & Woodward, of Austin, for defendant in error.

SADLER, P. J. The statement of the case as given in the opinion by the Court of Civil Appeals is so full and complete that we adopt same as shown in 176 S. W. 74. As aptly stated by Associate Justice Hodges:

"The only errors assigned are those which question the court's legal conclusions from the foregoing facts. To summarize: These facts show conflicting claims to a special fund authorized by law to be disbursed under the order of the board of permanent road commissioners for justice precinct No. 1 of Lamar county. The appellant [defendant in error] claims that fund—or rather so much of it as may be necessary to satisfy its debt against the engineering company—by virtue of parol assignments made before any of the money due upon the contract with the board had been earned by the engineering company. The surety company [Fidelity & Deposit Company of Maryland, and Title Guaranty Insurance Company, acting together] claims this fund upon three different written assignments. The first is referred to as the application agreement made at the time the contract of suretyship was entered into and as a part of the consideration of that contract; the second is another written assignment, dated February 26, 1913; and the third still another agreement made on the 8th day of August, 1913, at the time it took over, or agreed to take over, the contract of the engineering company with the board. The surety company also insists upon its right of subrogation to all of the claims, securities, and demands owned or held by the board against the engineering company at the time the latter defaulted in the performance of its contract.

The trial court held that the sureties on the bond of the O'Neill Engineering Company given to the board of road commissioners to insure performance of the road contract were entitled to the fund involved. On appeal, the Court of Civil Appeals held that the bank had a prior right in the fund to the extent of its debt against the engineering company. To this judgment writ of error was granted.

Opinion.

After a very careful consideration of the able presentation by counsel of the questions involved, we have concluded that the Court of Civil Appeals erred in the disposition made of this case.

[1, 2] In reaching this conclusion, we have recognized the difficulty involved. At the time the contract was entered into between the O'Neill Engineering Company and the board of road commissioners, it was therein specially stipulated that a bond should be given as required by law, guaranteeing performance by the engineering company of the contract, in which it obligated itself, in accordance with the plans and specifications furnished, to construct the roads contemplated. It was further stipulated as a protection to the board that 15 per cent. of each monthly estimate of the work completed should be retained by it until all of the work had been completed, in accordance with the contract. It was stipulated that between the 1st and 10th of each month, the engineer who was acting for the board should make an estimate of the amount of work which had been completed during the previous month; that he should deduct therefrom fifteen per cent. and such other amounts as might be proper to be retained by the board until the completion of the contract; that the remaining portion of the estimate should be paid over to the engineering company for the work which it had completed during the previous month. The contractor could not require payment of this amount before the fourth Monday in the month in which the estimate had been approved.

It may not be amiss to discuss the relationship existing between the board of road commissioners and the engineering company under the contract. The board provided for its protection against default on the part of the engineering company. The retention of 15 per cent. of the monthly estimates and such other deductions as its engineer might make, together with the bond guaranteeing performance, were provided as sufficient to recoup the board for any dereliction by the engineering company. We think that it is clear that this construction of the contract is in consonance with its terms and with the intention on the part of the board. As a

retained percentages and deductions by its engineer and the bond required. The engineering company accepted for itself, with the consent and permission of the board, such an amount of each monthly estimate as remained after the deductions had been made by the engineer in charge. This amount may, for convenience, be treated as 85 per cent. of each monthly estimate.

At the end of each month, after the work began, the engineering company, it then being in performance of the contract, was entitled to receive 85 per cent. of each estimate, without any retained claim thereto by the board. This board did not put any restraint upon this 85 per cent. to protect against any future dereliction, failure, or incapacity on the part of the engineering company in the performance of the contract. In the absence of fraud or mistake, when the board approved the estimate submitted by the engineer for any month, the amount of such estimate, the contract then being in performance by the engineering company, was set apart from the general fund to meet the obligation to the contractor at its maturity.

What was the position of the surety or bondsman who sought to indemnify the board against loss or guarantee the faithful execution of the contract by the principal? They were charged with knowledge of all of the terms, stipulations, and legal consequences of the contract upon which they became guarantors. If we treat the contract, which we think proper to do, as being incorporated in and forming a part of the bond, then the surety company occupied exactly the same position in relation to it as that of the principals themselves. The surety company had no greater right in the contract or under it than had the board. It accepted the suretyship with knowledge that a certain per cent. of each monthly estimate for work completed during that month was to become due and payable to and subject to the possession of its principal in the bond without restraint.

An examination of the application for suretyship made by the contractor to the surety companies further confirms the position here taken. The assignment contained in the application had relation to the condition which existed, not at the time of making the contract, but at the time of the breach and failure of performance on the part of the principal. As long as the contractor was carrying out his obligation in performing the terms of his contract, the surety company had no right to arrest or hold for its protection, either under the application assignment or by equitable subrogation, any part of the estimate approved by the board, ordered paid, and subject to the demand of the contract. It entered into its suretyship relying for protection upon the

retained percentage and its faith in the contractor. It reserved no rights against any earned and approved amounts subject to the demand of the contractor prior to breach by him.

This being the situation at the time the assignment was made by the engineering company to the bank, it became the first assignee of that portion of the monthly estimates to which the engineering company would be entitled under its contract with the board as long as the engineering company was in the performance of its contract and until any sums due to the bank covered by the assignment were liquidated.

The second assignment made to the surety company affected only the percentage retained by the board under the original contract, and did not in any wise attach to that portion of any estimate payable to the contractor. The last or third assignment to the surety company, that made on the 8th day of August, 1913, is not material except as it may affect the question of whether or not there was an abandonment of the contract by the engineering company.

What, then, was the status of the fund involved in this litigation on the 4th day of August, 1913? The engineering company was in the proper performance of its contract during the month of July, and had completed such a portion of the work contemplated as, in the judgment of the engineer in charge, entitled it to the sum of \$13,347.97. All proper deductions had been made in behalf of the board under the contract. On this date this fund had charged against it the indebtedness due by the engineering company to the bank. There was no other demand or claim against it. All claims of the board were satisfied in the deduction made by the engineer. This fund was resting under no obligation either to the board or to any other party as an assignee, by contract or by equitable subrogation, under the conditions as they existed on the 4th day of August, 1913. The only party who had any claim in this fund was the engineering company, subject, alone, to the assignment which it had made to the bank. The board of commissioners, on the submission to it of the estimate by the engineer, duly and legally approved the same and ordered the sum found due by him for the previous month's work to be paid to the engineering company, and a warrant was drawn on the special fund in its favor for this amount.

[3,4] At the time of this order the engineering company was carrying out and performing its contract. There had been no breath of suspicion of failure to perform on the part of the contractor. There had been no intimation of the prospective abandonment of the contract or of an inability to complete it. The board justly determined in the exercise of its power that it had no claim

on this amount, and that it was owing to the contractor. Nothing had occurred giving rise to any question as to the legal right of the contractor to the fund. The surety company was not asserting any claim against it, and nothing had occurred which gave it the right to assert a claim. If on that day the contractor had the right to demand the payment, and it had made the demand, there is nothing in the record which gives to any one the right to have demurred, or which would have given to the board the power to have refused payment to the contractor, or to the bank as its assignee. It appears, however, that for several days no demand was made for the delivery of the warrant or payment. On the 8th of the month the bank, as assignee, demanded the delivery of the warrant to it, and gave notice to the board of its assignment. Subsequent to this demand, but on the same day, came into existence the transactions which bring about this litigation. The president of the engineering company appeared before the board, and notified it that his company could not carry out the contract and that it had assigned the same, together with all rights under it, to the surety companies, who were to carry out and complete the work in accordance with the terms of the contract. On indemnification by the surety company, the board delivered the warrant to it.

If the surety company had any right in this fund, the power to exercise that right arose subsequent to the 4th day of August, 1913. The bank held, on that date, under the then existing conditions, the superior right in this fund to the amount of its claim against the contractor, except as that right may have been affected by the subsequent conduct of the engineering company.

The determination of the effect of the transactions which took place on the 8th day of August, 1913, has been fraught with great difficulty. We cannot agree with the Court of Civil Appeals that the engineering company did not abandon work and make default under the contract. It did assign all of its rights under the contract to its surety and all amounts then due thereunder by the board. This assignment, however, was superinduced by the fact of inability to perform the obligations resting upon the engineering company. We are impressed that the question is squarely before us to be decided in the light of effect thereon of abandonment of the contract by the engineering company, and that we will have to deal with the parties and their rights as such abandonment affects them.

If the contract had been abandoned prior to the approval of the estimate for July and the order for payment of that portion to which the engineering company was entitled, under the decision of the engineer in charge for the board, then, in a suit to compel ap-

final completion of the work contemplated. This right existed in the board in virtue of the relation existing between it and the contractor with regard to the subject-matter of the contract.

Notwithstanding the order approving the estimate and directing its payment to the contractor, should he have abandoned his contract at a time when there was no existing right in an assignee, the board could have defeated a recovery by the contractor until final completion, and, so long as no right existed in the contractor to demand payment and require performance of the order of the board, the assignee of the contractor could exercise no greater right than he. We are thus brought to the question of what effect upon these rights of the board the previous assignment to the bank had.

It appears to be settled that when there is an assignment of a particular fund the assignee takes the title of the assignor to that which is assigned, but he obtains no greater right in or to the fund than exists in the assignor.

The trial court and the Court of Civil Appeals seem to proceed to a decision upon the evident hypothesis that at the time the bank demanded payment (August 8th), the contractor then had the unqualified right to demand payment, in that the amount ordered paid was a matured obligation. These courts evidently overlooked that provision of the contract with controlled the maturity of the payment. In the clause providing for the estimates and deductions and directing the manner of payment, it is provided that the board, or the engineer acting for the board, "shall pay the remainder of such estimate to the contractor * * * at the office of the county auditor * * * on or before the fourth Monday of each month for the work of the preceding month." Under the terms of the contract, the board might make the payment at any time after approval of the estimate, but the contractor could not demand it as a matured and absolute right vested in him until the fourth Monday in August.

On the 8th day of August the parties stood in this relation: The board had determined that it was due for the previous month's work the amount of the estimate, and that the same should be paid, but the payment was reserved and the contractor could not demand that it be made. The option was with the board to pay then or to abide its time under the maturity clause of the contract. The amount due and owing was determined, but it was still an unmatured indebtedness. The definite amount of \$13,347.97 became fixed as due by the board to the

tion of the board. With the funds thus impressed, the contractor gave notice of his default, his inability to further perform, and, as a consequence, of abandonment, and that he had called upon the sureties to complete his original obligation—their ultimate contract.

The assignment in the application for the suretyship bond was of all amounts which might be due the contractor by the board at the time of the abandonment of the contract by the engineering company. This assignment antedated that made to the bank. It stood ready at all times, for the protection of the surety, to take hold of any money which the board owed to the contractor at the time of the abandonment of the contract. The amount of the estimate in question being a debt due, but not matured, at the time of the abandonment, was immediately fastened upon by the original assignment to the surety company, to the exclusion of any other assignment subsequently given. The assignment to the bank attached to this fund, subject to the stipulations contained in the contract, and subject to the rights of the parties under that contract as they might arise in law.

The rights of the board to retain this estimate against the contractor became fixed upon his abandonment of the contract. This right existed from the inception of the construction contract; the surety company was in equity subrogated to the then existing rights of the board. As the surety accepted its responsibility to, and did proceed in, the performance of the contract, it was vested, both under the application assignment and by subrogation, to a prior right in the fund to that of the bank. The bank's assignment postdated the application assignment, and postdated the equitable rights existing in the board and subject to attach to the fund. *Hess & Skinner Engineering Co. v. Turney* (Sup.) 216 S. W. 621. What occurred on August 8th gave rise to the rights of the board and of the surety company which related back to, and dated from, the inception of the construction contract.

We are of opinion that the surety company obtained the prior right in this fund, and that the Court of Civil Appeals erred in not so holding.

The judgment of the Court of Civil Appeals should be reversed, and that of the district court affirmed.

HAWKINS and GREENWOOD, JJ. We approve the judgment recommended in this case.

PHILLIPS, C. J., not sitting.

SHROYER v. CHICAGO, R. I. & G. RY. CO.
(No. 157-3129.)

(Commission of Appeals of Texas, Section B.
June 23, 1920.)

1. Carriers §218(1)—Interstate carrier not estopped to set up limitation of time for action.

Provision in contract for interstate shipment of live stock that in consideration of lower rate no action against the carrier shall be maintained unless commenced within six months, is valid, and cannot be avoided by the shipper on ground that the carrier is estopped to set it up.

2. Carriers §35 — Interstate carrier cannot waive requirement of Commerce Act or stipulation of contract thereunder.

No interstate carrier can waive a requirement of the Interstate Commerce Act, or stipulation of contract made pursuant thereto.

3. Carriers §35—Interstate carrier cannot estop itself to invoke limitation of time to sue.

Representatives of interstate carrier cannot, by conversations, letters, and negotiations extending beyond time limited for suit by contract pursuant to the Interstate Commerce Act, estop the carrier to assert and invoke the limitation against the shipper.

4. Commerce §8(12)—Carmack Amendment withdraws determination of validity of shipping contracts from state law.

The Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa) to the Interstate Commerce Act has withdrawn the determination of the validity of all stipulations in interstate shipping contracts from state law or legislation.

5. Carriers §32(1) — No discrimination by interstate carriers between shippers permitted.

Under the Interstate Commerce Act and the Carmack Amendment thereto (U. S. Comp. St. §§ 8604a, 8604aa) no discrimination will be permitted, directly or indirectly, by interstate carriers as between shippers.

6. Courts §97(5)—Construction of interstate bill of lading a federal question.

Question of construction of interstate bill of lading under the Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa) and the Interstate Commerce Act is a federal question.

7. Carriers §30—Shipper charged with notice of interstate tariffs.

Every shipper in interstate commerce is charged with notice of the terms of interstate tariffs governing his shipment.

8. Courts §97(5)—Federal law controls interpretation of Interstate Commerce Act.

If any state law or the holding of any state court conflicts with the Interstate Commerce Act or the interpretation put upon it by the Supreme Court of the United States, the federal law controls.

9. Carriers §218(5) — Stipulation limiting time for suit a "regulation affecting rates," and not binding where not filed.

Stipulation of contract for interstate shipment of live stock in consideration of lower rate that no action against the carrier for any loss should be maintained unless commenced within six months held a regulation affecting rates within the Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa) to the Interstate Commerce Act, so that it was not binding on a shipper where it was not filed as a part of the schedule of rates with the Interstate Commerce Commission.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Suit by W. H. Shroyer against the Chicago, Rock Island & Gulf Railroad Company. From judgment for plaintiff, defendant appealed to the Court of Civil Appeals, which reversed and remanded (197 S. W. 773), and plaintiff brings error. Judgment of the Court of Civil Appeals reversed, and judgment of the trial court affirmed.

W. A. Davidson, of Amarillo, for plaintiff in error.

N. H. Lassiter, of Ft. Worth, and O. E. Gustavus, of Amarillo, for defendant in error.

KITTRELL, J. Plaintiff in error sued defendant in error for damages arising out of an interstate shipment of cattle, and recovered judgment. On appeal that judgment was reversed and the cause remanded by the Court of Civil Appeals of the Seventh District. The report of the case is to be found in 197 S. W. 773, and the carefully considered and able opinion of Chief Justice Huff clearly reveals what issues were involved, and the holding of the court with relation thereto.

The question on the decision of which the opinion is in the main based was apparently raised on motion for rehearing for the first time. There were, however, several assignments of error presented, but the defense was based in the main on the ground that the plaintiff had not brought suit within six months after his cause of action accrued, as was required by the contract under which the shipment was made.

[1] By way of avoidance of that defense plaintiff pleaded certain facts by way of estoppel, to the effect that the representatives of the railway company had by their statements and letters induced him to believe that the six-month limitation would not be insisted on, but would be waived, and the Court of Civil Appeals, without setting forth the evidence, treated it as sufficient to show waiver by estoppel. We do not deal with the questions so ably discussed by the Court of Civil Appeals with the expectation of being able to add to or improve upon its opinion; but, since the memorandum of the Com-

mittee of Judges which granted the writ shows that it was granted because of the great importance of the question involved, without any expression of opinion as to the correctness of the holding, additional observations on our part may be helpful to the bar and courts in similar cases which may arise in the future. The Court of Appeals held that the six-month limitation provision was valid, and that estoppel could not be interposed to prevent its application to the case as a defense. With that holding we fully agree. To allow the force and effect of the limitation to be avoided on the ground of estoppel would be to allow that to be done indirectly which cannot be done directly.

[2] One of the controlling purposes in enacting the Interstate Commerce Act originally, as well as the amendments thereto, was to prevent the evils arising out of discrimination between shippers on the part of carriers, which had grown to harmful proportions; therefore the right or power to discriminate between shippers in any matter relating to interstate shipments was taken away by the federal statute, and no carrier can waive any requirement of the statute or any stipulation of any contract made pursuant thereto.

[3] If the representatives of a railroad company could by conversations and letters and negotiations extending beyond the statutory or contract limit of time to bring suit set estoppel in operation so that the carrier could not assert and invoke the statutory right given it, which is part of the contract of shipment, their action would, in effect, amount to the equivalent of a waiver, and would operate to enable the carrier to discriminate between shippers, and thereby virtually nullify the statute. *Georgia, etc., v. Blish, etc.*, 241 U. S. 197, 36 Sup. Ct. 541, 60 L. Ed. 948, and authorities cited; *Southern, etc., v. Prescott*, 240 U. S. 638, 36 Sup. Ct. 469, 60 L. Ed. 836; *St. Louis, etc., v. Landa (Olv. App.)* 187 S. W. 358.

The Interstate Commerce Act has been the subject of judicial decision by the court of ultimate resort in many cases, and the Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa) has been repeatedly construed, interpreted, and applied.

[4] It is clear beyond doubt or debate that the amendment has withdrawn the determination of the validity of all stipulations in interstate shipping contracts from state law or legislation. *Adams, etc., v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *Michigan, etc., v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176.

[5] No discrimination will be permitted directly or indirectly as between shippers.

The limitation of the time within which to bring actions is a usual and reasonable provision, and nothing in the Carmack Amendment is violated by such agreement.

[6, 7] The question of the construction of

an interstate bill of lading is a federal question. Every shipper is charged with notice of the terms of the interstate tariffs governing his shipments.

[8] If any state law or the holding of any state court conflicts with the provisions of the federal statute, or with the interpretation put upon it by the Supreme Court of the United States, the federal law will control. Authorities *supra*; *M., K. & T., etc., v. Harri-man*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690; *Western, etc., v. Leslie*, 242 U. S. 418, 37 Sup. Ct. 133, 61 L. Ed. 423; *Southern, etc., v. Prescott*, 240 U. S. 632, 36 Sup. Ct. 469, 60 L. Ed. 836.

The appellee, plaintiff in error here, stated in his motion for rehearing in the Court of Civil Appeals that it was not disputed by him that the court's holding that the stipulation could not be waived was correct, if the stipulation was enforceable in the first place, but contended that it was not valid, but was void because it was not a part of the schedule filed with the Interstate Commerce Commission. On the other hand, appellant, defendant in error here, contends that the stipulation as to bringing suit in six months was not required to be filed. The contentions of opposing counsel revolve around this single point. The question is one concerning which lawyers and courts may reasonably differ. While Chief Justice Huff discusses it with persuasive force, yet he admits it is not free from difficulty and doubt by saying:

"The presentation of the question upon motion [for rehearing] by appellee has been forceful, and it appears to us may be a reasonable interpretation of the statute, but, after examining quite a number of cases by the Supreme Court we find no case passing upon provisions of like kind that will justify us in reaching the conclusion that that court has ever placed its holding as to the validity of such limitations in bills of lading upon the ground that such provision must first be filed with the Interstate Commerce Commission as part of the carrier's rate sheet."

[9] The Supreme Court has indicated to us that the stipulation in the bill fixing the short period of six months for the institution of the suit was clearly a determinative element of the rate charged the shipper; indeed, was in a chief measure the consideration, the justification for the rate; that the statute declares that any regulation which in any wise affects or determines the rate shall be filed with the Interstate Commerce Commission as a part of the carrier's schedule of rates. The purpose of this must have been to acquaint the shipper with any rule or regulation having the character of a determinative factor in the making of the rate, and by which, because of this, the shipper would be bound if he accepted the rate. In fairness, he would be entitled to that knowledge so as to enable him to choose properly between the higher and the lower rate, and it should

therefore be assumed that the intention of the statute was to afford it to him. The ultimate decision of the question rests with the United States Supreme Court, but it has not yet determined it. Upon this view of the question the holding is based that the stipulation was a regulation affecting the rate within the meaning of the federal statute. This being true, it was not binding on plaintiff in error under the admitted facts, and the Court of Civil Appeals erred in holding to the contrary.

The proper judgment to be rendered is to reverse the judgment of the Court of Civil Appeals and affirm the judgment of the district court, and we so recommend.

PHILLIPS, C. J. We approve the judgment recommended in this case.

MISSOURI, K. & T. RY. CO. OF TEXAS v. NORRIS et al. (No. 126-3009.)

(Commission of Appeals of Texas, Section B. June 23, 1920.)

Carriers §322—Negligence of carrier must have caused or concurred in death of passenger.

In action against railroad for injury to shipper when riding in a box car, in absence of affirmative finding that injury in car, and not a subsequent injury in a wagon, was proximate cause of death, or of finding that injury in car and subsequent injury concurred as cause of death, there was no basis for judgment against the railroad.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Suit by J. A. Norris and others against Missouri, Kansas & Texas Railway Company of Texas. From judgment for plaintiffs, defendant appealed to the Court of Civil Appeals, which affirmed (184 S. W. 261), and defendant brings error. Judgments of the trial court and the Court of Civil Appeals reversed, and case remanded.

Chas. C. Huff and Lawther, Pope & Mays, all of Dallas, for plaintiff in error.

D. H. Morrow and Carden, Starling, Carden, Hemphill & Wallace, all of Dallas, for defendants in error.

SADLER, P. J. On the 10th day of January, 1914, J. A. Norris was injured at Pottsboro by the negligence of the Missouri, Kansas & Texas Railway Company of Texas. These injuries were caused by making a flying switch with a box car in which Norris was riding as a shipper of household goods, stock, etc. What injuries he received are left uncertain except as to his leg, hip, and a

skinned place on his cheek or forehead. This occurred on Saturday afternoon. Sunday he, with some assistance, loaded some of his freight into a wagon drawn by a span of mules, and started to his home out in the country. He fell from the wagon, receiving additional injuries, the nature and extent of which are not clearly shown by the evidence. He died the following Saturday from hemorrhage of the brain.

Suit was filed by the surviving wife and children against the railway company to recover damages on account of the death of the husband and father.

On the jury's responses to special issues judgment was rendered against the company, from which an appeal was taken by the defendant. The judgment of the trial court was affirmed in 184 S. W. 261, and writ of error granted to the judgment of affirmance.

The recovery is sought upon several theories: (a) That the death of Norris resulted from the injuries received in the box car, that the injuries received in the box car were fatal, and that the negligence of defendant in making the flying switch was the direct and proximate cause of such injuries and death. (b) That on the next day after receiving the injuries in the box car Norris while riding home in a wagon fell therefrom on account of such injuries and received additional injuries. The fall from the wagon is charged to have been the direct and proximate result of the previous injuries. (c) That as the proximate result of the negligence of defendant Norris was injured in his head, chest, left side, left ribs, leg, and hip, and internally. (d) That all the injuries received in the box car and in the fall from the wagon were the direct and proximate result of the negligence of defendant.

The answer of defendant put in issue each of these theories, and further charged that the injuries received in the fall from the wagon were the direct and proximate cause of death, and were produced by subsequent independent cause in no way created by or due to the charged negligence of defendant, or to the injuries received in the box car.

The cause was submitted on special issues, which, so far as necessary to the decision of this case, together with the answers, are as follows:

"(1) Did the deceased, Norris, die from the injury or injuries he got in the box car, and none other? A. No.

"(2) Did the injuries got in the box car contribute to cause the death of the deceased? A. Yes.

"(3) Was the deceased, Norris, faint or sick when riding upon the wagon from which he fell upon the occasion in question? A. Yes.

"(4) Did the sickness or faintness, if any, of the deceased, Norris, while riding upon the wagon result directly and proximately from the injuries got in the car? A. Yes.

"(5) Did the sickness or faintness, if any, of the deceased, Norris, while riding upon the wagon from which he fell directly and proximately cause him to fall off said wagon? A. No.

"(6) Did the deceased, Norris, die from the injuries, if any, he got at the time he fell off the wagon and none other? A. No."

Defendant requested the following issues, which were refused:

"Did the injuries received by J. A. Norris as a result of the collision with the box car, directly and proximately in a natural and continuous sequence, and unbroken by a new cause, produce his death?"

"Would the death of J. A. Norris, deceased, have occurred but for the injuries received by him in the runaway?"

It also requested the court to charge as follows:

"To attribute death to two or more concurrent causes each must be a prominent and efficient cause; for, if one of the alleged causes operates slightly with another one, which is the prominent, efficient cause, then the proximate cause of the death should be attached to the latter."

This was refused.

Defendant also moved for judgment on the findings of the jury because of the answer to special issue No. 5, for the reason that such answer was a finding that the injuries received in the box car and the act of the defendant in causing such injuries did not directly and proximately cause the deceased's fall from the wagon, the consequent runaway, and the injuries and death resulting therefrom?

Complaint is made by plaintiff in error to the finding by the Court of Civil Appeals that as a result of the collision Norris "received injuries to his head, chest, and side" because there is no evidence to support this finding.

Opinion.

The most important question arises upon the legal effect of the jury's answers to the special issues.

So far as the two sets of injuries which Norris received are concerned, the answers negative any connection between the negligence of the defendant and the fall from the wagon and the injuries resulting from the latter cause. We may premise that the injuries received in the fall from the wagon owe their origin to an independent, unrelated, and subsequent cause from those resulting from defendant's negligence. If these latter injuries were the proximate cause to which death is referable, it is not chargeable to the negligence of defendant.

Under the Bigham Case, 50 Tex. Civ. App. 367, 126 S. W. 324, and subsequent decisions of our courts following the holding there expressed, defendant cannot be held respon-

sible for the result of an independent, intervening cause which did not owe its origin to or have any connection with its negligence.

If the findings of the jury can be said to sustain the court's judgment, it must be based upon some other theory. If the injuries received in the box car were the direct and efficient cause of death, then the negligence of the defendant is the proximate cause of death.

The findings of the jury do not charge more certainly the death of Norris to one than to the other set of injuries. While issues 1 and 6 were very suggestive that Norris died from both sets of injuries, yet they certainly leave in the domain of conjecture to which the jury attributed the greater influence upon the result. In fact, the findings give us no guide pointing the way to the ascertainment of the extent to which either contributed to the death of Norris.

Defendants in error contend that, if the fall from the wagon is an independent intervening cause in no manner referable to the negligence of the railway company, yet the injuries received in the box car so acted upon Norris, and so concurred with those received in the fall from the wagon, as to be responsible along with the latter injuries for the death. This position would merit consideration if that theory were presented by the evidence. This is not done. The effect of the injuries shown to have been received in the box car in bringing about or rendering Norris subject to or as increasing the fatal effects of the later injuries is not made to appear.

Many cases are cited upon this theory. All have been carefully examined. Many not cited have had our attention. The propositions presented by these authorities are all based upon pleading and evidence showing that the recovery is sustained because it is charged and proved that the prior injury exerted a material influence upon the injured party in rendering him susceptible to the effect of subsequent disease or injury, and less able to withstand its deterrent effect upon his system, or when the subsequent disease was the natural and probable result of the injuries. The rule discussed in these cases has no application to that now under consideration because not raised by proof, and it is doubtful whether presented by the pleading.

The jury finding in answer to issue No. 2 cannot assist defendants in error, as it must be considered in the light of the pleading and proof. If it should be said that this is a finding that the injuries in the box car acted materially in conjunction with those subsequently received in producing death, then the finding is immaterial, because not within the purview of the pleading and proof. If it should be construed as a finding that the first injuries brought about the event producing the second injuries, then it is in

direct and positive conflict with the answer to issue No. 5.

Because of the failure of the jury to fix the proximate cause of death, a necessary finding in support of the judgment is wanting. Defendant requested the submission of an issue calling for a finding upon proximate cause of death in relation to the injuries charged to have been received as a result of the collision with the box car. This should have been given, since the court had failed to give the jury the opportunity to pass upon the evidence in this respect. The evidence called for the submission of the requested issue as to the proximate effect of such injuries.

The judgments of the Court of Civil Appeals and district court should be reversed, and the cause remanded for a new trial.

PHILLIPS, C. J. There was no affirmative finding by the jury in this case that the injury received by Norris in the box car and for which the defendant was responsible was the proximate cause of his death. The defendant requested the submission of this issue. Nor was there any affirmative finding by the jury that the injury received by Norris in the box car and the fall from the wagon concurred as the efficient cause of his death. Under this condition there was no basis for a judgment against the defendant, and accordingly there should be another trial.

We make no holding as to the effect of the evidence, nor as to what issues are presented by the evidence. In the disposition made of the case such a holding is unnecessary, and in view of another trial it is pretermitted.

As has been recommended by the Commission of Appeals, the judgments of the District Court and Court of Civil Appeals are reversed and the case remanded to the District Court.

CHICAGO, R. I. & G. RY. CO. v. SMITH. (No. 150-3108.)

(Commission of Appeals of Texas, Section A. June 23, 1920.)

1. Appeal and error \Leftrightarrow 216(3)—Instruction in personal injury action not to be complained of, in absence of request for correction.

In an action brought under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), a charge that if plaintiff was injured as alleged, and if the proximate cause thereof was concurring negligence, under issues submitted, then "in answer to this question you will diminish your findings on this issue in proportion to the amount of negligence attributable to plaintiff," cannot be complained of, in absence of a special charge suggesting corrections.

2. Appeal and error \Leftrightarrow 1068(4)—Instruction on diminution of damages for concurring negligence held harmless.

In an action against a railroad company for personal injuries, an instruction that if plaintiff was injured as alleged, and the proximate cause thereof was concurring negligence, then the finding should be diminished in proportion to the amount of negligence attributable to plaintiff, if erroneous, held harmless, where the jury found that plaintiff was not guilty of contributory negligence.

3. Master and servant \Leftrightarrow 297(2) — Findings held not inconsistent.

In a personal injury action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), a finding that plaintiff did not attempt to step on a stringer, lose his balance, and fall, as alleged in the answer, held not inconsistent with a special subsequent finding that, if the accident had happened as alleged, plaintiff would have been guilty of contributory negligence, which was rendered immaterial by the first finding.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Action by A. W. Smith against the Chicago, Rock Island & Gulf Railway Company. Judgment for plaintiff was affirmed by the Court of Civil Appeals (197 S. W. 614), and defendant brings error. Affirmed, as recommended by the Commission of Appeals.

Lassiter & Harrison, of Ft. Worth, C. B. Gustavus, of Amarillo, and R. M. Rowland, of Ft. Worth, for plaintiff in error.

L. C. Barrett, J. N. Browning, and Crudgington & Works, all of Amarillo, and Black & Smedley, of Austin, for defendant in error.

SPENCER, J. A. W. Smith instituted this suit, and recovered judgment against the Chicago, Rock Island & Gulf Railway Company for personal injuries sustained by him. Judgment was affirmed by the Court of Civil Appeals. 197 S. W. 614. Writ of error was granted upon application referred to the Committee of Judges.

[1, 2] Plaintiff in error complains of the following charge of the court:

"If you find that plaintiff was injured as alleged in his petition, and the proximate cause thereof was the concurring negligence, if any, of the plaintiff and defendant under the issues hereinbefore submitted for your finding, then in answer to this question you will diminish your finding on this issue in proportion to the amount of negligence attributable to plaintiff."

The reason assigned is that it does not correctly submit the liability of the plaintiff in error under the terms of the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665). The charge given is almost in the identical language of the statute, and in the

absence of a special charge from plaintiff in error, suggesting a correction of any error it deemed to exist, we think it is not now in position to complain. *St. L. & S. F. Ry. Co. v. Brown*, 241 U. S. 223, 38 Sup. Ct. 602, 60 L. Ed. 986. Moreover, the jury found that defendant in error was not guilty of contributory negligence, and this renders the error, if any, harmless.

[3] Plaintiff in error insists that the answer of the jury to special issue No. 5 is inconsistent with and contradictory to the answer of the jury to special issue No. 6, and therefore forms no proper basis for a judgment in favor of defendant in error. Special issue No. 5 reads:

"Did the plaintiff, at the time, place, in the manner, and under the circumstances alleged in paragraph 6 of defendant's answer, attempt to step upon the stringer, lose his balance, and fall to the ground?"

The jury answered: "No."

Special issue No. 6 is as follows:

"If the plaintiff at the time, place, in the manner and under the circumstances alleged in paragraph six of defendant's answer did attempt to step upon the stringer, lose his balance, and fall to the ground: (a) Was same negligence of plaintiff? (b) Was same the proximate cause of injuries to plaintiff, or any of them, alleged in plaintiff's petition?"

The jury answered both questions in the affirmative.

It is clear, we think, that the answers are not contradictory. Plaintiff in error alleged in paragraph 6 that defendant in error was guilty of contributory negligence, in that he carelessly and negligently attempted to step upon the moving timber, lost his balance, and fell to the ground. The jury, by its answer to special issue No. 5, found that the injury did not happen as alleged by plaintiff in error. This is conclusive of the issue of contributory negligence, and renders the answers to special issue No. 6 wholly immaterial. It is clear that the jury intended, by its answer to special issue No. 6, to find that, had the accident happened as alleged by plaintiff in error, defendant in error would have been guilty of contributory negligence proximately causing the injury.

The definition of "ordinarily incident," as defined by the court, when considered in connection with the entire charge, presents no error, and we think the honorable Court of Civil Appeals properly disposed of the assignment complaining of it.

It is recommended, therefore, that the judgment of the Court of Civil Appeals and of the district court be affirmed.

PHILLIPS, C. J. We approve the judgment recommended in this case.

WALKER v. CHATTERTON et al. (No. 131-3022.)

(Commission of Appeals of Texas, Section A. June 23, 1920.)

1. Judgment \Leftrightarrow 906—Defense to original cause not available in action on judgment.

In an action on a judgment, the original cause of action is merged in the judgment, and, unless void, it is conclusive; the principles of estoppel attached to final adjudications being as operative and conclusive in an action on judgment as in other cases, so that no defense can be urged which existed anterior to the judgment, the effect of which would be to render the judgment voidable, or erroneous, but not void.

2. Judgment \Leftrightarrow 519—Want of jurisdiction over person of defendant may be set up in action on judgment as direct attack.

Although a judgment rendered against a surety recites appearance by the surety, in an action on such judgment want of jurisdiction over the person of the surety may be set up by him; such defense not constituting a collateral, but a direct, attack upon the judgment.

3. Judgment \Leftrightarrow 906—In action on judgment, defense may attack validity of judgment.

Since equitable defenses may be interposed to actions at law, a defendant in an action on a judgment may interpose by way of defense facts which would require a vacation of the judgment for want of jurisdiction, if he had resorted to a dependent action for such purpose, and such defense should be given the same force and effect as a cross-bill.

4. Judgment \Leftrightarrow 884—Intervention by judgment creditor in receivership proceedings held not to work merger of judgments.

Where a judgment was rendered against a surety on a note, and also against a railroad company on its notes given as collateral to secure the note, and the railroad company subsequently became insolvent and went into the hands of receivers, an intervention by the judgment creditor in the receivership proceedings did not affect the status of the judgment on the note, and did not result in a merger of the two suits or judgments.

Error to Court of Civil Appeals of Sixth Supreme Judicial District.

Action by G. A. Chatterton and others against L. E. Walker. Judgment for plaintiffs was affirmed by the Court of Civil Appeals (192 S. W. 1085), and defendant brings error. Reversed and remanded, as recommended by the Commission of Appeals.

Y. D. Harrison, of Marshall, for plaintiff in error.

F. H. Prendergast, of Marshall, for defendants in error.

SONFIELD, P. J. On August 12, 1904, in cause No. 11063, W. A. Chatterton v. Delaware Western Construction Company

et al., in the district court of Harrison county, W. A. Chatterton, plaintiff, recovered judgment against defendants Delaware Western Construction Company, L. E. Walker, and Texas Southern Railway Company. The judgment against the two first-named defendants was based upon a note executed by the construction company and guaranteed by Walker; that against the railway company was upon certain construction notes issued by it to the Delaware Western Construction Company, and by that company delivered to Chatterton as collateral to secure the above-mentioned note.

Shortly after the rendition of this judgment, a proceeding was instituted in the same court, being cause No. 11076, United States & Mexico Trust Company v. Texas Southern Railway Company, and a receiver of the property of the railway company was appointed. Chatterton intervened in this proceeding, setting up the judgment recovered against the railway company in cause No. 11063, and in the final decree of foreclosure was awarded, in lieu of the construction notes, 15 of the bonds of the railway company; the decree providing that the judgment in cause No. 11063 as against the railway company should be set aside, and the construction notes canceled. Subsequent to the rendition of the judgment in cause No. 11063, both the railway and construction companies became insolvent, ceased to do business, and their respective charters were forfeited. No execution issued upon the judgment, and it was dormant at the time of the institution of this suit.

This is an action of debt on the judgment in cause No. 11063 by defendants in error, the heirs and representatives of W. A. Chatterton, against plaintiff in error, L. E. Walker, one of the defendants in that cause. Walker pleaded the invalidity of the judgment as to him, on the ground that he had never been served with process, and made no appearance in the case, and prayed its cancellation. He alleged partial payment of the note which was the basis of the judgment, and an agreement by Chatterton to accept in further payment thereof certain trust certificates; that Chatterton was entitled to certain bonds of the railway company as collateral to secure the note, such collateral, at the time of the institution of suit No. 11063, being worth \$7,500, and Chatterton sold his interest therein for the sum of \$3,300. The partial payment and alleged agreement sought to be interposed by way of defense by Walker, as presented in the assignments of error in his application for the writ, antedated rendition of the judgment sued upon.

Walker, by supplemental answer, pleaded that the suit in which the judgment herein sued upon was rendered was merged in the suit of United States & Mexico Trust Com-

pany v. Texas Southern Railway Company, No. 11076, and the judgment recovered by W. A. Chatterton therein against the railway company, in the final decree of foreclosure, was sold and transferred by Chatterton to F. M. Hubbel, and plaintiffs in this suit are not entitled to any interest in, and are not the legal owners and holders for value of, the judgment of W. A. Chatterton against the Texas Southern Railway Company, which judgment was the result of the merger of causes Nos. 11063 and 11076.

The cause was tried by the court. Walker adduced evidence to establish want of service upon and nonappearance by him in cause No. 11063, and to sustain the other defenses, which evidence the court declined to consider. The court concluded: (1) That the defenses which existed at the time the judgment was rendered could not be urged in this proceeding; (2) that the judgment reciting appearance of defendants by attorney, Walker was precluded from showing want of jurisdiction in the court rendering the judgment; this constituting a collateral attack upon the judgment. Judgment was rendered for defendants in error in the amount of the judgment sued upon, with interest, less \$3,300, the sum received by Chatterton on the sale of the collateral. On appeal, the judgment was affirmed. 192 S. W. 1085.

[1] We think the trial court correct in its first conclusion. The judgment, unless void, is conclusive in a proceeding of this character. The original cause of action is merged in the judgment, and the principles of estoppel attached to final adjudications are as operative and conclusive in an action on the judgment as in other cases; hence no defenses can be urged which existed anterior to the judgment, the effect of which would be to render the judgment merely defective, erroneous, or voidable, but not void. *Bullock v. Ballew*, 9 Tex. 498; *Hopkins v. Howard*, 12 Tex. 7; *Baxter v. Dear*, 24 Tex. 17, 76 Am. Dec. 89; *Bridge v. Samuelson*, 73 Tex. 522, 11 S. W. 539.

[2] We are of opinion that the conclusion of the trial court, to the effect that the recital in the judgment of appearance was conclusive, and that defendant in an action on the judgment could not defend on the ground of want of jurisdiction over his person by the court rendering the judgment, is erroneous. The judgment is the foundation of the action. The proceeding is directly upon the judgment, and does not merely collaterally involve it. The defense does not attempt to defeat the operation of the judgment in a proceeding where some new right derived from or through the judgment is asserted. No new right is affected. The only right involved is the original right expressed by the judgment. It is sought to make the judgment the basis of a new re-

covery, proceeding from the original right acquired by the judgment.

The judgment is itself the cause of action. The defense is that the judgment, the cause of action, is an absolute nullity. The action being directly upon the judgment, the defense that the court had no power to render it does not constitute a collateral, but a direct, attack. It is well established in this state that a proceeding to vacate a judgment, or to enjoin its execution, is a direct attack upon it. *Crawford v. McDonald*, 88 Tex. 626, 33 S. W. 325. Defendant could have brought such a proceeding, and, upon allegation and proof of want of jurisdiction over his person, obtain relief against the judgment.

[3] Our courts administer both law and equity in the same action, and equitable defenses may be interposed to actions at law. This being true, we can perceive no good reason for denying to defendant in an action on a judgment the right to interpose, by way of defense, facts which would require a vacation of the judgment for want of jurisdiction, had he resorted to an independent action for such purpose. The defense asserted in the answer, with prayer for cancellation, should be given the same force and effect as a cross-bill. *House & Co. v. Collins*, 42 Tex. 486. It is now well settled by the courts in a majority of states, and by the Supreme Court of the United States, that in an action upon a foreign judgment the question of jurisdiction may be inquired into, and a want of jurisdiction over the person shown, notwithstanding the requirement in the Constitution of the United States that full faith and credit shall be given in every state to the public acts, records, and judicial proceedings of every other state. No sound distinction can be made as to this defense in an action upon a judgment of another state and one upon a domestic judgment. If a conclusive presumption obtains in the one case, it should obtain in the other.

It is clear, upon principle, that the jurisdiction of a court entering a particular judgment may always be inquired into when such judgment is made the foundation of an action. In *Norwood v. Cobb*, 15 Tex. 500, the first case before our Supreme Court involving the availability of this defense to a foreign judgment, the court, speaking through Lipscomb, J., recognized that the defense was available in an action upon either a foreign or domestic judgment. In the course of the opinion it is said:

"The rule is believed to be universal, not only in cases arising upon judgments of a sister state, but by the common law, and acknowledged also to prevail in most civilized governments, that a want of jurisdiction in the court rendering the judgment invalidates the judgment; and it would be vain and useless to say to the party interested: You may impeach the judgment and show that the court awarding it

had no jurisdiction—and deny to him the means of showing such want of jurisdiction."

And again:

"If a suit was brought on one of our own judgments, it cannot be questioned; but it would be competent for the defendant to go behind the judgment, and show a want of jurisdiction in the court that rendered the judgment, or to show that it was obtained by fraud. In effect, we so ruled in *Gross v. McClaran*, 8 Tex. 341, and in *Jones v. Stuart*, 9 Tex. 469."

The Court of Civil Appeals did not pass upon this question, holding that, if it be conceded that the defense could be urged, the record disclosing that the judgment was valid, it devolved upon Walker to show that he had a good defense to the suit; that the trial court heard all the evidence, and passed upon its sufficiency, or as ground for vacating the judgment, and the evidence is not such as required the rendition of a different judgment upon the merits; that, the facts being such as to warrant a finding of an insufficient defense, it must be assumed that the trial court was justified in rendering the judgment herein.

The defendant pleaded and adduced evidence to establish a partial payment of the note, the basis of the judgment sued upon, and an agreement that Chatterton would accept in further payment of the note certain collateral trust certificates; such partial payment and agreement antedating the judgment. The trial court declined to consider the evidence, holding it inadmissible for any purpose; the judgment being conclusive upon defendant. It cannot, therefore, be assumed that the trial court was justified in rendering judgment on the ground of a lack of defense to the original cause of action. If defendant's right to defend upon the ground of want of jurisdiction was conditioned upon allegations and proof of a meritorious defense, which we do not determine, we hold that such condition was complied with.

[4] There remains to be considered the contention of plaintiff in error that cause No. 11063 was merged in cause No. 11076, and, W. A. Chatterton having sold that judgment, defendants in error cannot recover herein. The cause of action in suit No. 11063 against the Delaware Western Construction Company and L. E. Walker was on a note; that against the Texas Southern Railway Company was on certain collateral given to secure the note. Though joined in one suit, the causes of action were separate and distinct. So, likewise, the judgment was not joint, but as against the Delaware Western Construction Company and L. E. Walker was on the note, and against the Texas Southern Railway Company on the collateral. The intervention by Chatterton in the receivership proceeding was solely upon the

judgment recovered against the Texas Southern Railway Company; and neither the intervention nor the decree of the court thereon in any wise affected the judgment on the note against the Delaware Western Construction Company and L. E. Walker. The intervention was proper, and resulted in no merger of the two suits or judgments. The proceeds of the sale of Chatterton's rights under the judgment were duly credited upon the judgment herein.

We are of opinion that the judgment of the Court of Civil Appeals should be reversed, and the cause remanded for a new trial.

PHILLIPS, C. J. We approve the judgment recommended in this case, and the holding of the Commission on the question discussed.

THOMPSONS v. STATE. (No. 5874.)

(Court of Criminal Appeals of Texas. June 23, 1920.)

4. Criminal law \S 1086(13)—Appeal dismissed, where record does not show "sentence."

The "sentence" is the final judgment in a criminal case, and is necessary to the jurisdiction of the Court of Criminal Appeals over the appeal in a felony case, so that the appeal must be dismissed where the record does not show the sentence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sentence.]

2. Criminal law \S 1092(7)—Bills of exception, not filed within the time granted, cannot be considered.

Bills of exception, taken on the trial of a criminal case, which were not filed within the 30 days granted by the court within which to file them, cannot be considered.

Appeal from District Court, Newton County; J. T. Adams, Judge.

Arthur Thompson was convicted of theft, and he appeals. Appeal dismissed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for theft; two years in the penitentiary being the punishment assessed.

[1, 2] The appeal must be dismissed, because the record does not contain a sentence. The sentence, being the final judgment, is necessary to attach the jurisdiction of this court in appeal felony cases. Collated cases may be found in Branch's P. C. p. 338; C. C. P. art. 853; Vernon's Ann. C. C. P. p. 851. But for this omission in the record the judgment should be affirmed. The two bills of ex-

ception taken on the trial are not filed in time granted for that purpose. Court adjourned March 20th. The court granted 30 days in which bills of exception might be filed. The bills were not filed until in early part of May, and could not therefore be considered.

The appeal is dismissed.

YOUNG v. STATE. (No. 5766.)

(Court of Criminal Appeals of Texas. April 7, 1920. On Motion for Rehearing, June 16, 1920.)

1. Ball \S 65—Recognizance in misdemeanor appeal must state punishment.

The recognizance for appeal in a case of misdemeanor required by Code Cr. Proc. 1911, art. 903, must state the punishment.

2. Ball \S 65—Recognizance stating punishment as fine of "one hundred" is insufficient.

A recognizance for appeal from conviction of a misdemeanor which states the punishment merely as a fine of "one hundred" is insufficient, and the appeal must be dismissed.

On Motion for Rehearing.

3. Criminal law \S 200(2)—Conviction of assault no bar to prosecution for unlawfully carrying a pistol.

A conviction for assault, under an indictment charging that defendant, while unlawfully carrying, or having about his person a pistol, did make an assault, etc., is not a bar to a subsequent prosecution for unlawfully carrying a pistol, for the two offenses are entirely distinct, and averments as to unlawfully carrying a pistol might be rejected as surplusage, particularly as Vernon's Ann. Pen. Code 1916, art. 1024a, expressly provides for punishment of an assault while unlawfully carrying a pistol.

Appeal from Aransas County Court; F. Stevens, Judge.

Henry Young was convicted of a misdemeanor, and he appeals. Affirmed.

Gordon Gibson, of Rockport, for appellant. Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. By motion the Assistant Attorney General suggests that this court has not acquired jurisdiction to decide this case on its merits, for the reason that a recognizance in substantial compliance with the statute is wanting.

[1] On appeal to this court the statute (article 903, Code of Crim. Procedure) requires that the recognizance in a case of misdemeanor shall state the punishment; at least it has been construed in a uniform line of decisions to be incomplete if it fails to state the punishment. *Watson v. State*, 62

[2] In the instant case the judgment shows that the fine entered against appellant was \$100. In the recognizance the fine is described as "one hundred." It is essential that the recognizance comply with the law; otherwise it would be inadequate to support a judgment forfeiting bail.

Under the facts and the law, we are constrained to sustain the motion of the state, and the appeal is accordingly dismissed.

On Motion for Rehearing.

[3] The order heretofore entered, dismissing the appeal, is set aside upon the motion of appellant, accompanied by a proper recognizance. On the merits of the case the conviction is for unlawfully carrying a pistol on and about his person. He was previously convicted of an assault in an indictment charging that he did "then and there, while unlawfully carrying on and about his person a pistol, with the said pistol in and upon Willie Bell make an assault." The occasion upon which the assault was made was the same as that upon which the present conviction is had. The contention is urged that the conviction for the assault bars this prosecution for unlawfully carrying a pistol. The indictment in the assault case charged the offense awkwardly, and included therein surplusage; that is, "while unlawfully carrying on and about his person a pistol" was not necessary. The indictment, however, we think, did not charge the appellant with the offense of unlawfully carrying a pistol, but in describing the occasion charges with unnecessary particularity that it was done while he was unlawfully carrying one. The offenses are different, punished with different penalties, and that of unlawfully carrying a pistol is not included in the statutory offense of an assault. An assault may be made with a pistol unlawfully carried. We have a statute expressly so declaring. See Vernon's Texas Crim. Statutes, vol. 1, art. 1024a.

The case of Nichols v. State, 37 Tex. Cr. R. 616, 40 S. W. 502, was one in which the prosecution was for unlawfully carrying a pistol. The plea of former conviction for rudely displaying a pistol was stricken out, and the ruling sustained. So in Burns v. State, 36 Tex. Cr. R. 606, 38 S. W. 204, the propriety of a double conviction was recognized, where one was charged with unlawfully carrying a pistol, and also charged on the same occasion with carrying it within a prohibited distance of a polling place during an election. In Woodroe's Case, 50 Tex. Cr. R. 212, 96 S. W. 30, the ruling was that a plea of former acquittal of an assault with intent to murder was not available in bar of a prosecution

on the same occasion. In Ford's Case, 56 S. W. 918, the plea of former conviction charged that the appellant had been "convicted of an assault with intent to murder, * * * and that the carrying of the pistol was a part of this transaction; that is, he had the pistol, and used it in said assault." This plea as a bar to the prosecution for carrying the pistol was rejected.

Our attention has been drawn to no authorities supporting the view of appellant. Those we have cited we regard as analogous, and in our judgment the reasons expressed in them, controlling their rendition, support the ruling of the trial court.

The former judgment dismissing the appeal is set aside, the motion for rehearing granted, and the judgment affirmed.

WALLACE v. STATE. (No. 5871.)

(Court of Criminal Appeals of Texas. June 23, 1920.)

1. Criminal law §1116—Variances must be shown by record.

A conviction for forgery cannot be reversed for variance between the forged name as alleged in the indictment and the name signed to the instrument, where the record does not show what name was signed to the instrument.

2. Forgery §34(8) — Difference between "Bickerell" and "Bicknell" as forged name is fatal variance.

There is a fatal variance between an indictment charging forgery of the name "Bickerell" to a check and proof that the name forged was "Bicknell."

3. Criminal law §603(2)—Motion to continue must be sworn to.

A conviction will not be reversed for denial of a motion to continue or postpone which was not sworn to by accused or by any one for him.

4. Criminal law §1090(7)—Refusal to continue not reviewable without bill of exceptions.

The refusal to continue or postpone a criminal trial must be verified by bill of exceptions to authorize review of the ruling on appeal.

5. Criminal law §1090(8)—Error in admitting evidence must be shown by bill of exceptions.

A conviction cannot be reversed for error in admitting testimony where the record does not contain bill of exceptions to the rulings of the trial court, though the motion for new trial charged error in admitting testimony.

Appeal from District Court, Bexar County; W. S. Anderson, Judge.

W. H. Wallace was convicted of forgery, and he appeals. Affirmed.

State.

DAVIDSON, P. J. The jury allotted appellant two years in the penitentiary for forgery.

The indictment contains two counts, one for forgery, and the other for passing the alleged forged instrument.

[1, 2] Motion to quash on the ground that the check or draft was described as the act of "J. Bickerell," whereas the name of "J. W. Bicknell" is signed to the instrument, and that there is a variance between the allegation and the facts, was overruled. The indictment alleges the name of "Bickerell," and not "Bicknell." If there was developed on the trial that "Bicknell," and not "Bickerell," was the forged name, it is not made to so appear by the record. If such was the case, there would be a fatal variance. The facts have not been sent with the record; therefore we are unable to determine that question.

[3] There was a motion made to postpone or continue the case. This was not sworn to by appellant, or any one for him.

[4] Nor was exception reserved to the court's refusal to grant the application. Refusal to continue or postpone must be verified by bill of exceptions in order to authorize this court to review the ruling of the trial court.

[5] The record does not contain any bills of exception to rulings of the trial court. The motion for new trial states the court erred in admitting testimony, but this is not verified by bills of exception.

The record presents no reversible error.

The judgment is affirmed.

CLEMENTS v. STATE. (No. 5873.)

(Court of Criminal Appeals of Texas. June 23, 1920.)

Criminal law §1097(4)—Statement of facts necessary to review admission of testimony.

In absence of a statement of facts, the appellate court cannot review the admission of testimony.

Appeal from District Court, Bexar County; W. W. Walling, Special Judge.

A. J. Clements was convicted of receiving and concealing stolen property, and he appeals. Affirmed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. In this case appellant was convicted of the offense of receiving and concealing stolen property, and his punish-

mentary for a term of six years.

The record appears before us without either a bill of exceptions or statement of facts. We have examined the rather lengthy motion for new trial, but, inasmuch as the same complains only of errors in the admission of testimony, we are unable to determine the correctness of any of the contentions, in the absence of a statement of facts.

The indictment and charge of the court appear to be in conformity with the law, and no complaint is made of either.

The judgment of the trial court will be affirmed.

GARZA v. STATE. (No. 5878.)

(Court of Criminal Appeals of Texas. June 23, 1920.)

Indictment and information §79—Information sufficient to charge carrying a "pistol," though spelling it "pistle."

A complaint and information which charged defendant with unlawfully carrying a "pistle" will be construed as charging defendant with unlawfully carrying a pistol, and the rule of bad spelling will apply, notwithstanding it was contended that the word "pistle" was an obsolete word meaning a letter.

Appeal from Brazoria County Court; C. D. Jessup, Judge.

Morris Garza was convicted of unlawfully carrying a pistol, and he appeals. Affirmed.

Geo. C. Currier, of Alvin, and A. E. Master-son, of Angleton, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted in the county court of Brazoria county of unlawfully carrying a pistol, and his punishment fixed at a fine of \$100.

The complaint and information charge appellant with carrying a "pistle." The testimony shows that he carried a "pistol." Objection was made to this testimony on the ground of variance between the allegation and proof. It is urged that "pistle" is a word meaning a communication, and that the well-known rules of idem sonans and bad spelling do not apply. Appellant's authority for asserting that "pistle" is the name of a communication is the Century Dictionary. Reference thereto discloses that said work prints said word as obsolete and quotes Mr. Chaucer, who wrote in old English some 700 years since, as using it. We do not think that the fact that an early English poet, in the exercise of his license, should have used this word in that sense, would necessarily give it any standing at this time,

or would likely mislead a Brazoria county Mexican, defended by a pair of able lawyers, into the mistake, in preparing for trial upon a charge of unlawfully carrying a "pistle," of seriously thinking himself charged with unlawfully carrying a communication. The word "pistle" does not seem to be given in any of our other dictionaries, to which this court has access, and we are inclined to hold the word, as used in the information and complaint herein, idem sonans with "pistol," and that the rule of bad spelling will apply and, further, that it is evident that the word "pistol" was intended. The evidence that appellant had a pistol on his person in a public place was uncontroverted.

The judgment will be affirmed.

RAMIREZ v. STATE. (No. 5864.)

(Court of Criminal Appeals of Texas.
June 16, 1920.)

Criminal law §1182—There being no error of record, conviction will not be disturbed.

Where there was no statement of facts, bills of exception, or motion for new trial, a conviction will not be disturbed on appeal; there being no error of record, and the indictment and charge being sufficient.

Appeal from District Court, El Paso County; W. D. Howe, Judge.

Ernesto Ramirez was convicted of burglary, and he appeals. Affirmed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. In this case, appellant was convicted in the district court of El Paso county, for the offense of burglary, and given a term of two years in the penitentiary.

The record is before us without any statement of facts, bills of exception, or motion for a new trial. We have examined the indictment, and find it to be in conformity with the requirements of the statute, and the charge of the court is the law applicable.

Finding no error in the record, the judgment will be affirmed.

RABE v. STATE. (No. 5770.)

(Court of Criminal Appeals of Texas.
June 16, 1920.)

1. Larceny §32(5)—Ownership of cattle should be alleged in person controlling pasture and not owner of pasture.

In a prosecution for theft of cattle from a pasture, ownership should be alleged to be

in the person who had the care, control, and management of the pasture, and not in the owner of the pasture.

2. Animals §26(2)—Lien for pasturage given.

One taking cattle into a pasture of which he has control has a lien on the cattle for pasturage, although nothing is said concerning the price or who shall care for and control the cattle.

3. Animals §22—Duty in pasturing defined.

The law places the obligation on one taking cattle into his pasture to take care of them.

4. Criminal law §925½(3)—Discussion of accused's failure to testify by jurors required new trial.

Where a number of jurors were in favor of giving a two-year sentence until the fact that accused had not testified was called to their attention by jurors, and after the matter was discussed for some time, and because of such discussion, agreed to a four-year sentence, court erred in not granting a motion for a new trial.

Appeal from District Court, Angelina County; L. D. Guinn, Judge.

J. C. Rabe was convicted of cattle theft, and appeals. Reversed and remanded.

See, also, 212 S. W. 502.

Mantooth & Collins, of Lufkin, and J. J. Collins, of Huntington, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. [1] This is the second appeal. The judgment was reversed on the former appeal because of a variance between the allegations of the indictment and the evidence. The indictment on the former appeal charged ownership in Dr. Stewart, the real owner of the alleged stolen cattle. The care, control, and management of the cattle was held, under the evidence, to be in Thomas. This constituted a variance, for which the judgment was reversed. A new indictment was presented, containing three counts, alleging, respectively, ownership in Dr. Stewart, Mr. Herrington, and Mr. Thomas. Each count charges separate ownership. The count charging ownership in Herrington finds no basis in the facts. He was not in possession of the cattle, or the pasture from which they were alleged to have been taken. Herrington owned the pasture, but, under a contract with Mr. Thomas, Thomas was in control, and exercised care, control, and management of the pasture. Thomas had been in control under his contract with Herrington for about two years. Herrington had a conversation with Dr. Stewart with reference to pasturing his cattle, in which he informed him of the fact that Thomas had control of the place, and any contract he made with Thomas would be satisfactory. Dr. Stewart called upon Thomas, who agreed

to let him pasture his cattle. There seems to have been no stipulated price. Thomas was in control of the property—the pasture and fences.

Thomas' testimony upon this trial is in conflict with his testimony upon the former trial. Upon the former trial he stated:

"It is true that I testified before in this case 'that I owned a one-half interest in the pasture on that place this year. Dr. Stewart made arrangements with me this year to pasture some of his cattle in my pasture. He made a rental contract with me to rent my place. As to whether or not he was to pay me for the use of the pasture, we never set no price. He was to pay me a price. I left it to Mr. Herrington to set the price; that is, Mr. Josh Herrington. He did not pay the pasture rent in advance. I look after the place myself when I am able, such as keeping up the fences around the pasture, and the closing of gates, and things like that; but I have been sick some this year. There were a few cattle belonging to other people, besides Dr. Stewart. I saw to the cattle that were in the pasture; that is, I was supposed to keep them in there and to keep other people's out. I saw that the fences were kept up, and the gates closed, the best I could. I don't know just how far it is, but I think it is something like a mile Mr. Tulley lives from that pasture.' That is correct."

The above was his testimony upon the former trial. He further adds here: "What I testified to before was the truth, and it is true now." On this trial Thomas testified, referring to Dr. Stewart:

"I believe it was a couple of days that he came to see me before the cattle were put in the pasture; anyway he came to see me just before the cattle were put in there. When he put the stock, or when he made arrangements to put the stock, in the pasture, he did not put the stock in my control, for me to manage and look after. I did not have any authority, management, or control whatever over the cattle. I had no instructions at all with reference to the cattle. We had no agreement about the fences, as to who was to keep them up; me and Dr. Stewart did that. As to who kept the gate closed, and looked after things of that kind, the children did at that time; I wasn't able; I was sick. Dr. Stewart did not mention to me anything about such things as looking after the gate, or taking care of the cattle, whatever. If he asked me to exercise any sort of management or control about those cattle, I don't remember it. I am the one that reported that some of the cattle were gone."

[2, 3] The evidence shows that Dr. Stewart was not about the pasture, and exercised no management over it, or the cattle, further than to place them in the pasture controlled by Thomas. This he did through his employed hands. The case was decided before upon the theory that Thomas had a lien on the property for their pasturage, and that therefore he was in possession of the cattle as

against the true owner, Stewart. This conclusion was reached by virtue of a lien fixed under such circumstances by the terms of the civil statutes. It was a legal lien, and would be operative in the absence of a contract to the contrary. These parties could have made any contract with reference to it they saw proper to do. The evidence does not so show. In fact, it excludes the idea of such contract. Had the owner, Dr. Stewart, taken the cattle from the pasture with the fraudulent purpose of defeating the lien legally resting upon the cattle, he would have been subject to prosecution under the statute. See P. C. art. 1335; Branch's Ann. Crim. Stats. p. 1353. There would be no question in law or in fact that Thomas would be entitled to the possession of the cattle, after being placed in his pasture, as against Dr. Stewart, until the pasturage had been satisfactorily arranged. This would place Thomas in possession of the property under the facts of this case. We are still of opinion that ownership should have been alleged in Thomas, and not in Stewart. The statement by Thomas that there was nothing mentioned between him and Stewart that he (Thomas) was to have control and management of the cattle, and kindred testimony, would not legally change this proposition. The law places the obligation upon him to take care of the cattle when he assumed the burden of their pasturage, and gave him a lien for pasturage. This matter was presented in various ways by appellant in the trial court. We have stated the matters generally.

Appellant requested the court to require the state to elect upon which count the prosecution would be had at the time the trial began. When the testimony was in, he again urged the election under which count the conviction would be asked. These were overruled. The court instructed the jury that they could convict under either count, submitting all three of them to the jury. Exception was properly and timely reserved to this action of the court. General ownership could have been alleged in Dr. Stewart as the real owner, and possession and management in Thomas. This was pointed out in the former appeal; not that it was necessary to so allege, but if it was thought proper to allege ownership in the real owner under the facts of this case, it should have been alleged in that manner. We are still of opinion that ownership should have been alleged in Thomas. He became the temporary owner of the property, as against even the real owner under the circumstances and the evidence depicted in this record. The authorities were sufficiently collated in the opinion on the former appeal.

[4] Misconduct of the jury in discussing the failure of appellant to testify was presented on motion for new trial. Several jurors testified to that effect. Two or three of

the jurors testified that, if it occurred, they did not hear it. Several jurors testified they were for the minimum punishment of two years until this matter was discussed; that they then changed their view, and voted for the maximum of four years, which was the verdict returned by the jury. The details of the testimony we deem unnecessary to mention. There are a great number of authorities, cited by appellant in his brief, which we think are in point. *Wilson v. State*, 39 Tex. Cr. R. 365, 46 S. W. 251; *Tate v. State*, 38 Tex. Cr. R. 261, 42 S. W. 595; *Mizell v. State*, 31 Tex. Cr. R. 241, 197 S. W. 300; *Boozar v. State*, 198 S. W. 295; *Walling v. State*, 59 Tex. Cr. R. 279, 128 S. W. 624. And for a great number of other cases see Branch's Ann. P. C. p. 292. Some of the jurors gave as a reason for desiring to fix the punishment at two years that appellant was getting to be an elderly man, and they thought two years would be a sufficient time for his reformation, and to ascertain the fact that he must not repeat this character of transaction; but, after the matter was discussed of his failure to testify, they changed their verdict and went to four years. It is sufficient, with reference to the remarks used, to copy the following from the affidavit of Perry:

"After the jury had retired, I was in favor of giving him a conviction for only two years, as he is now an old man, and there being no proof of other crimes against him, I felt that if we gave him a two-year sentence that probably by the time he served that out he would be taught a sufficient lesson to not do a thing like that again. Some of the others, also, were in favor of a two-year term; but some of the older men spoke up against this, and, as an argument against giving him a two-year term, said that he ought to have the limit of four years; that he did not even get on the stand and testify, or attempt to explain and tell how it happened, and that he did not even get on the stand and offer any excuse for his conduct, or give the jury any information as to why he stole the cattle, and that, if he had not been guilty, he would have certainly got on the stand and denied it."

There are affidavits of other jurors substantially to the same effect. The evidence on this issue is in substantial compliance with the above.

The judgment will be reversed, and the cause remanded.

SMILEY v. STATE. (No. 5861.)

(Court of Criminal Appeals of Texas. June 23, 1920.)

1. Robbery §13—Intent essential to conviction of assault with intent to rob.

To sustain conviction of assault with intent to rob, the evidence must show a specific intent to rob.

2. Criminal law §784(1)—Refusal to instruct as to circumstantial evidence held error.

In prosecution for assault with intent to rob, defended on the ground of an alibi, refusal to instruct on circumstantial evidence held error under the evidence.

3. Criminal law §404(2) — Exhibition of wounds not error, in prosecution for assault with intent to rob, under indictment charging aggravated assault.

In a prosecution for assault with intent to rob, where the indictment included a charge on aggravated assault, the exhibition to the jury of the wounds received by the prosecuting witness in the encounter held not reversible error, since the character of the wounds received might have enabled the jury to decide the issue of aggravated assault.

4. Robbery §27(5)—In prosecution for assault with intent to rob, aggravated assault should be submitted, where indictment includes such charge.

In a prosecution for assault with intent to rob, where the indictment included a charge on aggravated assault, the issue of aggravated assault should be submitted to the jury.

Appeal from District Court, Wichita County; H. F. Weldon, Judge.

L. R. Smiley was convicted of assault with intent to rob, and he appeals. Reversed and remanded.

Mathis & Caldwell, of Wichita Falls, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. The appellant was convicted of an assault with intent to rob Harry M. Reed. It appears that, as Reed was approaching his home and about to enter his gate, he was attacked by three men. As he described the matter, they came to him, and the man in the middle said, "Stick them up." Reed replied, "What is your idea?" and he said, "Stick them up," when Reed replied, "Put that thing up; you are going to hurt yourself." Quoting:

"Just then the fellow on the left struck me with his gun, hit me on the jaw, and I hit the fellow on the right, and knocked him about 10 feet, and swung at the fellow on the left, knocking him off the curbing, and then the one on the right hit me and knocked me to my knees; then the man in the middle came at me, and from that time on it was a free-for-all. I began to holler, and the Lowry boys came running out of their home, and the three fellows beat it. I engaged in the difficulty, and observed the appearance of the man, and identify the defendant as the one in the middle, and he was engaged in the difficulty."

Alibi was the defense interposed by the appellant, and he urges that a charge on circumstantial evidence should, upon his request, have been given to the jury. The

identity of the assailant in a prosecution for assault frequently depends upon circumstances, and this is true in some instances, although the injured party may claim on the trial to identify the accused; and experience has demonstrated that the mere conclusion of the party injured touching the identity of the offender, where there is no previous acquaintance, no peculiarities noticed, and the opportunity for observation limited, is often unreliable. *Wills on Circumstantial Evidence*, p. —; *Burrill on Circumstantial Evidence*, p. 606. In this case, Reed had no acquaintance with the appellant. He states upon cross-examination that in his identification on the trial there was a possibility, though not a probability, of mistake. The assault was at night, though the moon was shining. The observation of the assaulting parties was but momentary, and necessarily under excitement. Reed afterwards saw in a business house the appellant, who, according to the judgment of Reed, met the description that he held in his mind of one of the assailants. He gave no details, no peculiarities of stature, personal appearance, gait, habit, traits, tone of voice, nor does he describe any article in the possession or pertaining to the clothing of his assailant. His identification is necessarily but the inference which he draws from the similarity of appearance of one of the men who assaulted him and the appellant.

[1] To sustain the conviction of assault with intent to rob, it was essential that the evidence show a specific intent to rob. The proof describing the assault would undoubtedly sustain a conviction of aggravated assault and might if the indictment was so framed, sustain one for assault with intent to murder; this, of course, predicated upon there being sufficient proof of identity. There are cases in which facts somewhat similar have been held sufficient to show that the assault was with the specific intent to rob. *Long v. State*, 47 Tex. Cr. R. 296, 83 S. W. 384. In that case, however, the assailant was identified with certainty, and, presenting a gun, demanded that the injured party stop and "throw up your hands!" and, upon the party assailed running, a shot was fired upon him. Other facts, according to the opinion if the court, eliminated any other intent than that to rob. The case before us is not so plain. The command was to "Stick them up." This probably meant, "Throw up your hands." The attack took place so near the home of Reed that assistance was in easy call, and reached him during the mêlée. He received injuries which, as above stated, might have indicated that the intent of the parties was to murder him, or to injure him. They made no demand upon him for his property. The facts are somewhat similar to those in the case of *Sanders v. State*, 53

Tex. Cr. R. 613, 111 S. W. 157, in which it was held the intent was not sufficiently established.

[2] We are not prepared to hold that the evidence in the instant case was not sufficient to sustain conviction, but are of the opinion that in the matter of identity and specific intent to rob the evidence is left in a condition to render it necessary that the jury determine by inference from facts rather than from direct testimony that the appellant is guilty, and we think the appellant's request that the jury be instructed upon the law of circumstantial evidence should have been granted.

[3, 4] Complaint is made of the exhibition of the wounds received by Reed in the encounter. As the matter is presented, we think that this would not justify a reversal of the case, for the reason that the indictment included a charge on aggravated assault, and the character of wounds received might have enabled the jury to decide that issue, if it had been submitted to them, and in this connection we suggest that upon another trial it should be submitted.

For the reasons pointed out, the judgment is reversed and the cause remanded.

TEXAS & P. RY. CO. et al. v. McDOWELL et al. (No. 576.)

(Court of Civil Appeals of Texas. Beaumont.
May 25, 1920.)

1. Carriers ⇐215(1)—Carrier held not liable for negligence in having caused castration of bulls shipped.

A railway company was not liable to a shipper of cattle for negligence in causing bulls in a shipment to be castrated, where the carrier, intending to comply with quarantine regulations, refused to receive the bulls for shipment unless they were given the tubercular test or castrated, and the shippers exercised their choice and themselves castrated the bulls.

2. Appeal and error ⇐1175(1)—On reversal judgment will be rendered where no different result probable on new trial.

Where judgment is reversed, and it appears that the case was fully developed and that no different result would probably be reached by remanding, judgment will be rendered for appellant.

Appeal from District Court, Shelby County; Chas. L. Brachfield, Judge.

Suit by H. L. McDowell and another against the Texas & Pacific Railway Company and others. Judgment for plaintiffs against the named defendant, and it appeals. Reversed and rendered.

Young & Stinchcomb, of Longview, and E. H. Carter, of Center, for appellant.

Sanders & Sanders and J. P. Anderson, all of Center, for appellees.

HIGHTOWER, C. J. This was a suit by the appellees, H. L. McDowell and J. E. Burton, filed in the district court of Shelby county against the Texas & Pacific Railway Company and its receivers, and also against the Gulf, Colorado & Santa Fé Railroad Company; the purpose of the suit being to recover damages to a shipment of cattle from Waldo, Ark., to Timpson, Tex. The shipment consisted of about 286 head of cattle, and among them were 137 head of bull yearlings between one and two years of age. The appellees, McDowell and Burton, resided at Timpson, in Shelby county, Tex., and were engaged in the dairy business at that place, and also in buying and selling cattle generally. About the 28th day of March, 1916, they went to Waldo, Ark., and purchased the 286 head of cattle which constituted the shipment in question, and made an effort to make a through shipment of the cattle from Waldo, Ark., to Timpson, Tex., but the Cotton Belt Railroad Company at Waldo refused and declined to accept the cattle for through shipment to Timpson, Tex., but would only receive them for shipment as far as Texarkana. Thereupon appellees shipped the cattle down to Texarkana, Tex., and from there shipped them over the road of the Texas & Pacific Railway Company and its connecting carrier, the Gulf, Colorado & Santa Fé Railroad Company, to Timpson, Tex. The cattle reached Texarkana from Waldo about 8 o'clock in the morning of March 29, 1916, and it was the purpose of appellees to ship them out of Texarkana direct to Timpson as soon as arrangements could be made for cars at Texarkana for that purpose. Arrangements were made some time in the afternoon of March 29, 1916, the agent of the Texas & Pacific Railway Company agreeing with appellees to furnish the cars so that the shipment might move from Texarkana that night; but when said agent ascertained, which he did before the cattle were received or loaded, that there were a number of bulls in the shipment, he told appellees that on account of quarantine regulations he would have to decline to receive the shipment with the bulls in it, and referred appellees to Mr. James, who was the live stock agent of the Texas & Pacific Railway Company at Texarkana.

Appellees then went to Mr. James, as agent of the Texas & Pacific Railway Company at that point, and took the matter up with him, and Mr. James explained to them that because of quarantine regulations which he had been advised were in effect his road was prohibited from accepting a shipment of bulls into Texas unless the shipment was accompanied by a health certificate, in accordance

with the rules and regulations of the live stock sanitary commission of the state of Texas. Thereupon Mr. James and appellees sought Dr. Hearn, who was a veterinarian at Texarkana, and who was registered as such with the live stock sanitary commission of Texas, and who represented both the state of Arkansas and the state of Texas in the official capacity of inspector of live stock for interstate shipment. It was explained to Dr. Hearn that appellees desired to ship said cattle to Timpson, Tex., and it was also explained by appellees that the cattle were not intended for dairy or breeding purposes or for exhibition in the state of Texas, but that appellees intended to put them on the range and resell them, etc. Dr. Hearn explained to appellees, in the presence of Mr. James, that he could not permit the shipment of the bulls into Texas unless they were accompanied by a health certificate showing that they had been tested for tuberculosis within 60 days prior thereto, and when it was admitted by appellees that they had no such certificate Dr. Hearn stated that the shipment of the bulls would not be permitted unless they were given a tubercular test. At that point Mr. James, in his capacity as live stock agent for the Texas & Pacific Railway Company, told appellees that his road could not receive the bulls for shipment until they were given the tubercular test, or castrated. Thereupon the Texas & Pacific Railway Company's agent declined to issue a bill of lading for the shipment of cattle, and appellees consulted further with Dr. Hearn and asked him if the shipment of the bulls would be permitted if they were castrated, and Dr. Hearn told him "Yes," and appellees asked him what the cost would be of castrating the bulls and were advised that it would be 50 cents per head. They then asked him if they might not do the work themselves, and Dr. Hearn stated that they might, and that no charge on his part would be made therefor. Appellees then castrated 137 head of these young bulls, and the shipment of the 286 head moved from Texarkana on the following day, April 30, 1916, somewhere in the forenoon.

For their cause of action appellees alleged, substantially, that the Texas & Pacific Railway Company was guilty of negligence or negligently caused the castration of these young bulls, and that 17 head of them were so weakened by the operation that they were knocked down and trampled upon while en route to Timpson, and that 17 head of them died; that they were of the value each of \$20. Appellees also alleged that on account of negligence on the part of both railroad companies in roughly handling the cars in which they were loaded 7 head of the cows were so injured that they died, and that these cows were of the value of \$30 each. They also alleged, substantially, that on account of negligence on the part of both rail-

roads in roughly handling the cars 145 head of cattle, not including the bulls, were damaged to the extent of \$3 per head. They sued for this total amount of damages, and also other items unnecessary here to mention.

The railroad companies and receivers answered by general demurrer and several special exceptions, general denial, and special pleas. They also specially set up the shipping contract, which, among other things, provides: (1) That the shipper assumed all risk of injury to or loss of stock because of their being wild, unruly, weak, or any inherent vices or defects, etc.; (2) that the carrier should not be liable for any delay or damage sustained by the stock, or any expense incurred by the shipper by reason of any enforcement or attempted enforcement by government officers of quarantine regulations, either federal, state, county, or municipal, whether such officers should act lawfully or unlawfully, or by reason of the existence of any quarantine regulations or laws, federal, state, county, or municipal. They also alleged that the castration of the bulls was made in compliance with the laws of the state of Texas, the laws of the state of Arkansas, and the laws of the United States, and that defendants and their agents were not guilty of any negligence in acting as they did. They also alleged that the cattle were wild, unruly, weak, and had inherent vices and defects, and that the shippers and laborers acting under them were guilty of contributory negligence, etc.

Appellees filed a supplemental petition in which the matters of fact alleged by the defendants were denied, etc. The trial was with the jury and their verdict consisted of answers to special issues, and judgment was rendered thereon in favor of appellees against the Texas & Pacific Railway Company in the sum of \$500, but there was no recovery as against the Gulf, Colorado & Santa Fé Railroad Company. Motion for new trial was made by Texas & Pacific Railway Company, and was overruled, and that company alone has appealed.

[1] There are several assignments of error found in appellant's brief, but we shall not take them up in their numerical order, nor mention them specifically, because in the view we take of the case it is only necessary to dispose of that assignment which substantially complains that upon the undisputed facts appellant was not guilty of any negligence in causing, and in fact did not cause, appellees' bulls to be castrated, as claimed, and that since the jury expressly found in answer to special issues that there was no other negligence on the part of appellant, as charged by appellees, the verdict and judgment should have been in favor of appellant. This is the contention of appellant substantially.

We have given the case careful considera-

tion, and have reached the conclusion that appellant's contention is correct, and that the judgment should be reversed and here rendered in favor of appellant. As we find the evidence in this record, there is practically no contradiction or dispute as to the facts touching this shipment of cattle, and they are, substantially, as follows:

In addition to what has been above stated, defendants below introduced a certified copy of the proclamation of the Governor of Texas, issued May 23, 1915, having reference to the shipment of live stock into the state of Texas, by which was given full power and authority to the live stock sanitary commission of the state of Texas to make rules and regulations pertaining to the admission of live stock into the state, and further providing that the live stock sanitary commission of Texas should have authority to make any rule or regulation to prevent live stock infected with tuberculosis from entering the state. There was also introduced by defendants a rule of the live stock sanitary commission of this state, of date January 21, 1916, which became effective February 1, 1916, providing as follows:

"Cattle for dairy and breeding purposes, over six months old, and cattle for exhibition within the state, must be accompanied by a health certificate, including the tubercular test, such certificate to show that the tubercular test was given within at least sixty days prior to the time the cattle entered the state."

It was then shown that the name of Dr. J. L. Hearn, Texarkana, Tex., was officially registered with the live stock sanitary commission of Texas. It was then shown by Dr. Hearn that he had no connection whatever with any railroad company, but, as above stated, was inspector of live stock for interstate shipment for both the state of Texas and the state of Arkansas, and that it was his duty to inspect live stock and pass upon its admission in the interest of the state. In this connection he said:

"It was my duty to inspect live stock that were to be transported into the state of Texas by railway companies, and ascertain whether or not they should be admitted. If I found a shipment of live stock from another state in the state of Texas, and there was no certificate showing that they had been tested for tuberculosis, and they were coming into the state for breeding or dairy purposes, it was my duty to give them the tubercular test.

"I am acquainted with the rule made by the live stock sanitary commission of Texas that went into effect February 1, 1916, with reference to cattle being admitted into Texas. I was in Ft. Worth attending the state veterinary medical association, and at the live stock sanitary commission office about March 15, 1916, and while there I asked for a ruling on live stock coming into Texas. I was in Ft. Worth about March 15, 1916. I know Mr. James, the foreman of the stock yards of the Iron Moun-

sation with Mr. James after I returned from Ft. Worth and before this matter came up on March 30th. I told him to prohibit all bulls from coming into the state of Texas without the tubercular test."

It was further shown by this witness, on cross-examination, that he stopped the shipment of the bulls in question because he was instructed by the chairman of the live stock sanitary commission of Texas to that effect.

Without undertaking to quote the testimony of either of the appellees in detail, it will suffice to say that they testified, substantially, that they never even considered whether they would have the bulls in this shipment of cattle tested for tuberculosis when they were informed by Dr. Hearn that such would be necessary before the shipment could pass, but they further testified that they were given their choice in that matter, that is to say, they were permitted to choose whether they would have the bulls given the tubercular test or castrated, and that they chose the latter. Speaking with reference to appellant's agent at Texarkana, Mr. Burton stated:

"He let us take our choice and we castrated them. We did not consider the matter of having them tested for tuberculosis at all."

It was further shown by the appellees themselves that the cost of giving the tubercular test, as stated to them by Dr. Hearn, would have been 50 cents a head, but, as shown by Burton's statement above, they did not consider testing the cattle at all.

Now, as shown above, the jury acquitted appellant of any negligence in handling the shipment of cattle in question, but found that appellant caused the castration of the bulls, and that in doing so appellant was guilty of negligence. We have concluded that it cannot be said that appellant caused the castration of these bulls. Upon the whole evidence, the material parts of which we have stated, it is manifest that appellant's agent at Texarkana was acting in perfect good faith in trying to comply with the quarantine regulations, as he understood them, relative to the shipment of cattle into Texas, and that the railway company had no interest whatever in insisting upon the castration of these bulls, other than to comply with the quarantine regulations, as appellant's agent understood them to be; and, without deciding whether the proof of what the rules and regulations of the live stock sanitary commission of Texas were was of such character as to show that appellant acted in strict compliance with such rules in declining to receive the shipment of the bulls, we have concluded that it cannot be held that appellant's agent caused these bulls to be castrated. It is true that appellant's agent, acting in obedience to instructions of Dr. J. L. Hearn, refused to re-

tubercular test or castrated, but it is also too clear for argument that appellees had their choice as between the tubercular test and castration, and no sufficient reason is shown why the bulls might not have been given the tubercular test and all damages here claimed to them prevented.

[2] We have been cited to no authority by appellees which we think supports their contention that appellant's refusal to receive and ship the bulls without the tubercular test or castration was the cause of the damage to appellees in this case, and, since upon the express findings of the jury no other damage to the shipment of cattle could be chargeable against appellant, there was no basis for a judgment against appellant in this case for any amount; and since it appears that the case was fully developed, and that no different result would probably be raised by remanding the cause, the judgment of the trial court will be reversed and here rendered in favor of appellant.

WALKER, J., did not sit in this case.

BOST v. BIGGERS BROS. et al. (No. 1672.)

(Court of Civil Appeals of Texas. Amarillo. June 23, 1920.)

1. Mines and minerals \S 78(1)—Provision for development, not satisfied by efforts to secure third parties to do so.

Where a contract for the lease of oil lands expressly binds lessee to begin actual development of the oil property, such obligation is not discharged by making reasonable efforts to secure third parties to develop the land.

2. Mines and minerals \S 58—Consideration of \$1 for oil lease covering 2,000 acres held not inadequate.

One dollar a year, paid upon the execution and delivery of an oil lease covering 2,000 acres, held not so inadequate a consideration as to suggest fraud.

3. Appeal and error \S 527(1)—Refusal to submit special issues must be presented by bill of exceptions.

Refusal to submit special issues in a suit to cancel an oil lease cannot be reviewed by the Appellate Court without a bill of exceptions under Vernon's Sayles' Ann. Civ. St. 1914, arts. 2061, 2062, art. 2058, being controlling, and the mere fact that the court's indorsement upon objections and exceptions recites that a bill was allowed is insufficient.

4. Exceptions, bill of \S 7—Exceptions to refusal to submit special issue held too general to be considered.

A bill of exceptions, based on refusal to submit special issue, stating that "the charge is

incomplete and fails to submit to the jury material issues raised by the pleading and testimony and covered by issues requested on the part of" appellant, is too general to be considered.

5. Mines and minerals — 78(7) — Lessee's financial inability to develop oil property held properly excluded.

In a suit to cancel an oil lease, where plaintiff contended that part of the consideration consisted of actual development of the land by lessee, it was not error to exclude testimony that the lessee was not financially able to put down a well on the land, where it appeared that plaintiff fully understood lessee's financial inability at the time of the execution of the lease.

6. Mines and minerals — 78(7)—Refusal to develop held not to avoid lease containing alternative rental provision.

Where an oil lease provides for the sinking of a well by lessee within a stated time, and gives lessee the alternative of paying a stated rental annually, refusal on the part of lessee to develop does not, as a matter of law, avoid the contract.

Appeal from District Court, Carson County; W. R. Ewing, Judge.

Suit by John Q. Bost against Biggers Bros. and others. Decree for respondents, and complainant appeals. Affirmed.

S. E. Fish and C. E. Gustavus, both of Amarillo, for appellant.

F. P. Works, of Amarillo, for appellees.

HALL, J. The motion has called to our attention some matters shown by the record which we overlooked, and some inaccuracies in the statement of the rules of law governing cases of this character, and in order to correct these the cause will be again fully considered and the original opinion withdrawn. The object of this suit is to cancel an oil and gas lease executed by appellant to appellee, upon certain land situated in Hutchinson and Carson counties. With slight immaterial changes the lease is what is commonly known as "Producers Form No. 88." The appellant alleged, in substance, that he was about 60 years of age when the lease was executed, was feeble in mind and body, is and has been a farmer and laborer all of his life, and wholly unacquainted with and unaccustomed to transacting business matters of complicated character. That the lands described are located in a section of country pronounced by experts as having indications of oil and gas and highly promising territory for development of these minerals; that at the time of the execution of the lease and ever since said lands have a high rental value, and that the same are constantly and rapidly advancing in price; that on March 14, 1917, the defendants, with knowledge of said facts, secured an oil and gas lease from him, by pretending and representing that

they would develop his lands, and that plaintiff would realize large profits therefrom in the way of royalty, expressly representing and stating that a well would be put down and the said lands developed within a short time. He further alleges that they stated that such lease would be only for 1 year, unless a well was put down within that time, and, having confidence in their statements and representations, he executed said lease for a consideration of \$1; that the lease as executed is for a period of 5 years, containing a provision for renewal thereof during said period of time, upon the payment of \$1 every 12 months; that the lease is void, is a cloud upon plaintiff's title, and should be canceled for the following reasons:

"(a) The said contract of lease is without consideration, the said sum of \$1 therein specified being only nominal, and bearing no relation to the real lease value of said lands.

"(b) Said contract is unilateral, imposing no duties or obligations whatever upon the defendants, and containing no requirement for putting down a well or developing said land in any manner.

"(c) Said contract is unreasonable and unconscionable, in that it grants defendants the right to hold and speculate upon the lease value of plaintiff's land, which is now from \$5 to \$10 per acre, without the payment to plaintiff of anything except \$1 each 12 months for annual renewal thereof.

"(d) Before signing and executing same said contract was read to plaintiff by one of the defendants, who falsely and fraudulently read the same as expiring on March 14, 1918, unless renewed on or before said date, which said lease as now recorded fixes the expiration date as March 14, 1919. That said lease was either falsely read to him or had been changed since its execution. That such change was made either through fraud, accident, or mistake, and plaintiff is entitled to have same reformed so as to show the expiration date to be March 14, 1918. That defendants did not renew said lease by depositing the \$1 under the terms of the contract until the time had expired; such deposit being made March 16, 1918, when the contract, according to its true terms, expired March 14, 1918.

"(e) That plaintiff did not understand and was incapable of understanding the purported terms of the lease, and did not know or understand that he was granting to defendants the full leasehold estate for a period of 5 years for a consideration of \$1 per year, without any obligation on the part of appellees to put down a well or make any development; otherwise he would not have executed the same.

"(f) That the defendants have not the means and financial ability to develop land, and have never intended to do so, but fraudulently pretended that they would develop said land for the sole and only purpose of procuring such lease.

"(g) That a reasonable time has transpired for developing and testing said lands, and the defendants have no intention of developing the

"(h) That plaintiff has requested and demanded a release and cancellation of the lease, and has refused to accept the last deposit of \$1, placed to his credit in the bank.

"(i) Plaintiff has heretofore tendered and now here tenders to defendant the \$1 originally paid to him."

The substance of defendant's amended answer, upon which the case was tried, in addition to the general demurrer, general denial, and setting out practically the material terms of the contract, is an allegation of the payment and deposit of the \$1 consideration, in accordance with its terms. They further allege, in substance, that although not expressed in writing, it was in fact understood and agreed between the parties that the lessees should and would use their best efforts to secure development of said lands within the time limited by the contract; that prior to the contract there had been no development whatever attempted near the premises, and that the territory was what is known as strictly "wildcat territory," that the lessees did in good faith and with all possible diligence strive to make arrangements for exploration and development of the land in connection with other lands held by them under lease in that neighborhood, which they had secured for a like purpose; that in their efforts to secure development, they conveyed their interest in other leases in that neighborhood to prospective drillers; that on account of war conditions existing since the 6th day of April, 1917, and within less than a month after the execution of the lease, which conditions have existed to the present with but slight change, they have been unable to secure the means, machinery, and material with which to prosecute development; that Mille Biggers and Zack Biggers, two of the defendants herein, were both within the draft age; that Zack Biggers entered the army about the 17th day of June, 1917, and has been in the service continually ever since; the said M. W. Biggers being excused because of having certain dependent relations to support; that plaintiff is estopped from claiming that the lease contract was for only 1 year, and has waived any additional payment and the right to forfeit the same on account of defendant's failure to make the second payment promptly, in this, that during the summer of 1918, and the first year, plaintiff not only permitted, but encouraged the lessees in their further efforts to develop the land and in incurring further expense looking to the development of said land, and knowingly permitted them to assign the leasehold interest held by them in other lands to prospective drillers, which said leaseholds so conveyed were of the reasonable value of about \$500; that by such act on the part of plaintiff, with the knowledge

and intention of lessening said lease contract, and waived any of the alleged rights to forfeit the same; that on or about the 31st day of August, 1918, while their lease was in full force and effect, and while they, with the knowledge and approval of plaintiff, were making all possible effort to secure development, plaintiff executed to third parties a subsequent lease upon the same lands, which said lease was immediately recorded in both Carson and Hutchinson counties, whereby a cloud was cast upon the leasehold interest of defendants, and their further progress toward development was materially interfered with and rendered practically impossible; that having by his own act prevented successful development, plaintiff cannot now be heard to complain of defendant's default. The court submitted the cause to the jury upon three special issues, which, with the answers, are as follows:

"(1) Was or not the provisions of the lease contract involved herein as to the time the first renewal thereof might be had misread or misstated by defendant Less Whittaker, to plaintiff as to same being 1 year instead of 2 years?" Answer: "No."

"(2) If you answer the foregoing question in the affirmative, then state whether or not the plaintiff was deceived thereby and was thereby induced to sign said contract." Answer: "No."

"(3) Was the plaintiff capable and capacitated to read and understand the lease contract in question at the time of its execution?" Answer: "Yes."

The court further submitted a special issue, inquiring whether or not more rapid exploration and development of the land was prevented by war regulations, the violation of which would have involved punishment of the offender by the government. Upon this issue the jury disagreed and failed to return an answer. Judgment was entered for appellees upon the verdict so returned.

[1] The lease in this case, under the jury's findings, provides that in lieu of development after the first 2 years the lessee shall pay \$1 annual rental for the whole tract of land, consisting of about 2,000 acres, during the remainder of the term. The contract does not require the payment of any sum by the lessees in the event they should desire to surrender the lease before the expiration of the 5-year time; neither does it expressly require the lessees to begin development at any time. There is no evidence in the record showing that at the time the lease was procured the land had any value as oil or gas producing property, although it is shown that at the time of the trial, 2½ years later, it had a value of \$3 to \$6 per acre. The testimony of lessee tended to show they had made reasonable efforts to secure third parties to develop the land, but this would

not discharge an obligation on their part to begin actual development if the contract expressly bound them to do so.

[2] Appellant insists that the \$1 consideration paid at the time of the execution and delivery of the lease was in fact no consideration, being nominal, and is not a sufficient and adequate consideration to support the lease. This court has recently considered this question in several cases, and in *McKay v. Tally et ux.*, 220 S. W. 167, and *Nolan et ux. v. Young*, 220 S. W. 154, announced the conclusion that \$1 was a sufficient consideration to support an option contract of this character. We cannot say from the record that the consideration originally paid or to be paid for the renewal of the lease annually is so inadequate as to suggest fraud.

Appellant requested the submission of three special issues, the first being:

"Is the lease contract in question, in its terms and provisions as to plaintiff, unreasonable and unconscionable?"

"(2) Did the defendant, prior to the execution of the written lease contract, represent and lead the plaintiff to believe that they would start putting down an oil or gas well within 12 months after date of the lease contract?"

"(3) Was the sum of \$1, stipulated in the lease contract in question, a valuable consideration as distinguished from a nominal consideration?"

These special issues were refused by the court. It appears from the record that appellant filed objections and exceptions to the court's charge, the fourth subdivision being as follows:

"The charge is incomplete, and fails to submit to the jury material issues raised by the pleading and testimony and covered by issues requested on the part of plaintiff."

The court's indorsement upon the objections and exceptions shows that it was duly presented to opposing counsel and the trial court, that the exceptions were overruled, and that plaintiff, in open court, excepted to the ruling, and recites:

"And plaintiff is hereby allowed this as his bill of exception, to said action of the court."

[3] As we understand the practice, this ruling of the court, if error, is not properly before us for review. Article 1974 (as amended by Acts Thirty-Fifth Leg. p. 389), V. S. C. S., and Supplement, relate to charges and special instructions. The practice with reference to the submission of special issues is governed by V. S. C. S., arts. 1984a, 1985. A special issue which has been requested and refused by the court is not a part of the record on appeal in the sense that the action of the court must be reviewed by the appellate court without a bill of exceptions under V. S. C. S. arts. 2061, 2062. In such case article 2068, V. S. C. S., controls. *Texarkana & Ft. S. Ry. v. Casey*, 172 S. W. 729; *Tex.*

L. A. v. Fleming, 18 Tex. Civ. App. 668, 46 S. W. 63; *Hill v. Hill*, 193 S. W. 727.

[4] If the objections and exceptions which the trial judge, by indorsement, converted into a bill of exception may be considered as such, the fourth subdivision quoted above is too general to be considered. *M., K. & T. Ry. Co. of Texas v. Churchill*, 171 S. W. 517; *K. C., M. & O. Ry. Co. v. Corn*, 186 S. W. 807; *Morris v. McSpadden*, 179 S. W. 554. We agree with appellant that it is a hard rule which will permit lessees of approximately 2,000 acres of land to procure a lease for the first 2 years for a consideration of \$1 and maintain the option in force by the annual payment of \$1 for the remaining 3 years without any definite promise to develop the land at any time during the 5-year term, but it is not the province of the court to make contracts. Under the weight of authority we would not be justified in declaring the lease void upon the ground of inadequacy of consideration. There is nothing in the record to show that any development was going on upon other lands anywhere within the vicinity of the land in question, and it appears that the parties negotiated for several days, making one trip to inspect the premises before the deal was closed. The appellant testified that during the negotiations, prior to the execution of the lease, the appellees said they expected to sell leases to put down a well, and hoped to sell them to railroad men around the shops. He further testified:

"They spoke about leasing land and would try to get a well. * * * We discussed that it would take a lot of money and time to develop, and they discussed the drilling and cost of it among themselves, and that it took a lot of acreage in wildcat territory to get a drilling contract. * * * I do remember that they said it would take a lot of money and time to get a drilling contract, and we understood that steel and machinery were hard to get hold of. * * * They also discussed at the same time other leases to help this drilling, and they made efforts to get others, and I assisted them in locating some of these leases. * * * They wanted about 5,000 acres. * * * They thought they could get a driller for what I and Mrs. Dunaway had, and I thought so too. There were two sections of the Dunaway land, and that, added to my 22, makes 3,200 acres, but I have understood from other parties that there was some kind of a muddle over that land. * * * On the first trip appellees spoke of selling stock in order to get money to drill."

From this testimony it appears that appellant understood that the development of the land which all the parties testified was the real consideration depended upon securing at least 5,000 acres, and that early development, even with that number of acres, was doubtful. The fact that the land 2½ years later may have a lease value of \$3 to \$6 per acre is foreign to the issue. It is held and so stated by this court in the *Talley Case*,

court of equity should not declare the contract void on that ground. In the light of the surrounding circumstances, at the time when the contract in question was executed, we are not prepared to say that the price was so grossly inadequate as to suggest fraud. The issue of fraud was decided against appellant. It may be that appellant's pleadings are sufficiently full to raise the issue of abandonment by the lessees, and there is some evidence tending to support the contention. The matter is not before us for consideration, however, as appellant did not request that the issue be submitted to the jury. The question is waived in this court by a proposition urged under the third assignment of error. This assignment is predicated upon the refusal of the court to direct a verdict for appellant, and the proposition is therefore not germane to the assignment, as it does not present fundamental error.

[5] Appellant's first and second assignments of error are based upon the court's action in refusing to permit him to prove that the defendants were not financially able to put down a well upon the land. The testimony above quoted shows that appellant fully understood the financial inability of appellees at the time of and prior to the execution of the lease, and was informed by the lessees that they must secure, in all, leases upon about 5,000 acres of land, and sell the stock in order to secure the money for development. The contention under these assignments we think is disposed of by the case of *Griffin v. Bell*, 202 S. W. 1037, in which it is said:

"The state of the evidence in this case was such as to sustain a finding that the contract was executed under circumstances free from fraud, and that all of the parties signed it with a fair understanding of its provisions. It gave the lessees the liberty of assigning their rights to third parties. The fact that they acquired the option granted with no intention of then drilling for minerals, but with a view of selling that privilege at a profit is no ground for cancellation. They had not bound themselves to sink wells, and they violated no agreement by failure to do so."

[6] There are a number of propositions urged under the third assignment, which have been disposed of by what has heretofore been said. If the lessees had bound themselves to sink a well within a given time, less than 5 years, and had failed, the right to cancel the contract would be clear, but the alternative is given them of paying the \$1 rental annually, and thereby postponing development to the end of the term. In view of this provision a failure or refusal on the part of appellees to develop does not, as a matter of

an extreme case, we cannot, under the authorities, go further than to sustain the implied holding of the trial court, the effect of which is to declare the consideration valuable and adequate.

It seems that the lease contract was executed in duplicate or possibly triplicate originals, and the one delivered to appellant is sent up as an original paper with the statement of facts. The blanks were filled with a typewriter and by the use of carbon, and it is difficult to determine from this copy whether the lessees are given until March 1, 1918, or 1919, in which to commence a well, but it appears from the statement of facts that the other copies of the lease made at the same time show this date to be 1919. The effect of this is to grant appellees a 2-year lease upon payment of \$1 before they would be required to begin operations in order to prevent a forfeiture. In this connection it may be stated that the jury found that Whitaker correctly read the lease to appellant.

Under the eighth assignment it is contended that the verdict is insufficient to support the judgment because the jury failed to agree upon the special issue submitted at appellant's request, inquiring whether or not more rapid development was prevented by war regulations. This issue was based upon one of the defenses urged by the appellees, and in view of the condition of the record it is an immaterial matter to appellant. If the \$1 consideration is a valuable one, even though the answer to this issue had been in appellant's favor, it could not affect the result.

The remaining assignments present no reversible error, and the judgment is affirmed.

WALKER v. J. N. HIRSCH COOPERAGE CO. (No. 584.)

(Court of Civil Appeals of Texas. Beaumont. June 8, 1920. Rehearing Denied June 23, 1920.)

1. Appeal and error \Rightarrow 758(2)—Refusal of issues not considered, where brief does not show written request.

Assignments of error to the refusal of the trial court to submit three special issues cannot be considered, where there was no statement in the brief showing that the special issues were requested in the writing before the case was submitted to the jury, nor even that they were requested and refused by the court at any time.

2. Appeal and error \Rightarrow 500(2), 758(2)—Assignments to sustaining of exception to plea not valid, where record does not show exception.

An assignment that the court erred in sustaining defendant's exception to plaintiff's plea

shows no error, where the statement in the brief and the record itself do not show any exception to the plea.

Appeal from District Court, Harris County; Ewing Boyd, Judge.

Action by James Walker against the J. N. Hirsch Cooperage Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Charles Murphy, of Houston, for appellant.
Baker, Botts, Parker & Garwood and Fouts & Patterson, all of Houston, for appellee.

HIGHTOWER, C. J. Appellant, James Walker, sued appellee, J. N. Hirsch Cooperage Company, in the district court of Harris county for damages claimed on account of personal injuries alleged to have been sustained in consequence of negligence attributable to appellee. In his petition appellant alleged five specific grounds of negligence against appellee, but upon conclusion of the evidence the trial court seems to have entertained the opinion that only one of the grounds of negligence alleged should be submitted to the jury, which was done, and the jury's finding in answer to a special issue submitting that ground was favorable to appellee, and judgment was rendered upon the verdict in favor of appellee. After his motion for new trial had been overruled, appellant properly perfected his appeal, and presents in his brief six assignments of error, by which he seeks to have this court reverse the judgment.

[1] The first three assignments complain, substantially, of the refusal of the trial court to submit three special issues embracing grounds of negligence pleaded by appellant, in addition to that submitted by the court. To the consideration of these assignments appellee strenuously objects, pointing out several reasons; but it will suffice to say that following these assignments there is no statement in the brief showing that these special issues were requested in writing before the case was submitted to the jury, nor does it even appear, from the statement in the brief following the assignment, that such issues were requested at any time and refused by the court. For that reason, as well as others pointed out by appellee, we decline to consider the first three assignments. The holdings of all the courts on this point are so numerous that a mention of the decisions would be superfluous.

By the fourth assignment it is claimed, substantially, that the jury, in determining

the issue of negligence submitted to them in favor of appellee, was actuated by prejudice or passion against appellant on account of his race (he being a negro), and we are asked, for that reason, to set aside the jury's verdict. We shall not go into this matter in detail, but, notwithstanding the fact that the assignment is not briefed in accordance with the rules, at the same time we have gone to the record and considered the assignment upon its merits, and hold that we cannot sustain it, and it is therefore overruled.

By the fifth assignment it is complained that the trial court erred in entering judgment for the defendant upon the jury's verdict, and erred in refusing to set aside the findings of the jury on the special issue submitted to them. Considering this assignment also upon its merits, in the light of the record, we have concluded that it cannot be sustained and must be overruled.

[2] The sixth assignment of error is as follows:

"The court erred in sustaining the exception of the defendant to the plaintiff's plea in the alternative, wherein plaintiff asks for damages for failure of defendant to inform and advise him that defendant carried insurance."

This assignment is followed by this proposition:

"Where it develops that plaintiff sustained an injury with the defendant corporation carrying the workmen's compensation, and appellant did not know of such compensation until after the institution of his suit and after the time had elapsed within which he should file his claim, the failure of the corporation to notify and advise plaintiff renders the corporation itself liable for such a sum as it would have had to pay had plaintiff been notified in the first instance and availed himself of the insurance."

It will be noted that the assignment complains that the trial court sustained an exception interposed by appellee touching the above-mentioned plea by appellant. From the statement contained in appellant's brief, however, it is not shown that any exception on the part of appellee to such plea was ever presented to the trial court or ever ruled upon one way or the other by him. In fact, the record itself on this point is silent. We therefore must hold that the assignment points out no error, even if we should go to the record in the absence of anything in the statement following the assignment touching this complaint.

This disposes of all the assignments of error, and the conclusion is that the judgment must be affirmed; and it will be so ordered.

(Court of Civil Appeals of Texas. Texarkana.
May 27, 1920.)

1. Bills and notes @493(3), 497(2)—Maker has burden of proving failure of consideration and assignee's notice.

Maker of note sued by assignee, conceding execution and delivery and assignment before maturity, has burden of proof on defense that consideration failed and that assignee had notice thereof.

2. Bills and notes @518(1)—Failure of consideration not shown.

Failure of consideration of note given to corporation, which was to acquire land and issue stock to maker, is not shown; there being no evidence that the land will not be acquired and the stock issued.

Appeal from District Court, Harris County; J. D. Harvey, Judge.

Action by the Arkansas Bank & Trust Company against John H. Kirby and others. Judgment for plaintiff, and the named defendant appeals. Affirmed.

Andrews, Streetman, Logue & Mobley, of Houston, for appellant.

J. W. Lewis, of Houston, for appellee.

HODGES, J. On June 22, 1917, J. H. Kirby, the appellant, executed and delivered to the Marion Coal & Lumber Company his promissory note for the sum of \$5,000, due four months after date. A few days thereafter the note was indorsed in blank by Earl D. Sweetwood, treasurer of the Marion Coal & Lumber Company, and delivered to A. N. Walker, the president of that corporation. Some time before its maturity, Walker pledged the note to the Arkansas Bank & Trust Company, the appellee, as collateral to secure his personal obligation amounting to something over \$4,000. Walker having failed to pay his indebtedness at maturity, demand was made upon the appellant for the payment of this note. He refused, and this suit was instituted by the appellee against the appellant, the Marion Coal & Lumber Company, and A. N. Walker. Appellant was the only defendant who answered in the court below. He pleaded a failure of consideration, and alleged, in substance, the following facts: That a short time prior to the execution of the note the appellant was approached by A. N. Walker and Earl D. Sweetwood, who represented themselves to be the president and treasurer, respectively, of the corporation known as the Marion Coal & Lumber Company; that Walker also represented that he expected to acquire for that company a large body of timber and coal land situated in Tennessee, with which the appellant was then familiar. Walker further represented that he

if secured from the appellant, would be used for the purpose. He further represented that the papers to be delivered in consummation of the purchase were then in the possession of a certain bank in Tennessee, and that, if appellant would advance the amount of \$10,000, he (Walker) would immediately proceed to make the purchase of the property. It was thereupon agreed between Walker as the president of the Marion Coal & Lumber Company, and Sweetwood as its treasurer, and the appellant Kirby, that the latter would execute and deliver to the Marion Coal & Lumber Company two notes for the sum of \$5,000 each, which should be immediately used by Walker in part payment for the property above referred to; that Walker would proceed to Tennessee and complete the purchase, using the two notes in part payment therefor. In pursuance of that understanding, the appellant executed his notes and delivered them to Walker with the express understanding that they were to be used only in the acquisition of that property. It was further alleged that the representations of Walker were false and fraudulent and were made for the purpose of obtaining the appellant's note for Walker's individual use and benefit, and that the notes were so used for that purpose by Walker. After hearing the evidence, the court gave a peremptory instruction in favor of the plaintiff in the suit.

[1, 2] In this appeal it is contended that the evidence presented issues of fact which should have been submitted to the jury. It is claimed that the testimony was such as to support a finding by the jury that the consideration for which the note was given had failed, and that the appellee was not a purchaser for value and without notice.

The execution and delivery of the note and its assignment before maturity being conceded, the appellant had the burden of proving that the consideration had failed and that the appellee had notice of that fact. In testifying for himself the appellant admitted the execution of the note. He stated that at the time the note was given Walker represented that he (Walker) had decided to make the purchase of the coal lands but lacked part of the money; he wanted appellant to take a part of the investment, which the latter agreed to do and executed this note and another of like amount and delivered them to Walker and Sweetwood. Walker represented that the papers covering the purchase were then in a bank in Chattanooga, Tenn., and that with this \$10,000 the purchase could be consummated; that after the purchase was consummated he (Walker) would issue to appellant an agreed amount of the stock of the Marion Coal & Lumber Company as a consideration therefor. On cross-examination he said:

"I first learned that the plaintiff in this case held one of these notes at the maturity of the note, whatever date that was. These properties that I speak of had not been acquired by the Marion Coal & Lumber Company then. I learned from both Mr. Walker and Mr. Sweetwood prior to the maturity of this note, I should say about September 1917, that the consummation of the deal was held up because one of the selling parties had died and it was necessary to have some court proceeding to bind his heirs, and that the deal was halted pending that court action."

The legitimate inference from the above is that the real consideration for the note sued on was stock in the Marion Coal & Lumber Company to be issued in the future. No defense, however, is predicated upon that fact. The evidence relied on by the appellant was not sufficient to justify a finding that the consideration of the note had failed. There was no evidence that the land had not or would not thereafter be acquired, or that the stock in the corporation would not thereafter be issued. The appellee offered testimony, which was not disputed, that the lands were subsequently acquired and were owned at the time of the trial by the Marion Coal & Lumber Company. It is true the evidence shows that this note was pledged by Walker for the purpose of securing his individual indebtedness to the appellee; but, assuming that the consideration had failed in whole or in part, the evidence was not sufficient to show that the appellee had notice of such failure.

It could serve no useful purpose to quote at length from the evidence. We have carefully considered all of the material facts, and have concluded that the judgment should be affirmed.

GOODMAN et al. v. TOPLITZ. (No. 1121.)

(Court of Civil Appeals of Texas. El Paso. May 20, 1920.)

Appeal from District Court, El Paso County; Ballard Coldwell, Judge.

Suit by L. S. Toplitz against L. Goodman and Theo. Meyer. Judgment for plaintiff, and defendants appeal. Affirmed.

Loomis & Kirkland, of El Paso, for appellants.

Beall, Kemp & Nagle and H. Potash, all of El Paso, for appellee.

WALTHALL, J. This suit was brought by appellee, L. S. Toplitz, to recover on a prom-

issory note executed by Theo. Meyer and L. Goodman, and made payable to L. S. Toplitz, for the principal sum of \$4,100, due and payable 90 days after date, with interest from date, and containing the usual 10 per cent. attorney's fee clause and accelerated maturity clause. The note was given in payment of a stock of shoes sold by appellee to appellant Meyer.

In addition to the general denial, suretyship of Goodman, and certain credits admitted by appellee, appellants pleaded that Toplitz in making the sale of the shoes to Meyer made misrepresentation as to the shoes, and warranted said shoes to be of a certain kind and character. By supplemental petition appellee pleaded that the shoes were sold in bulk; that they were counted out to and accepted by Meyer; that thereafter Meyer made payments on the note and asked for extension of time and repeatedly promised to pay said note, and denied that Goodman was surety on the note.

The case was tried before the court without a jury. The court made and filed findings of fact to the effect: That appellants executed and delivered to appellee the note sued on; found the credits made on the note in the total amount of \$1,000, and that same was applied at the several times when made, first to the discharge of the interest, and the balance to the principal; that the note was placed in the hands of an attorney for collection; found the balance due on the note, principal, interest, and attorney's fee, in the total sum of \$3,648.37; that the note was due and unpaid; that the note was given in consideration of a stock of shoes sold by appellee to appellant Meyer; "that Toplitz made no false representations as to the kind, quality, size, or style of the shoes, nor the number thereof, and that the full number purchased by Meyer was delivered to him by Toplitz; that the sale of the shoes was a sale in bulk, and not a sale in parcels; and that the market value of the shoes delivered to Meyer was not less than \$4,100," the amount of the note. Judgment was entered for appellee against appellants for the amount found due, with interest and attorney's fee, as provided in the note.

Appellants present two assignments of error. The first claims error to the court's finding that Toplitz made no false representations as to the kind, quality, size, and style of the shoes sold by him to Meyer, because said finding is not supported by the evidence. The second claims error in the finding that the sale of the shoes was made in bulk, and not parcels, because not supported by the evidence.

A careful examination of the evidence satisfies us that both of the court's findings complained of are well sustained by the evidence. We need not reproduce the evidence here.

Finding no error, the case is affirmed.

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⇒16½. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of ⇒ number sections 346-420, at the end of this topic, where the matter in this and future index digests will be found.

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⇒87½. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of ⇒ number sections 346-420, at the end of this topic, where the matter in this and future index digests will be found.

⇒88(7) (Mo.) Railroad employes going to distant town for lodging not in service unless journey is necessary.—Williams v. Schaff, 412.

⇒100(1) (Tex.Com.App.) Contract requiring notice of injury void under federal act.—Panhandle & S. F. Ry. Co. v. Brooks, 186.

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⇒103(2) (Tex.Com.App.) Injuries to servant charged with duty of making working place safe not actionable.—Texas City Transp. Co. v. Winters, 541.

⇒103(2) (Tex.Civ.App.) Duty to keep tool in condition defined.—Hines v. Flinn, 679.

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⇒107(2) (Tex.Com.App.) Employer's duty to secure rolling door defined.—Dawson v. King, 164.

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⇒109 (Mo.App.) Master must furnish team reasonably safe for the purposes.—Cowan v. Hydraulic Press Brick Co., 924.

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⇒219(3) (Tex.Civ.App.) Assumption of risk of injury from defective hammer defined.—Hines v. Flinn, 679.

⇒220(8) (Tex.) Assumption of risk after assurance of safety defined.—Cox v. St. Louis & S. F. R. Co., 964.

⇒221(6) (Ark.) Assumption of risk suspended by promise to repair.—Moline Timber Co. v. Taylor, 371.

⇒222(1) (Mo.App.) Driver ordered to drive from unstable load did not assume risk.—Gilbert v. Hilliard, 1027.

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(G) **Contributory Negligence of Servant.**

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- ⚡250¾. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of ⚡ number sections 340-420, at the end of this topic where the matter in this and future index-digests will be found.
 ⚡258(18) (Mo.) Mode of pleading custom defined.—Kirkland v. Bixby, 462.
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- ⚡286(11) (Mo. App.) Negligence in furnishing team to boy *held* question for jury.—Cowan v. Hydraulic Press Brick Co., 924.
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 ⚡297(2) (Tex. Com. App.) Findings *held* not inconsistent.—Chicago, R. I. & G. Ry. Co. v. Smith, 1099.

- ⚡297(2) (Tex. Civ. App.) Findings *held* inconsistent.—Baker v. Beattie, 858.

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- ⚡316(1) (Ark.) Mine lessee *held* independent contractor.—Harger v. Harger, 736.

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- ⚡332(3) (Ark.) Testimony as to employment of lessee by mine owner *held* insufficient to go to jury.—Harger v. Harger, 736.
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